The absence of literature on reward measures in the European context is counterbalanced by an immense literature on the repressive-preventive key, which bets on the necessity and efficacy of its role mostly of neutralisation, rather than prevention. The book contains the results of the research project "Fighter" (Fight Against International Terrorism. Discovering European Models of Rewarding Measures to Prevent Terrorism), financed by the European Commission (Justice Programme 2014-2020), which has involved eight European Universities: Università degli studi di Modena e Reggio Emilia (P.I.), Università degli studi di Ferrara, Sveučilište u Zagrebu - Pravni Fakultet, Université Saint-Louis Bruxelles, Université du Luxembourg, Universidad Autónoma de Madrid, Ludwig-Maximilians Universität München, Université de Lille 2. The investigation aims at assessing whether a "rewarding" approach – favored by Art. 16 Dir. (EU) 2017/541 – can be pursued as a harmonized and useful tool of prevention of terrorism. The question, on the other hand, is whether a European model of restorative and collaborative measures already exists or can be born, or if instead there are more than one model and it is necessary to let them coexist without impossible unifying pushes. More than distinct "models", however, the research shows that there are differences of "legal systems", substantive and procedural, which impose any general "model" to be differentiated according to those distinct normative and legal realities, or at least force to "flexible" applications because of the different disciplines and specific preventive purposes that are necessary. At the end of the research a European model of rewarding measures to prevent terrorism has been drafted, which can be partly already implemented despite the current formulation of art. 16 of the mentioned Directive.

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TABLE OF CONTENTS

SECTION III

A "EUROPEAN MODEL" OF REWARDING MEASURES

INTRODUCTION TO A EUROPEAN PROJECT FOR «REWARDING MEASURES» TO PREVENT TERRORISM

MASSIMO DONINI

1. *A project of prevention, rather than of fight, on the rewarding measures for terrorists*

In the general conception of punishment, a new vision is that the reparative moment is an essential part of the penalty, not an external and eventual aspect of mitigation and alleviation.

If there is reparation of the offence, in one of the very different possible forms (among which procedural cooperation is only one of the many), the punitive response, the penalty, must be different, and the State increasingly recognises this different need for sanctioning, to the point of envisaging reparation itself as a 'sanction' that replaces the traditional penalty suffered at least for part of the penal response. Hence, reparation is already a form of "acted punishment". In this sense, it constitutes a sanction offered to the liberty of the person responsible for the offence in order to partly settle the score with the wrongdoing committed[1].

Therefore, the conducts of cooperation and repentance are also part of the sanction, which is not commensurate or designed only for culpability, i.e. for the *ex-ante* conduct, but also in relation to the conduct subsequent to the fact.

This has always been the case, but until now reparation programmes had not been seen as state, public, but only private projects: a personal matter, an individual burden of the accused. Instead, restorative justice and re-

[1] More details in M. DONINI, *Per una concezione post-riparatoria della pena. Contro la pena come un raddoppio del male*, in *Riv. it. dir. proc. pen*., 2013, 1162 et seq.; ID., *Il delitto riparato. Una disequazione che può trasformare il sistema sanzionatorio*, in *www.penalecontemporaneo.it Riv. trim*., n. 2015, pp. 236-250); ID., *Pena agìta e pena subìta. Il modello del delitto riparato*, in *Questione giust*., 2020 (on-line, 29 October).

warding measures are increasingly the subject of public criminal policy programmes.

Until now, a comparative and European-wide study on the relevance of reward measures in the criminal law of terrorist offences has not been addressed and this research aims to fill a gap in international and european juridical production.

The research project financed by the European Commission (Justice Programme 2014-2020), which has been titled «*Fight Against International Terrorism. Discovering European Models of Rewarding Measures to Prevent Terrorism*», and has involved eight European Universities[2], was conceived when Europe was under attack from Isis, while now Daesh has disappeared from the European occidental scene after the fall of the Islamic State.

Decisive reasons for that defeat are not to be found in the so-called judicial fight against terrorism, if I may use the expression, which in reality describes a logic contrasting with the position of the judge as a third party, although it is widespread in the EU culture and in its mass media translation[3], On the contrary, the military and war turn for the intervention of international military forces in Syria has been of great and decisive importance, whereas the choice to face terrorism in a jurisdictional form, instead of war, represents the simple expression of the rule of law of the countries where the terrorist action has produced or is preparing conducts and offenses of criminal relevance. Jurisdiction has not been chosen to militarily win a military formation, because jurisdiction is not an instrument of war. And even conceiving it as an instrument of fight, risks distorting its function and constitutional role at the level of judging magistracy (rather than investigating magistracy).

The very perception of the terrorist risk in Europe cannot be said to be alarming today, but the revival of the Arab-Israeli conflict is enough to restore a climate of concern, if not alarm, and an attack would in any case be enough to summon punitive, rather than collaborative, responses.

In terms of real victims everyone knows how much greater is the number of those of road traffic, smoking, environmental pollution or the food industry.

The fact that there have been no injuries, no attacks in Italy, for instance, is indicative of a situation that has always been very diverse in Europe.

In the face of these evolutions, the reconstructive task of the research has appeared more theoretical, even if its political and technical value has certainly not diminished.

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[2] FIGHTER - GA num. 831637, Justice - Action Grant. The involved research centres are: Università degli studi di Modena e Reggio Emilia (P.I.), Università degli studi di Ferrara, Sveučilište u Zagrebu - Pravni Fakultet, Université Saint-Louis Bruxelles, Université du Luxembourg, Universidad Autónoma de Madrid, Ludwig-Maximilians Universität München, Université de Lille.

[3] See M. Donini, *Le statut de terroriste: entre l'ennemi et le criminel. Les droits fondamentaux et la juridiction pénale comme garantie contre ou comme justification pour l'usage du droit comme arme?*, in *Revue de science criminelle et de droit pénal comparé*, n. 1/2009, pp. 31-42.

It is theoretical because of the lack or scarcity of significant trials and events, of jurisdictional material and cases, even though there are many hypotheses of preventive action by the secret services and public security agencies, of collaboration anticipated with respect to the already anticipated criminal offences:

Indeed. As we will see, some of those offences, now close to the "criminal law of the author", rather than "of the fact", present a legitimacy linked to the very existence of restorative hypotheses that have a substantial value of non-punishability.

Faced with 'facts of crime' of presumed danger but subjectively constructed, often lacking in harmfulness of the single conducts separated from the types of author, unless they are followed by terrorist actions, the provision of subsequent forms of pre-trial collaboration becomes decisive.

This currently practical relevance must however be connected with the overall strategy of the role of law in facing the problem of terrorism not only in a repressive dimension, but also in a preventive and utilitarian one: for the strategic importance of obtaining information from within groups even no longer organized by a "center" as it was with al Qaeda, before Isis, but also for the contextual offer of dialogic responses that present a face and a reality of jurisdiction capable of building bridges with the majority and healthy cultural background of the presence of Islamic populations in the West: a bridge necessary to offer the most suitable basis for deradicalization processes that assume a background of inclusion different from that of terrorist minorities.

2. *First problematic aspects of art. 16 Dir. (UE) 2017/541*

The research aimed to assess whether a "rewarding" approach – apparently favoured by Art. 16 Dir. (EU) 2017/541[4] – can be pursued as a harmonized and useful tool, of prevention of terrorism ("Rewarding Measures to Prevent Terrorism"). A tool that, although it is also *de facto* functional to the political program of counter-terrorism, cannot be conceived as an expression of struggle through jurisdiction.

Why "apparently favored"? Because, as we shall see, art. 16 of Dir. (EU) 2017/541 introduces, but only optionally, the provision of reward measures, and moreover, rather than really favoring their experimentation and use, taking into account the different and multiple regulatory realities of the Member States, "seems" to be concerned with hardening and limiting their use, confining such legislation within strict conditions in terms of general prevention, rather than special prevention[5].

Special prevention is completely subordinate to general prevention if the normative parameters are rigid and concerned with imposing on the col-

[4] The Directive may be found on *https://eur-lex.europa.eu/legal-content/IT/TXT/?uri=celex%3A32017L0541*.

[5] The lack of correspondence or harmonization between the demands of general and special prevention is perhaps the most problematic feature of Article 16 which is the subject of the present research.

laborator very high conditions to his contribution. And this is the risk present in art. 16 which, in this way, is actually weakened in its very attractiveness and special-prevention effectiveness.

The question, on the other hand, is whether a European model of restorative and collaborative measures already exists or can be born, or if instead there are more than one model and it is necessary to let them coexist without impossible unifying pushes.

More than distinct "models", however, we will see that there are differences of "legal systems", substantive and procedural, which impose any general "model" to be differentiated according to those distinct normative and legal realities, or at least force to "flexible" applications because of the different disciplines and specific preventive purposes that are necessary.

3. *The tasks carried out by the project research Units*

Starting from this "open" question, in the first phase each country involved has carried out a survey of the existing legislations, focusing on the presence, or not, of reward measures against internal ideological terrorism, as well as on their legislative structure, the existing theoretical debate and practical use. In the second phase, the individual partners were divided into two groups: the first (Belgium[6], Luxembourg[7] Croatia[8] and Spain[9]), coordinated by the University of Modena and Reggio Emilia, was assigned the task of creating a possible "general model of reward measures" exportable in each Member State; in light of this purpose, a comparative study of the reward models in the various legal realities (substantive and procedural) involved was carried out, after which the socio-criminological peculiarities of the author-type and the EU competences in the matter were analyzed. The second group (Germany[10] and France[11]), coordinated by the University of Ferrara, was assigned the task of assessing whether the current EU legislation already allowed the introduction of a first set of reward measures against international terrorism, and possibly to what extent; to do this it was decided to analyze in general EU law, with specific reference to the obligations of criminalization, as well as the implications of Art. 16 Dir. (EU) 2017/54.

4. *Criminological aspects of Islamic terrorism and of the "criminal out of conviction"*

At the very base of the project already laid the persuasion that it is not punishment that defeats terrorism, and that the operative importance of the presence of the repressive penal system in moments of major conflict is only

[6] The coordinator of the Belgian Unit is Prof. Yves Cartuyvels.
[7] The coordinator of the Luxembourgish Unit is Prof. Silvia Allegrezza.
[8] The coordinator of the Croatian Unit is Prof. Zlata Durdevic.
[9] The coordinator of the Spanish Unit is Prof. Manuel Cancio Meliá.
[10] The coordinator of the German Unit is Prof. Prof. Helmut Satzger.
[11] The coordinator of the French Unit is Prof. Julie Alix.

one aspect[12] of the society's reaction and of the necessary "ideological" and "political" reconstruction of identity relations around certain fundamental values and a positive relationship with Islamic culture as a whole[13].

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[12] The absence of literature on reward measures in the European context is counterbalanced by an immense literature in a repressive-preventive key, which bets on the necessity and efficacy of its role mostly of neutralisation, rather than prevention, which is seen at the limit as negative, rather than general positive prevention, especially in the face of radically "anti-system" types of terrorists such as those of religious-Islamic matrix. For instance, as noted by J. Alix, *Radicalisation et droit pénal*, RSC 2020 n° 3, p. 769, in France, we are currently experiencing a clear increase in the severity of sentences pronounced and executed in terrorist matters, with laws that progressively restrict reductions in sentences or access to sentence adjustments, particularly conditional release, but with a purely eliminatory objective.

For a selection of comparative contributions on terrorism legislation or criminal laws, H. Laurens, M. Delmas-Marty (dir.), *Terrorismes*, CNRS Editions, Paris, 2010, 189 et seq., 219 et seq.; C. Bassu, *Terrorismo e costituzionalismo. Percorsi comparati*, Giappichelli, Torino, 2010; F. Galli, A. Weyembergh (eds.), *EU counter-terrorism offences. What impact on national legislation and case-law?*, Univ. Bruxelles, Bruxelles, 2012; K. Roudier, *Le contrôle de constitutionnalité de la législation anti-terroriste. Étude comparée des expériences espagnole, française et italienne*, LGDJ, Bibliothèque constitutionnelle et de science politique, t. 140, 2012; S. Donkin, *Preventing Terrorism and Controlling Risk. A Comparative Analysis of Control Orders in the UK and Australia*, Springer, Berlin, 2014; F. Galli, *The Law on Terrorism: The UK, France and Italy compared*, Bruylant, Bruxelles, 2015; K. Roach (ed.), *Comparative Counter-Terrorism Law*, Cambridge University Press, 2015; F. Fasani, *Terrorismo islamico e diritto penale*, Wolters Kluwer, Cedam, Padova, 2016; J. Alix, O. Cahn (eds.), *L'hypothèse de la guerre contre le terrorisme. Implications juridiques*, Dalloz, Paris, 2017; D. Castronuovo, *Quale lezione dagli anni di piombo? La legislazione dell'emergenza e sui pentiti in prospettiva storica e comparata*, in *Diritto penale XXI secolo*, 2019, n° 1; J. Alix, O. Cahn, *Terrorisme et infraction politique*, Mare & Martin, 2020; N. Karaliota, E. Kompatsiari, C. Lampakis, M. Kaiafa-Gbandi, *The New EU Counter-Terrorism Offences and the Complementary Mechanism of Controlling Terrorist Financing as Challenges for the Rule of Law*, Leiden-Boston, 2020; S. De Coensel, *Terrorists on the Move: A Legitimacy Test of the Criminal Law Approach on Foreign Fighters in Western Europe*, in *ECLR*, vol. 10, Iss. 2, 2020; C. Walker, M. Cancio Meliá (eds.), *Precursor Crimes of Terrorism: The Criminalisation of Terrorism Risk in Comparative Perspective*, Cheltenham, 2021, forthcoming.

[13] The 'cultural' profiles of religiously-motivated terrorism are mostly present in the historical and criminological contributions, not in the penal ones in the strict sense. See, among a huge literature, J. Raflik, *Terrorisme et mondialisation. Approches historiques*, Gallimard, Paris, 2011; A. Garapon, M. Rosenfeld, *Démocraties sous stress. Les défis du terrorisme global*, Presses Universitaires de France, Paris, 2016; T. Heggammer, *Jihadi Culture*, Cambridge University Press, 2017; C. del Prado Higuera, E. Sánchez de Rojas Díaz, *Terrorismo islamista: El caso de Al Gama'a al Islamiya*, Tirant lo Blanch, Valencia, 2018; H. Micheron, *Le jihadisme français. Quartiers, Syrie, Prisons*, Gallimard, 2020; G. LaFree, J.D. Freilich (eds.), *The Handbook of the Criminology of Terrorism*, Wiley Blackwell, Chichester, 2017; D. Weggemans, B. de Graaf, *Reintegrating Jihadist Extremist Detainees: Helping Extremist Offenders Back into Society*, Routledge London - New York, 2017; J.D. Freilich, G. LaFree (eds.), *Criminology Theories and Terrorism*, Routledge, London and New York, 2016; see also the Nr. 1/2021 of *La Comunità internazionale*, on "Nuove forme di estremismo: strumenti di prevenzione e contrasto delle minacce jihadiste transnazionali"; P. Laurano, G. Lanzera, *L'analisi sociologica del nuovo terrorismo tra dinamiche di radicalizzazione e programmi di de-radicalizzazione*, in Quaderni di sociologia, 2017, p. 99 at 115; F. Khosrokhavar, *Radicalisation, Maison des Sciences de l'Homme*, Paris, 2014; Ministero della Giustizia. Dipartimento dell'Amministrazione penitenziaria (Hrsg.), Quaderni ISSP Nr. 9, *La radicalizzazione del terrorismo islamico*, Istituto Superiore di Studi penitenziari, 2012; H. El-Said, J. Harrigan, *De-radicalising Violent Extremists: Counter-Radicalisation and De-radicalisation Programs and their Impact in Muslim Majority States*, Routledge, London, New York, 2012; O. Ashour, *The De-Radicalization of Jihadists: Transforming Armed Islamist Movements*, Routledge, New York, 2009; M.-A. Beernaert, *Repentis et collaborateurs dans le système pénal: analyse comparée et critique*, Bruylant, Brussels, 2002; S. De Coensel, *Processual Models of Radicalization into Terrorism: A Best Fit Framework Synthesis*, *Journal for Deradicalization* 2018/19 n° 17.

This is an important premise in order to hypothesize some chance of success for collaborative operations that must have as their background not only a de-radicalisation, but also a social fabric in which the person finds an identity that is not broken but placed within the positive values of his or her own religious culture of origin.

Not only. The belief or, if you want, the operative hypothesis from which to move is that, with respect to a criminal out of conviction, to an "anti-system" delinquent, the classic categories of punishment/blame do not have a resolving hermeneutic capacity and, above all, a preventive capacity. On the contrary, on the criminological level, expecting from an anti-system ideology that its members could be "blackmailed" by a reward that is viewed as treason is a message culturally and politically destined to failure, as *the criminological analysis of the Belgian unit* (Yves Cartuyvels) persuasively explains.

The comparative final report of the Spanish unit (M. Cancio Meliá) also attests to this underlying problem. *Comparisons with the French unit* (J. Alix) also show that from a criminological point of view, the opposition we face in France is linked to the practice of concealment (taqqiya). For counter-terrorism actors, the jihadist is obliged to practice taqqiya, so even if he repents, he is not trustworthy.

Obviously, if the thesis, widely discussed in the criminological research of the Belgian unit, that the new typology of terrorists is *per se* refractory to any dialogue and therefore to any collaboration, was true, the empirical basis of the legislation would be disproved and one would have to conclude for the lack of effectiveness of the dispositions, even more if they are limited, according to certain readings, to admitting only "mitigation of punishment" in case of collaboration.

We should better resort to amnesty measures, rather than count on individualized solutions. As noted in the final report of the Belgian unit: «… it seems to us, in this respect, that individualized denunciation policies are less promising than collective amnesty or rehabilitation».

5. *Some outcomes of cooperation emerged in the most recent Italian experience*

On the other hand, some on-the-field experiences, even in Italy, demonstrate the variety of persons who are susceptible to follow collaboration programs, and the possibility and space for dialogue interventions in view of de-radicalisation and processual collaboration, from which it is possible to orient European legislation in terms of effectiveness, even more if it is extended, rather than restricted, in its possible spaces of application.

The contribution of the Italian Nucleus Police Prevention Central Director[14], for instance, displays, among the facts resulting also from the press and as such disclosable, some cases of collaboration in advance with respect

[14] See the report of V. di Peso presented at the first Focus Group of the Italian Unit, on 24 September 2019: *Collaborators of justice in the context of the countering international terrorism. Italian cases*. In this book Section I, Chapter 1 b.

to the preparation of terrorist attacks or trainings abroad: see, in addition to the most dated collaborations within the *Operation Al Mouhajirun* and with Afghan Tunisians in Algeria (coordinated by the Public Prosecutor's Office of Milan and conducted by the DIGOS of Milan and Varese in 2001), the collaborations (Jelassi Riadh, Tlili Lazhar) whose cognitive fruits were collected in an anti-terrorism operation (Haidora) carried out in May 2005; the operation *Rakno Sadess*, carried out on June 7, 2007 by the Guardia di Finanza of Milan regarding the *Salafite Group for Preaching and Combat*, operating between various European, North African and Middle Eastern countries; the contribution of the Tunisian Zouaoui Chokri around 2005 (Operation Bazar); and more recently, the contribution of collaborator Touray Elhagie and the information rendered in 2018 about Libyan elements, traceable to Daesh, and the recruitment of young extremists in countries in the central-western band of Africa, their training in mobile camps in the Libyan desert (the *moaskars*), their exfiltration towards jihad conflicts or towards Europe via the migration routes, etc.

In addition to this, it is attested in relation to the extra-trial benefits granted to subjects who have collaborated with investigators or with the information and security sector in the context of the fight against terrorism, that from 2005 to September 4, 2019 there has been a total of 401 foreigners who have obtained the residence permit provided by art. 2 of Legislative Decree No. 144 of July 27, 2005, converted into Law No. 155 of July 31, 2005 (s.c. residence permit for investigative purposes)[15].

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[15] Art. 2. L. 155/2005: *Residence permits for investigative purposes*.

1. Also outside of the cases referred to in chapter II of the decree-law of 15 January 1991, No. 8, converted, with modifications, by the law of 15 March 1991, No. 82, and subsequent modifications, and referred to in article 18 of the single text of the dispositions concerning the discipline of immigration and norms on the condition of the foreigner, referred to in the legislative decree of 25 July 1998, No. 286, hereinafter referred to as: "legislative decree No. 286 of 1998", and in derogation of the provisions of article 5 of the legislative decree No. 286 of 1998, when, in the course of police operations, investigations or proceedings relative to crimes committed for purposes of terrorism, including international terrorism, or subversion of the democratic order, there is the need to ensure the permanence in the territory of the State of the foreigner who has offered the judicial authority or the police bodies a collaboration having the characteristics referred to in paragraph 3 of article 9 of the aforementioned decree-law No. 8 of 1991, the Questore (police commissioner), *autonomously* or on the recommendation of the heads of the police forces at least at a provincial level, *or of the directors of the information and security services, or when requested by the public prosecutor*, issues the foreigner with a special residence permit, valid for one year and renewable for equal periods.

2. With the report referred to in paragraph 1, are communicated to the Questore the elements that show the existence of the conditions specified therein, with particular reference to the importance of the contribution offered by the foreigner.

3. The residence permit issued under this article may be renewed for reasons of justice or public safety. It is revoked in the event of conduct incompatible with the purposes of the same, reported by the Public Prosecutor's Office, the other bodies referred to in paragraph 1 or otherwise established by the Questore, or when the other conditions that justified its issuance are no longer present.

4. For all matters not provided for in this article, the provisions of paragraphs 5 and 6 of article 18 of Legislative Decree No. 286 of 25 July 1998 shall apply.

5. When the collaboration offered has had extraordinary importance for the prevention in the territory of the State of terrorist attacks on the life or safety of persons or for the concrete reduction of the damaging or dangerous consequences of the attacks themselves, or *for*

In this framework, the collaboration of the terrorist or of his flankers, often destined to enter the investigative area of the very anticipated criminal offences, more anticipated than the same traditional "preparatory acts" of final-crimes, but sometimes relevant for other crimes existing today, as they are anchored to ways of being or becoming dangerous (enrolment and training), appears as a strategic moment both in the project of general and special prevention. This choice has been valued and indicated in Article 16 of the EU Directive 2017/541 as a *facultative option* for the States.

6. *Utilitarism as the basis of Art. 16*

The cultural and juridical context of this intervention strategy which is additional and certainly not a substitute for that of punishing the crimes, appeared in the course of the research inspired by clearly utilitarian criteria.

The *Spanish second paper* argues that "the conflict entailed in the whole area of rewarding measures (as already pointed out in their Report II by the Luxembourgish unit), this is, between justice to be made – normative approach – for the offenses the repentant may have committed and the need to combat effectively terrorism – utilitarian approach –) has been solved in all examined member states, expressly or implicitly, in principle, in favour of the utilitarian/pragmatic approach (goals: prevention of further harm or to bring to justice the [other] perpetrators of terrorist crimes) which is the fundamental ground and rationale of establishing rewarding measures (as whereas 21 and 24 of Directive [EU] 541/2017 [the Directive] expressly state: "combat terrorism effectively")".

And goes on: the main program of the Directive is to "mitigate" his treatment, the offender/defendant has to: *a*) "renounce" terrorism: German: "lossagen", French: "renoncer"; Spanish: "abandonar"; Italian: "rinunciare") (Art. 16 *a*); and *b*) furnish (new/relevant) information, which can be done in two forms: – internal (punitive) collaboration related to an offense already committed: information to mitigate or prevent effects of the offense (Art. 16 *b*) I); to bring to justice other offenders (Art. 16 *b*) II) or to find evidence (Art. 16 *b*) III); or – external (preventive) collaboration to prevent further crimes of terrorism (Art. 16 *b*) IV).

We can add to these remarks that it is not the repentance that is placed

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the identification of those responsible for acts of terrorism, the foreigner may be granted, *with the same modality as in paragraph 1*, the residence card, also in derogation of the dispositions of article 9 of the legislative decree No. 286 of 1998.

The aforementioned art. 9 of the d.l. 8 of 1991, in paragraph 3, states: "For the purposes of the application of the special measures of protection, the collaboration or the declarations made in the course of criminal proceedings are important. The collaboration and the aforementioned declarations must be of an intrinsically reliable nature. They must also have the character of novelty or completeness or for other elements must appear to be of considerable importance for the development of the investigations or for the purposes of the judgment or for the activities of investigation on the structural connotations, the endowments of arms, explosives or goods, the articulations and the internal or international connections of the criminal organizations of mafia or terrorist type or on the objectives, the purposes and the operative modalities of said organizations".

at the basis of the tested experiences of anti-terrorism legislation in the countries that have given life to this investigation, but the procedural relevance of detachment from the group to which one belongs through the use of information, revelations and confessions relevant to prevent the commission of crimes, to ascertain those committed, and to have information of importance for the contrast to the activity in progress or to the ascertainment of the responsibilities of others.

However, a very strict reading of the Directive risks leading to consider the preventive moment of procedural collaboration as an instrument only of contrast and general prevention, rather than special prevention.

To this impression must be added the consideration that terrorist crimes are political-cultural oriented offences (even if depoliticized by the 1977 Convention for the purposes of jurisdiction/extradition) and, apart from military and warlike actions of contrast, can be faced, in a legal-preventive key, only with dialogic tools which are not those of the "criminal law of the enemy"[16]. The "enemy law" makes the terrorist a permanent target of non-dialogue and mutual destruction. In contrast, the reward logic is grounded in dialogue, although not in necessary repentance (s. below).

7. *The problem of a facultative harmonization with imposed conditions*

Yet there is not only the impression of a strong rigour.

Art. 16 of the Directive represents an optional entry of the EU into the territory of mitigating/extenuating circumstances, but once broadly understood – the *quantum* of reduction could always extend up to almost 100% of the penalty – they certainly trespass into the territory of non-punishability. Slowly but surely.

And the differences between legal systems, both procedural and substantive, make true European harmonization in the field of non-punishability very difficult.

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[16] On this subject, within a very large bibliography, s. *Derecho penal del enemigo. El discurso penal de la exclusión*, ed. by Cancio Meliá, Gómez-Jara Díez, vol. I e II, Edisofer S.L., Euros Editores, B de F Ltda, Madrid-Buenos Aires-Montevideo, 2006; *Diritto penale del nemico. Un dibattito internazionale*, ed. by M. Donini e M. Papa, Giuffrè, Milano, 2007; and the n. 1/2009 of the *Revue de science criminelle et de droit pénal comparé*; F. Muñoz Conde, *De nuevo sobre el "Derecho penal del enemigo"*, Hammurabi, Buenos Aires, 2005; E. Raúl Zaffaroni, *El enemigo en el derecho penal*, Buenos Aires (impreso en propio), 2006; M. Donini, *Das Strafrecht un der "Feind"*, Lit Verlag, Berlin, 2007. German bibliography in C. Roxin, L. Greco, *Strafrecht*, AT, Bd. I[5], Beck, München, 2020, 109 et seq. (where, moreover, the issue is largely underestimated). S. also A. Vahlas, *Le droit de l'Union européenne et la «guerre contre le terrorisme»*, in J. Alix, O. Cahn (eds.), *L'hypothèse de la guerre contre le terrorisme*, cit.; F. Muñoz Conde, *Derecho en la guerra contra el terrorismo: el derecho de la guerra, el derecho penal internacional y el derecho de la guerra dentro del derecho penal interno ("derecho penal del enemigo")*, in *Revista Justiça e Sistema Criminal*, v. 5, n. 9, 2013, p. 77 et seq.; V. Masarone, *Politica criminale e diritto penale nel contrasto al terrorismo internazionale, tra normativs interna, europea e internazionale*, Esi, Napoli, 2013; M. Cancio Meliá, *Los delitos de terrorismo: estructura típica e injusto*, Ed. Reus, Madrid, 2010, p. 46 et seq., 138 et seq.; M. Donini, *Le statut de terroriste: entre l'ennemi et le criminel*, cit., p. 31 et seq.; R. Bartoli, *Lotta al terrorismo internazionale. Tra diritto penale del nemico,* jus in bello *del criminale e annientamento del nemico assoluto*, Giappichelli, Torino, 2008; P. Faraldo Cabana (dir.), *Derecho penal de excepción. Terrorismo e inmigración*, Tirant lo blanch, Valencia 2007.

Imposing a harmonization of "non-punitive rigour" (many limits to extensive mitigation of punishment) means to violently enter those differences, with not always manageable repercussions, as we shall see, in terms of substantial equality. In fact, the principle of equality obliges to differently treat different situations. Among the differences, however, it is also necessary to consider the legal systems. In the sense that if, with respect to the incriminations, harmonizing is easier, with respect already to the penalty mitigation, harmonization becomes more complex because of the differences between the national sanctioning systems.

This is the same well-known cause of difficulties in harmonising European penalties rather than precepts.

But then, with respect to non-punishability, it is even prohibitive, because it is not a strict alternative as it might seem: non-punishability can also be achieved in concrete terms, not only through abstract rigid rules.

This difficulty, moreover, can be addressed in two ways:

a) prohibiting in abstracto hypotheses of non-punishability for a better contrast strategy: but this is a rigid solution and can be circumvented in several ways;

b) leaving such solutions to the discretion and full freedom of the States in order to better ensure differentiated strategies that are also suited to the logic of prevention, which as such cannot be predetermined in a fixed or rigid manner.

A third solution appears to be that of:

c) admitting the discipline of forms of mitigation, up to almost non-punishability in concreto, but prohibiting different forms of rigid non-punishability for the conduct of collaboration in international terrorist crimes.

At a first interpretation, the choice of art. 16 of the Directive may seem to be linked to this model or at least be better in line with it. We will see if this interpretation, which remains controversial within the partners of the research, is fully satisfactory or deserves different future analysis.

We will also see that the objectives of strengthening pre-trial protection and in the executive phase override the meaning of the rules intended for the judgment.

The *judicial finding* of the reward for cooperation, only just potential in systems of optional prosecution, and on which Article 16 of EU Directive 2017/541 seems to focus, is only an instant of evidentiary verification of a much longer path, where the extra-trial and extra-legal reality appears decisive.

8. *The results of the comparative analysis*

At this point we should trace a distinction between the *de lege lata* and *de lege ferenda* analysis that have been conducted within this research.

De lege lata I shall follow in this paragraph some results of the comparative paper of the Spanish Unit, literally quoting various parts out of it[17].

[17] Manuel Cancio Meliá, Sabela Oubiña Barbolla, *Substantial law issues: selected problems*, Section II, Chapitre 5.

On the legislative level, "we have to distinguish first between tools located in substantial, procedural (investigation and pre-trial proceedings) and penitentiary law, and, perhaps more important, between overt and somehow clandestine practices, especially, when the negotiation prior to court proceedings is located in the realm of "private" activities of the prosecutor's office. This is especially difficult to see in the case of informal agreements on charges or prosecution that could take place in any given procedural system (whether there is a legality principle system or an opportunity system on prosecution).

Most Member States establish a specific collaboration regulation for terrorism offenses (Spain, France, Luxembourg, Croatia); in Germany, there is a mixed model, since general rules for sentencing are combined with terrorism-specific provisions (limited to selected offenses)".

"As the example of Italy and Spain shows, certain general legal possibilities in penitentiary law are used in a post-sentencing stage to counter strong restrictions of substantial or procedural law (this happens because of political reasons: in E, because these measures are the only way to "normalize" enforcement conditions that stem from a very restrictive substantial and procedural regulation, as any sign of some kind of "benevolence" towards terrorist perpetrators is immediately thrown into public debate depicting the executive that acts in this line as weak or even accomplice of the terrorists).

This implies that there will be huge differences in the Member States depending on how the circle of specific terrorism offenses has been drawn in the respective Code (and as long as the obligation to consider them "terrorist" offenses established in art. 3, 14 of the Directive has not been met yet): from regulations as the one in Spain, where almost all severe offenses of the special part of the code can be "terrorised", that is, conceived as (aggravated) terrorism offenses, to Member States where this legal label ("terrorism offense") is restricted to organization crimes (in the German terminology: offenses that consist of having a certain relationship to a terrorist organization, i.e., membership or collaboration offenses), as is the case in Germany".

"Spain only provides for mitigation (which however can imply that e.g. in offenses of membership of or collaboration with a terrorist organization the resulting penalty in cases of sentence reduction would not imply necessarily an effective prison term); also Croatia's regulation only covers mitigation (which is esteemed to be almost impossible in practice by the national report).

Germany allows exemption only for the crime of membership in/collaboration with a terrorist organization (up to a penalty of three years of prison term); France establishes the possibility of exemption before prosecution takes place (including organization offenses); Italy allows exemption if especially high requirements on the quality and effects of the information are met; Luxembourg's regulation has both possibilities before and after prosecution".

About the "Renouncement requirement", namely Mitigation vs. Exemption, "Germany, France, Luxembourg do not require that the repentant has

renounced his or her terrorist activity (although for the specific exemption rules regarding organizational offenses it is necessary that the repentant presents an effort to prevent the continued existence of the organization); *Belgium*, *Croatia* establish that the repentant must not be a recividist offender; Spain, Italy, Croatia require renouncement of the collaborator, with different degrees of intensity (including Spain the option that the repentant contributes to hinder not only the activities of the terrorist collective, but also its "development")".

The Spanish conclusive report proposes that "the absence of the requirement of renouncement/abandonment of the terrorist activity, as pointed out in some national reports, seems a major failure to comply with the standard set by Art. 16, in our opinion. It is true that we are dealing with a facultative harmonization standard. But when engaged in introducing such a regulation, it seems that this element – as said before: essential to the area of terrorism because of its ideological bias – is a basic element of the model of rewarding measures designed by the Directive. To comply with it, national legislations need to incorporate this element (the L report offers a different interpretation of the scope of the harmonization obligation and holds that compliance is possible even without the renouncement element)".

"Departing from the distinction in art. 16 Directive between internal (punitive) and external (preventive) forms of collaboration, the reports show that all Member States incorporate both forms.

Some Member States do not specify any requirements on this relationship besides that they have to be terrorist offenses (Spain, Luxembourg, Croatia).

Other Member States require expressly a proportionality analysis of both offenses (Belgium), the existence of some relationship of the offense on which the information is given to the own offense of the repentant (Germany), that both offenses are "related and of the same nature" (France) and that they were committed for the same "purpose" (Italy).

The requirements regarding the quality of the information the repentant provides are different in formulation, but converge in the information being truthful, relevant and effective: in Belgium's regulation, the information has to be "significant, revealing, truthful and complete"; in Germany, that it constitutes a "substantial contribution to discovery" or leads to the completion of the offense to be averted, and is given "voluntarily and timely"; in Spain, "decisive", effective and complete (as to the offenses committed by the repentant).

Most Member States establish a specific collaboration regulation for terrorism offenses (Spain, France, Luxembourg, Croatia); in Germany, there is a mixed model, since general rules for sentencing are combined with terrorism-specific provisions (limited to selected offenses).

"Especially interesting seems in this context the problem – which has been out of the central focus of our approach – of the coordination of rewarding measures with the general institution of withdrawal/voluntary abandonment in the Member States legislations, in particular regarding organization offenses (membership and collaboration; here there is a practice

in some Member States, e.g. in Spain and Croatia, not to use this institution in terrorism offenses; some national reports – for instance, France – stress that the practice of withdrawal in this area is very unclear; in Italy, some specific regulations were deemed to be special cases of withdrawal).

An important field of the current wave of terrorism, especially in the EU, is the activity of isolated perpetrators without real organizational ties to a terrorist organization (so-called "lone wolves"). The design of Art. 16, requiring renouncement *and* information (or, in other words, the absence of a substantial law approach to de-radicalization) excludes this important group of offenders".

The main deficit of the research concerns the "judicial" application aspect of the forms of reward measures concerning types of Islamic terrorists and concerning the evolution of the phenomenon after the transition from Al Qaeda to Isis.

The only relevant body of case law in the concerned Member States is the one produced in Italy in the period 1980-2000, related to past terrorist organizations. Regarding the present time there is no or very little case law.

9. *Critical remarks on harmonization and Art. 16*

The most relevant remark about the art. 16 is stressed in the Spanish Report: "A general difficulty in assessing the quality of harmonization provided by Art. 16 of the Directive lies in the piecemeal approach typical of UE criminal law harmonization: a certain criminalization standard or, as it is here the case, the possibility of a mitigation is established, and launched on the national legislators. But this is done without a proper prior analysis of the situation in every jurisdiction (and without a proper follow up to the implementation of the harmonization rules). This means that the house is being built beginning by the roof, as it is very difficult to grasp what the real effects of such measures in every national system are if procedural, sentencing and penitentiary law are brushed under the carpet and there is only a (fragmentary) focus on substantial law"[18].

This awareness must guide us both in the *de lege lata* reading of art. 16 and in the *de lege ferenda* proposals.

According to the German paper on the European perspectives of the interpretation and application of art. 16, 'the Member States have to ensure that they are only applied under national law if the offender fulfils *at least* the conditions laid down in Art. 16'[19]. Admittedly, this poses the risk of depriving counterterrorism rewarding measures of their *effet utile*, as the comparative findings pointed out[20].

Conversely, in principle, national rewarding legislation laying down broader requirements or more favourable legal consequences is prohibited

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[18] Manuel Cancio Meliá, Sabela Oubiña Barbolla, *Substantial law issues*, *cited*, § 3.

[19] Helmut Satzger, Patrick Born, Section II, Interpretations of article 16 of the Directive of 15 March 2017, Chapter 1 "B", *German Report*, § 3.1.2.1

[20] Manuel Cancio Meliá, Sabela Oubiña Barbolla, *Substantial law issues: selected problems*, Section II, Chapitre 5, *passim*.

under Article 16. As the German unit pinpoints, the violation of fundamental principles enshrined in the national Constitutions and the internal coherence of the criminal law are to be considered the only possible exceptions. Another argument in favour of a non-absolute limitation of 'reduction' of criminal sanctions under Article 16 to mitigating circumstances only would be that "reduction' does not preclude reduction to 'zero"[21].

The point of view of the French Unit is different[22].

Like the German unit did[23], the French unit maintained, more generally, that transposing in an overly narrower manner the EU minimum rules on rewarding measures to counter terrorism 'would reduce the possibility of being granted the status of collaborator of justice' and that this 'would risk running counter to the logic of the minimum rules'[24]. However, unlike the German unit, the French unit argued that whichever additional requirements or rewarding measure complies with Directive 2017/541/EU, 'as long as the conditions envisaged by the Directive are at least provided for' at the national level[25].

This interpretation acknowledges that harmonisation in the field at hand is unsatisfactory[26] and that mutual trust and mutual recognition are jeopardised[27]. Arguably, the French unit based its argument on a bottom-up approach to the extent that the state of play across Europe, which is deemed unsatisfactory with a view to EU harmonisation and judicial cooperation, is said to mirror long standing 'legal and cultural choices to offer wider benefits to the collaborator of justice'[28].

Be that as it may, the French unit acknowledges that "if the Member State did not comply with the minimum conditions [set forth under Article 16], this would run counter to the principle of primacy and would not be in

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[21] Albeit hardly, as it is confirmed by the translations of the text of Article 16 in languages other than English: with reference to the German version, Helmut Satzger, Patrick Born, *op. cit.*, § 3.2.2. The same holds, for instance, to the Italian translation, in that the title '*Circostanze attenuanti*' (mitigating circumstances) refers to reduction of criminal sanctions at the sentencing phase, whereas the non-punishment at hand belongs to the legal category of '*cause di non punibilità*' (also known as '*cause di esclusione della punibilità*'). Furthermore, in the absence of any soft or hard principle or rule of general criminal law at the EU level, to infer that waiving punishment as a rewarding measure complies with Article 16 by reading other clearer EU criminal law texts adopted in other areas of cross-border serious crime does not seem unquestionable. To this end, the German unit mentions Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime and the Proposal for Framework Decision 2004/757/JHA in the field of illicit drug trafficking (*ivi*, §§ 3.2.1, 3.2.2).

[22] C. Quentin, J.-Y. Maréchal, J. Alix, *Interpretations of Article 16 of the Directive of 15 March 2017*.

[23] With respect to the prognosis of the impossibility to gather the information otherwise (laid down by Article 16 (*b*)), but also to the interpretative issue regarding the compatibility of non-punishment of terrorist offenders as rewarding measure with EU law: Helmut Satzger, Patrick Born, *op. cit*., § 3.2.2.

[24] C. Quentin, J.-Y. Maréchal, J. Alix, *op. cit*., § 1.1.1.1.

[25] C. Quentin, J.-Y. Maréchal, J. Alix, *op. cit*., § 1.1.1.1.

[26] Arguably, the point upon which the French and the German unit agree (albeit with different arguments) is that national non-specific beneficial provisions that apply to other legal situations are not affected.

[27] C. Quentin, J.-Y. Maréchal, J. Alix, *op. cit*., § 1.2.2. See also H. Satzger, P. Born, *op. cit*., § 3.2.2.

[28] C. Quentin, J.-Y. Maréchal, J. Alix, *op. cit*., § 1.2.2.

conformity with European legislation. The Member State would then risk an action for failure to fulfil obligations before the CJEU"[29].

In the contributions of the units of the universities of Ferrara and Modena and Reggio Emilia[30], these differences are amply illustrated and discussed. In view of the *de lege ferenda* solution that the research envisages for a model of reward measures in terrorism, it is now important to make some considerations on the limits and the vitality of a regulation such as the current Art. 16 of the Directive.

10. *General conclusion on the concept of non-punishability as category that includes the mitigation*

A point of connection between the moments of analysis and observation, *de lege lata* and *ferenda*, seems to me to be the link between reduction of punishment and exclusion of punishability: mitigation vs. exemption.

The difference between legal systems and the various political-criminal needs suggests a flexible and ductile reading of the distinction between mitigating circumstances and non-punishability.

The category of non-punishability, on the other hand, has long been known in literature to include various forms of degradation of punishment that, in practice, can lead to exemption from punishment.

These categories (mitigation of punishment/non-punishability) are not alternative, because mitigation is a way of declining the various forms of non-punishability, that is, of reducing, up to the exclusion *in concreto*, of the punishment[31].

This means that, instead of being alternative or excluding categories, they are one included within the other, like the smaller circle of a larger one: non-punishability includes various forms of reduction of the penalty, within a framework of special prevention and subsidiarity.

The fact that this should also apply to the EU Directive on terrorism, beyond the conception of some of its compilers, depends:

a) on an objective interpretation of the text of art. 16;

b) on a teleological consideration.

Sub *a*)

When the European Parliament issued Directive 2017/541 and its Article 16, it knew perfectly well that among the Member States, some (in particular, France) do not have minimum penalty limits, except for the general

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[29] *Ivi*, § 1.2.2.

[30] *Infra*, Section III, Chapter 2 (Ludovico Bin, Francesco Rossi) and 1 (Ludovico Bin).

[31] For a general overview of this theme in the italian literature, M. Donini, *Non punibilità e idea negoziale*, in *Indice pen*., 2001, 1035 et seq.; Id., *Le tecniche di degradazione fra sussidiarietà e non punibilità*, *ibidem*, 2003, 75 et seq., 89 et seq.; Id., *Il volto attuale dell'illecito penale*, Giuffrè, Milano, 2004, 259 et seq. F. Palazzo, *La non-punibilità: una buona carta da giocare oculatamente*, in Sistema penale, 19 dicembre 2019; G. Cocco, *La punibilità. Quarto elemento del reato*, Wolters Kluwer-Cedam, 2018. S. also P. Caroli, *Non punibilità e indirizzo politico-criminale*, in *Sistema penale*, 29 settembre 2019.

limits, which are however very low, for *crimes*: to provide for a decrease of penalty in a system that does not have minimum sentencing limits, or that has very low ones even for the most serious crimes, has a profoundly different meaning compared to systems that do possess actual minimum limits. This implies that it is possible to pursue a result of actual non-punishability in concrete terms, but also *in abstracto*, because already at the abstract level the system allows this in the ordinary way. The mitigation becomes pure commensuration because the penalty is completely individualized.

Not only. Various systems provide for non-punishment as a consequence of general institutions such as active withdrawal, or active repentance, from the crime. Applying this rule to terrorist offences becomes possible because the directive does not neutralize the general rules.

The question is: what if for terrorism those rules were adapted in a more restrictive direction, would it make sense to prohibit them in the name of the Directive? And this just because the Directive does not provide for non-punishability in an explicit way, not even under the strict conditions it establishes for the mitigation of the punishment?

Frankly, it does not seem reasonable to reach such a conclusion, also considering another profile.

Various incriminations introduced after the events of 2005 in various European legal systems, and which anticipate the offences envisaged by Directive 2017/541 (in particular the provisions of Articles 6 to 11), can be traced back to forms of "criminal law of the author" (Täterstrafrecht) rather than to "criminal law of the fact" (Tatstrafrecht).

Punishing the organization of trips abroad or the self-training or enrolment of persons with the "purpose" of terrorism (indicated in art. 3, par. 2 of the Directive), before an act of adhesion to terrorist associations has been committed, and punishing the preparation of purpose-crimes, means extending the criminal law area to very anticipated fields with respect to preparatory acts of concretely offensive conducts, which are never required to be committed (see art. 13 of the Directive).

Now, even if this has appeared and still seems legitimate in constitutional terms, the limit is to verify firstly the concrete dangerousness of the 'facts', not of the persons. But do these *facts* remain offensive if the *persons*, who have never committed the final crimes, have abandoned those generic programs and cooperate with the justice system?

The non-dangerousness of the person renders harmless the acts already committed, because they in fact only appeared so in an "author" perspective.

The relevant fact for us is that in these cases the very provision of non-punishability for collaboration becomes a requirement for the legitimacy of those incriminations. There is, in other words, a constitutional constraint of offensiveness or social harmfulness of the facts that would make the punishment of dissociated authors be evaluated as linked only to a *concretely inoffensive program apart from the terrorist goal*. It is true that the dissociation is subsequent to those "facts", but these are only facts *presumed* to be dangerous *due to the subjective orientation* of the person or of other unidentified persons. A presumption which is not absolute but can be overcome by a con-

trary proof: if we move from this preparatory area to collaboration, we understand that what was already a criminal law based only or mainly on the author, is now also without the author.

Sub *b*)

From these considerations it emerges how functional to such anticipated offences is the prevision of non-punishability in order to justify their effective application.

In fact, in this so markedly subjectivized criminal law area, it is neither reasonable nor functional to the objectives of real prevention to separate non-punishability from mitigation of the penalty. Because the criminal offence is subjectivized, and therefore the sanctioning treatment must remain firmly anchored to special prevention, not only general prevention, and therefore also of real enhancement, and not of depowerment, of the forms of collaboration.

The special prevention is itself oriented to a better implementation of the general-preventive purposes: to think of renouncing one of these objectives, or to unify these two purposes (political the general prevention, legal-individualising the special one) is contrary to a realistic understanding of the discipline.

This reinforces the reading of art. 16 of the French and German units which, although theoretically opposed – s. above, § 9 –, converge in practical terms in considering the possibility that the reduction of punishment already *de lege lata* can reach 100%.

11. De lege ferenda. *The Model*

On this basis, it is possible to face with greater serenity the construction of a European model of rewarding measures against terrorism, because it is better anchored to an analysis which takes into account the differences between the consolidated policies of the States in the European context.

The model[32] has been structured keeping in mind the necessity to facilitate judicial cooperation between authorities of different Member States, aimed at overcoming the many differences that inevitably characterize the different national legal systems.

On this perspective, while at the sentencing stage the differences between legal orders are less marked, as the types of measures are generally twofold (an extenuating circumstance or a ground for exclusion of the penalty), the most relevant issues for judicial cooperation would evidently derive from the profound differences currently existing in the pre-trial phase, for what concerns mandatory or discretionary prosecution. Given these irreducible disparities, the search for a minimum set of measures that could be implemented in all Member State has been pursued keeping in

[32] Ludovico Bin, *A Model of Reward Measures*, *infra*, Section III, Chapter 1; Francesco Rossi, Exploiting art. 16 of Directive 2017/541/EU, ivi, Chapter 2.

mind the "substantial goal" of approximating the reward system, at the expense of the "formal equality" between the measures which grant such rewards.

This substantial equality has been traced in the use of a cause of non-punishability, as such tool would not only imply an acquittal in the trial phase but also already a case dismissal in the pre-trial phase. When a cause of exclusion of the penalty applies, indeed, the proceeding generally stops and the case is dismissed, even – and foremost – in those legal systems in which prosecution is mandatory. On the other hand, in those Member States in which prosecution is discretionary, the very existence of such measures in the written legislation would have an indisputable 'communicative' effect, inasmuch as it would let perpetrators know of the possibility to benefit of such measures in case they decide to cooperate, even prior to being arrested and approached by the investigators.

As for the shape of such measure, firstly the traditional condition of "dissociation" or "disengagement" has not been inserted. Requesting for such condition would in fact probably prove to be counter effective: one of the most relevant factors for radicalisation is the perception of western states as trying to oppress other cultures; in this perspective, requiring dissociation as a legal condition for the application of the reward would most probably be seen as a "blackmail" perfectly in line with the terrorist narrative and thus enhance this perception while it would not grant any tangible result: dissociation means betraying the "cause", but this is already shown by the simple fact that cooperation is carried out. Moreover, disengagement/dissociation is the initial part of a possible deradicalization process, which is a complex and medium/long-term process, likely to take years. Requiring such a significant part of the process to happen already during the trial or even at the pre-trial stage would therefore most likely prove to be unrealistic and useless. At this regard, a "full disclosure" of the facts committed or known is instead likely to produce more tangible advantages at least for a first evaluation on the reliability of the repentant and of the information provided.

Secondly, for what concerns the "minimum" indefectible element that shall be requested for the concession of the reward, *i.e.* the supply of relevant information, the 'usefulness' of the information has been structured following art. 16 of Directive 2017/541/EU, which draws the possible types of suppliable information. In this perspective, helping authorities to find evidence and/or identify or bring to justice other offenders seems to be of such relevance as to justify only a mitigation of the penalty, while only preventing or mitigating the effects of the offence or the commission of other offences (referred to in Articles 3 to 12 and 14, *i.e.* terrorism-related) could imply the highest reward, according to their concrete relevance. Of course, the choice between mitigation and exemption will have to be evaluated *in concreto*, by the prosecutor and/or the judge; however, a sort of internal limit to the measure at stake should be displace already at the abstract level in order to avoid possible "blackmails" from the offender and grant a minimum proportional-

ity: hence it is provided that the information provided should regard offences much severe than that for which the proceeding is brought on.

Thirdly, considering that usually the proceeding brought against the collaborator comes to an end before those against the persons regarded by the information provided, in order to prevent the risks that false or useless information in this phase will provoke an unjust acquittal or reduced sentence without any further possibility to reopen the case (due to the *ne bis in idem* principle), the necessity to provide for a mechanism of suspension of the proceeding aimed at consenting the judge to evaluate if the information was as true and relevant as promised, in order to avoid the possible backdrops connected to the exemption in the trial stage, has been inserted. On the other hand, in order to prevent the offender from 'waiting' the initiation of the trial in order to benefit of an actual acquittal instead of a case dismissal, the applicability of the penalty exemption in this phase has been subordinated to the proof that the offender could not provide the authorities with it in the pre-trial phase.

As for the post-sentencing phase, a residual strategy for those who did not decide to walk the path of de-radicalization – whose structure falls outside the scope of this research – has been shaped: reward logic would be here brought to its fullest potential, which means not proposing an advantage in exchange for cooperation, but removing a disadvantage: in other words, if the terrorist still does not want to cooperate, he/she will not be allowed to access the normal penitentiary benefits that the other convicted do access such as parole institutes, external work permits and so on, as both Spanish and Italian disciplines already provide.

Such measure aims at an aggressive induction to cooperate, trying to break the convicted resistance through the enhanced heaviness of the penalty. Exclusion from parole institutes and work permits, as well as the possibility to harden detention conditions, do represent the other face of reward legislation: if the promise of an actual reward did not convince the offender, the State tries to promise the removal of a disadvantage that all other prisoners are not subjected to. This way, reward legislation is exploited to its very end.

As already illustrated (§ 10), this legislative "model" brings together the needs of special and general prevention, without abandoning the logic of reward to forms of pure contrast or legislative warfare to which an effective dialogue with the persons subjected to such measures would be extraneous, if the mitigation of punishment, with respect to any crime of terrorism, were interpreted in a rigid or inflexible way.

Indeed, a delicate aspect is that of the cases to which this model should be applied and those from which hypotheses of non-punishability in the strict sense should be excluded. It is in this specific area that European criminal policy should and could most usefully provide exhaustive indications: something that has certainly not yet happened with art. 16 of the directive.

SECTION I

NATIONAL REPORTS

CHAPTER 1

ITALY*

FRANCESCO DIAMANTI, FRANCESCO ROSSI, GIULIA DUCOLI

1. *Historical background of rewarding legislation (where existing)*

Italy has a long and rich tradition of rewarding measures put in place to tackle more or less general criminal phenomena (or perceived as such), as well as to resolve more or less emergency situations (or perceived as such).

Let us begin, however, by saying that "reward measures" and "emergency" are not always superimposable terms, at least if observed from a historical point of view: from a broader look, in fact, it emerges that this was so only in the last period of the "fight" against banditry and then in the fight against the internal political-ideological terrorism. Without going too far back in time, legal historians point out that the rewarding logic has long been the sign of the privatisation of the medieval *ius terribile* and, at least in the pre-enlightenment era, of the advancement of a utilitarian method that

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* § 1-1.2, 2-2.5 and 3 written by Francesco Diamanti. § 1-1.3.5.1 and 4 written by Francesco Rossi. § 2.6-2.9 written by Giulia Ducoli. This national report was finalised after the first Italian Focus Group "Terrorismo e misure premiali", which took place at the Law Department of the University of Modena and Reggio Emilia (UNIMORE). The authors would like to thank all the speakers and participants for their valuable insights.

differs from and is older than the English method, more oriented to the enforcement of the timeless reason of State. All this, in fact, can be seen rather well in the development of the legislation of the pre-unitary liberal states against banditry; this is a problem that is typical of our pre-industrial society and, at least in part, a direct product of criminal law. Terminologically, banditry indicates the existence of bandits, i.e., human beings "banned" due to either a political decision made by a small community or by choice of a court "…vested with the authority to ban".

Effectively described as "… a *catalyst* of different and even opposing instances […] a container of various humanity […] a witness of serious contradictions within society, in impatience, discomfort, rebellion or common criminal routine", this is a problem "Italian" society only began to become (more or less) aware of in the 15th century. Of course: crime and bandits, even though they arouse fear amongst the population, became real objects of the criminal policy of the States of the *Ancien Régime* only in so far as they knocked on the doors of the cities, given that "… the great fragmentation of "public opinion" (and, more precisely, its non-existence) did not allow for the formation of fully defined criminal stereotypes". Law historians speak of "bandits" and "banditry" (as a "general" criminal phenomenon) only due to the specific routes of enlistment and the control they were able to exercise over the rural population, not because they were so perceived by those populations.

The characteristic traits of the first bandits – among the most recent ones, that will become the bandits of the 19th century – only began to be studied in the 16th century. Against those criminals, "bounties" and impunity, subsidies, rewards and attenuations, designed to induce the citizen (or the criminal him/herself) to find the *latrones*, with good peace of mind of the first disquisitions of Cesare Beccaria on the immorality of bounties, concentrated on the idea that "… those who have the strength to defend themselves do not try to buy it […]. Now the laws invite betrayal, and now they punish it". The rewards created mistrust amongst accomplices, who could no longer trust each other: as was effectively written, in the *Ancien Régime* "… the fight against banditry becomes a fight between bandits; the spring that triggers the mechanisms, that lubricates the devices, is the reward". At the turn of the 16th and 17th centuries, the reward tools often recur: in the Republic of Genoa, for example, the *De premio occidentis rebellem* became the first legislative instrument to combat criminals; just as the "reward" was fundamental to counter the activity of very dangerous and very famous bandits such as Marco Sciarra, who was betrayed by his lieutenant Battistella in exchange for a pardon.

Although central, in the Italian states of that time, the expedients *in mitius* did not only have positive reflections, but rather the opposite; the major problems (although not the only ones, of course) for example, were raised at a theoretical level. The prevalence of retribution and the incessant need in the Old Regime to do justice clashed with the need to derogate by rewarding: however, politicians were overcompensated and jurists ignored the problem. "At the basis was the contrast: between politics and law, legal logic

and exercise of power, criminal geometry and *quies publica*. Politicians must know how to swallow the bitter chalice of unworthiness, jurists cannot admit too striking antinomies and then be silent or almost silent". The search for public peace, however, flattened the contrasts and managed the embarrassments only from a theoretical point of view, whilst in the trials everything changed and the rewards became expedients to hit the criminal hard, whether collaborating or not. It will suffice to recall the long-existing discussion and the frankly disconcerting results for observers of our time, on the existence, or not, for the court, of a legal obligation to keep the (rewarding) promise made to the whistleblower.

With the exception of certain types of reward measures structurally linked to the offence (such as, for example, those contained in Article 56 of the Criminal Code), in the 19th century and in the first half of the 20th century, reward measures were generally not used for the prevention of criminal phenomena. For their mass diffusion, it would be necessary to await the ideological ("red" and "black") terrorism of the 1970's[1].

1.1. *Socio-political reasons*

From a socio-political point of view and without pushing the analysis beyond the 20th century, "reward measures" were introduced in a very specific period, which became known as the "years of disquiet". The 1950s were characterised by political and economic changes of immense importance: in addition to the abrupt transition from fascist dictatorship to republican democracy, Italy at that time was faced, for the first time, with a market economy open to international competition. Italy's growth (economic and cultural) was too rapid; it did not leave time for society to adapt to all these great changes: it suffices to reflect on the fact that, from 1955 to 1963, Italian society went from mainly agricultural to mainly industrial politics, all this without trade union experience, often without education, etc. The logic of competition infiltrated all aspects of society. Individualism attempted, for the first time (albeit slowly), to spread to the population, with consequent erosion of traditional values and ties. In the same way, serious and pressing migratory flows from the south to the north of Italy began and the exploitation of the weak social groups (amongst them, especially workers) almost immediately took over, generating great outrage amongst politicians and young people growing up. It is certainly no coincidence that perhaps the most significant terrorist organisation – the Red Brigades – was formed within the Emilian Communist Party, within the University of Trento and amongst the workers of some factories in the north. As it has already been mentioned, in 20th Century the (re)birth of the reward measures is indissolubly tied to internal ideological terrorism; or rather, to internal ideological terrorisms. The plural is a must, given that, alongside the terrorism of the extreme left, there was that of the extreme right and both sides contained

[1] For more details, see A. Spataro, *Judiciary and institutions during the "years of lead": a virtuous model*, in this *Volume*.

within them various different criminal organisations. In turn, ideological terrorism, at least at an internal level, can be explained by the changes (above all, political and economic) that are typical of the aforementioned decade.

1.2. *Legislative evolution*

With the exception of some more classic provisions (e.g., the already mentioned Article 56 of the Italian Criminal Code), the Italian legislator has experimented with the reward logic in the Special Section, on kidnapping for extortion (Article 630 of the Italian Criminal Code). It must be anticipated that, originally, this provision imposed a very severe penalty for kidnapping for the purpose of obtaining, for oneself or others, an unjust profit as the price of release (aggravated by the achievement of the criminal intent). As a result of sadly known events, in 1974, a reward consisting of the reduction of the legal margin (on the "model" of art. 605) following the release of the victim without redemption was included.

"Rewards" are dealt with in paragraphs 4 and 5 of Article 630 of the Italian Criminal Code and dissociation is a must (only the dissociated, even all, can be rewarded, others cannot), but it is not enough. It is also necessary (*i*) to ensure that the person is bought back his freedom without ransom; (*ii*) to ensure that the criminal activity does not lead to further consequences; (*iii*) to provide practical assistance to the judicial or police authorities in gathering evidence that is decisive for the detection or capture of accomplices.

In addition to the individual case-law developments resulting from these changes, one characteristic immediately comes to mind: in the first two cases, the conduct that the perpetrator must maintain has a correlation with the harmfulness expressed by the offence committed. The third case, being completely "eccentric and uneven with respect to the plan of the harmfulness", is not placed in protection of the legal interest of "personal freedom", but finalised to the repression of the single offence, at least if multi-subjective. However, it is still mainly oriented to the single fact, not to dismantle a hypothetical criminal association, red or black terrorism, mafia, etc., nor against a general phenomenon (organised crime, terrorism, corruption, etc.).

On the "model" of reward introduced in the kidnapping of a person for the purpose of extortion or terrorism (Article 630, paragraphs 3 and 4 and 289-*bis*, paragraph 4, of the Italian Criminal Code), in the middle of a social situation that was quite unstable and characterised by tragic attacks, the Legislator then intervened (also) with expedients *in mitius* finalised to the promotion of the "dissociation" and "collaboration" of the terrorist type.

The first discipline to analyse, in this context, is the one contained in the "Cossiga Law" (1980). The significant tightening of sanctions (the "stick", Article 1, 2 and 3 of Decree Law No. 625 dated 15 December 1979) and very important procedural interventions (Articles 7, 8, 9 and 10 thereof) were accompanied by favourable treatments (the "carrot", Articles 4 and 5).

Some insights. The purpose of these last two articles, of a reward nature and structure, is very clear: to avoid the naturalistic event and to clarify the fact by ensuring impunity to those who prevent the event and collaborate with the authorities to reconstruct it, as well as to track down any accomplices. The saving on the disvalue of the result (having prevented the event) is central, but by itself rightly insufficient for the non punishability. It should therefore be noted that the structure of the provision-reward referred to in Article 5 of the Decree Law under analysis begins by excluding the cases of active withdrawal: if the perpetrator, even without dissociating himself, voluntarily withdraws from any intentional crime (preventing the event), he obtains a mitigation, even very significant, of the punishment; if a terrorist does so, he obtains impunity, provided that he collaborates to reconstruct the facts and to ensure that any accomplices are brought to justice. To understand the relationship between these two provisions, a general provision (Article 56 Criminal Code) and a special provision (Article 5 of Decree Law No. 8 of 1991), it is necessary to specify the following: on the one hand, upon first reading, it seems that this non-punishability-reward can only work in the case of terrorism-related criminal offences which contemplate events that do not coincide with the "typical" one (e.g., in case of crimes aggravated by the event), whilst in all the other cases (also unrelated to terrorism, and not excluding a balancing with other circumstances) Article 56, paragraph 4, of the Italian Criminal Code would apply. From a systematic point of view, to all intents and purposes, this seems to work, but legitimate results are not well balanced from a political-criminal point of view: it would be better, instead, to identify the scope of application of the withdrawal-reward (non-punishability) only to crimes attempted in matters of terrorism and subversion.

Another problem (significant for the reward logic as a whole and also related to the formulation of Article 5) touches on the understanding of the adjective "determined", referring to the evidence that the author, after having voluntarily prevented the event (even without dissociating), must provide to the authority to reconstruct the fact and to identify any accomplices. Rationally, there is no doubt that a "decisive" evidence is only the "indispensable" evidence for achieving the goal; if this is the case, the task of the collaborator is to be rather punctual: if the accomplice voluntarily prevents the event and collaborates by providing indispensable information, but (shortly before) already provided by others without his knowledge, he is in trouble and can only hope that the information given will complement each other.

This is not the place to discuss all these problems in depth, but to report their existence is more than enough. Lastly, it should be noted that the two provisions discussed above have been included in the Italian Criminal Code in Article 270-*bis* 1 of the Italian Criminal Code, by Article 5 of Legislative Decree No. 21 dated 1 March 2018, No. 21 concerning "Provisions implementing the principle of delegation of the code reserve in criminal matters pursuant to Article 1, paragraph 85, section q) of Law No. 103 dated 23 June 2017".

We shall now move on.

Also, worth noting is the well-known "law on penitents" (especially Articles 1, 2, 3 and 5); a legislative intervention in which the "rewards" have been prepared in defence of the constitutional order and when the stakes (at least on paper) are so high there are no limits to the *do ut des*. Radical "non-punishability" for the terrorist who dissolves or contributes to the dissolution of the association, or withdraws from the agreement or surrenders without resistance or abandoning his weapons and provides (in any case) all the information he has on the structure and organisation of the association. Timing is important: everything must take place before the final sentence is pronounced. If this happens, except as provided for in Article 289-*bis* of the Italian Criminal Code, the penalty of life imprisonment is replaced by imprisonment from fifteen to twenty-one years and the other penalties are reduced by a third. For the individual accused of one or more crimes committed for the purposes of terrorism or subversion of the constitutional system that maintain one of the collaborative conducts described above and that make, at any stage or degree of the trial, full confession of all the crimes committed, effectively working to elude or mitigate the harmful or dangerous consequences of the crime, or to prevent the commission of related crimes pursuant to Article 61, No. 2 of the Italian Criminal Code, the penalty cannot in any case exceed fifteen years of imprisonment. Even the rigidity of the irreducible can give way: to obtain the attenuation-reward they must confess and activate in various ways; there is no alternative.

It is clear that the structure of the discipline under analysis derives in part from Article 62 No. 6 of the Italian Criminal Code and in part from Article 4 of Legislative Decree No. 625 dated 15 December 1979 (converted by Law No. 15 dated 6 February 1980). Here repentance is broad; the choice that the perpetrator has before him to reach the reward is full of practicable ways: avoid harmful or dangerous consequences, avoid future crimes, etc. There is a hindrance of choice, but the fluidity and the few obstacles to the reward must be compensated for by the effectiveness of the alleged conduct. A "seriousness of intent capable of achieving the goal" is barely enough.

Moving on to Article 3 of the law under discussion, we note some mitigating circumstances for those who, also before the final sentence of conviction, behave in one of the ways provided for in Article 1, paragraphs 1 and 2, as well as making a full confession of all the crimes committed, helping the police or the judicial authority in the collection of evidence that is "decisive" for the identification or capture of one or more perpetrators of crimes committed "… for the same purpose", or provides evidence relevant to the exact reconstruction of the fact and the discovery of the perpetrators.

The formulas, here also, more or less repeat themselves; there are some peculiarities, however.

The first, which is highly significant, is the use of the concept of "perpetrators of crimes committed for the same purpose" instead of "accomplices". In this way, it is possible to benefit from the reward by providing aid (not precisely described and free from the requirement of concreteness) in the identification or capture of other terrorists, even if it does not necessarily strictly an accomplice of the cooperator. This time, therefore, the reward

is intended to eradicate the terrorist organisation as a whole; it is freed from obligatory connections with the crime, or with the crimes, for which proceedings are instituted.

Under Article 3, in order to benefit from the reward, the terrorist defendant may (alternatively) provide evidence relevant to the exact reconstruction of the fact and the discovery of the perpetrators. Something does not add up: the effort, in this second case, is much less than that previously analysed, but the reward is the same. However, if so, why should the defendant choose the longest and most complex route to the same place? This, in fact, is not the case. A careful reading of the provision reveals that the legislator has contemplated the two conducts not as alternatives, but as subsidiary and with spatially diversified effects: only if the defendant cannot carry out the first conduct (which would mitigate all the contested offences) can he gain access to the same reward; only in that case can he limit himself to providing evidence relevant to the exact reconstruction of the fact and the discovery of the perpetrators.

Articles 2 and 3 of Law No. 304 dated 29 May 1982 provide (both) for full confession of all crimes committed as an essential requirement for the awarding of the "reward". However, what are "all crimes committed"? Is it also necessary to confess an old theft or sexual assault that is completely unrelated to terrorism and subversion? In our opinion, absolutely not, because if the reward follows the purpose of combating terrorism, then only the terrorist experience of the offender can be considered pertinent and relevant. The reward does not mitigate the position of the accused on the basis of the existence of a confession-sacrifice, but on the basis of important help in combating a serious and highly dangerous criminal phenomenon. Otherwise, very trivially, it would suffice to confess some old mischief, some criminally relevant fact, perhaps prescribed or non-existent; this, of course, would not be serious.

Domestic terrorism was not only composed of obstinate leaders and perpetrators, endowed with marked criminal resistance, but also of a more or less vast number of young men and women, who, fascinated by the idea of the armed revolution, had fallen into the quicksand of crime and had managed to get out of it definitively and, in some rare cases, even deeply understanding the gravity of what they had done, the pain they had caused to other human beings. In addition to irreducible individuals, in other words, there were also dissociated individuals and Law No. 34 dated February 18, 1987 was designed (mostly) for them. According to the letter of the law under discussion, the dissociated terrorist, in fact, is the one who "accused or condemned for crimes of terrorism or subversion of the constitutional order, has definitively abandoned the terrorist or subversive organisation or movement to which he belonged, jointly holding the following conduct: admission of the activities effectively carried out, behaviour objectively and univocally inconsistent with the persistence of the associative bond, repudiation of violence as a method of political struggle". The dissociated person enjoys benefits, at least until he or she reoffends or engages in conduct that is not consistent with dissociation (Article 5 Law No. 34 dated 18 February 1987).

Lastly, it is specified that the legislation in question was applicable only to crimes committed, or the permanence of which ceased, by 31 December 1983 (Article 8, Law No. 34 dated 18 February 1987).

1.3. *Case-law evolution. Substantive criminal law profiles: an overview of the temporal validity, the scope and the requirements of rewarding measures*

An overview of the Italian case law shows a gradual decrease in the implementation of counterterrorism rewarding measures. The following sections will sum up the judgments delivered from the 1980s until the 2000s. By showing a certain similarity with other fields (e.g., illicit production and trafficking of drugs, organised crime, etc.), Italian case law on rewarding measures firstly clarifies their scope and the kind of cooperation required.

1.3.1. *The sequence of rewarding laws with different temporal effects and the issue regarding the validity of the "Cossiga Law"*

The rapid succession of both permanent and time-limited rewarding laws required to ascertain whether the laws adopted in 1982 and 1987 implicitly repealed all or part of the "Cossiga Law".

The first Court of Cassation's rulings acknowledged that the "Cossiga Law" had been repealed. In the *Algranati* case[2], the Supreme Court ruled that the Law No. 304 of 25 May 1982 had done so implicitly, as it ruled the same subject matter as Article 4 of the Law No. 15 of 6February 1980. According to the Court, the 1982 law had regulated entirely *ex novo* the matter of the rewards to be granted to those who dissociate themselves from terrorist and subversive organisations and cooperate, in various forms, with the investigating authorities.

Afterwards, the Court of Cassation overruled *Algranati*[3]. The Sixth Section of the Supreme Court ruled that notwithstanding the "Cossiga Law" of 1980 and the "law on repentants" of 1982 rule the same subject matter, they do not overlap with regard to crimes committed after 31 December 1982[4].

1.3.2. *The scope of application*

With regard to Article 4 of the "Cossiga Law", the Court of Cassation ruled that the mitigating circumstance provided for therein applied to any terrorist or subversive crime "committed by the defendant who dissociates himself from an organised group and fully collaborates with judicial authorities"[5]. Evidence of an established and consistent criminal plan, as well as the existence of a connection between the crime the defendant is prosecuted for and those he or she is cooperating for, are mandatory[6].

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[2] Court of Cassation, Section I, judgment of 10 May 1993; *CP*, 1995, 53.
[3] Judgment of 17 June 2007, No. 38260, *B.*; *CP*, 2008, 1327.
[4] Court of Cassation, *B*, cit., p. 30-31.
[5] Court of Cassation, *B.*, cit.
[6] Court of Cassation, *B.*, cit.

The Court of Cassation has ruled that rewarding mitigating circumstances also apply when collaboration concerns other suspects who have nothing to do with the crime the collaborating defendant is charged for. The collaborator can be rewarded also for helping to identify or capture individuals who were not involved in the crimes committed[7].

Conversely, if the collaborator is charged for more than one crime and provides truthful, complete, decisive, or useful information to the judicial authority, the issue concerning the applicability of rewarding measures to crimes connected with those collaboration is provided for is controversial. In a case regarding the murder of Marco Biagi, the Court of Appeal of Bologna ruled out that the mitigating circumstance provided for by Article 4 of the "Cossiga Law" could include all the crimes the defendant was being prosecuted for. Arguably, the wording of Article 4 grants the special mitigating circumstance provided for therein with respect exclusively to the specific crime (or crimes) for which cooperation is provided. The Court of Appeal ruled that the rewarding mitigating circumstance does not apply to other offences, albeit connected.

Admittedly, the Court of Cassation overruled the latter decision, in that not applying rewarding mitigating circumstances to connected offences infringes the rationale of the law. The goal of rewarding legislations is to disrupt terrorist activities. Against this background, the connection amongst crimes committed is within a unitary criminal plan expands the mitigating effects of collaboration on criminal sentences[8].

1.3.3. *Collaboration*

In order to apply rewarding measures, the Italian case law requires cooperation to be *decisive*, *complete*, and *truthful*.

The Court of Cassation has clarified the meaning of "*decisive*". This criterion intends to restrictive the application of rewarding measures. Cooperation is decisive insofar as not just useful, but rather conclusive contribution to achieve the goals pursued by the criminal investigation, is provided. According to such a restrictive interpretation, cooperation with a view to collecting further evidence and ascertaining criminal responsibilities is not to be qualified as decisive, to the extent that accomplices are already identified[9].

In other cases, the Court of Cassation has interpreted the "law on repentants" No. 304 of 29 May 1982 more broadly with respect to the required efficacy of collaboration. The information provided shall be complete, relevant and *useful* (rather than decisive).

Undoubtedly, the relevance and usefulness of collaboration varies depending upon manifold objective and subjective circumstances. That is to

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[7] Court of Cassation., judgment of 14 November 1985, *Andriani*; *CP*, 1987, 1109.

[8] Court of Cassation, *B.*, cit., in particular p. 26 and 34. Formerly, among the District Courts' case law, see Court of Padua, judgment of 26 July 1980, *Rigami*; Assise Court of Genoa, judgment of 3 October 1985, *Faranda*.

[9] Court of Cassation, judgment of 18 March 1994, *Bernardoni*, *CP* 1996, 119; judgment of 14 April 1993, *Soave*, *CP* 1995, 71.

say, case by case, each defendant is able to provide information of different procedural relevance. Against this background, the Italian case law acknowledged that the burden to provide adequate information is fulfilled even if the defendant who knew little, due to his or her marginal role, disclosed all the other information without reticence[10]. Therefore, arguably, the minimum threshold to apply rewarding legislation to cases of useful cooperation varies case-by-case.

However, the Italian case law does not grant relevance to "merely assertive contributions" or "subjective states"[11]: for instance, if the statements only reaffirm or add details to other statements that have already been obtained *aliunde*. Conversely, if the actual efficacy of collaboration is diminished by causes that do not depend on the collaborator, a broad interpretation acknowledged that rewarding legislation applies to contributions that are objectively suitable to produce foreseeable and desirable investigative and procedural results. According to this interpretation, the reward applies even if such result is not eventually produced in case external factors that did not depend upon the *post delictum* behaviour of the defendant occurred. A different and strict interpretation maintains the opposite and applies rewarding measures only insofar as the expected results are met[12].

Over time, the broad interpretation has prevailed. With reference to preventing the criminal activity from having further consequences, the Court of Cassation assessed the "potential suitability" of cooperation "to achieve a tangible result"[13].

Lastly, the statements and information must be *truthful*. Considering the aforementioned ruling of the Supreme Court on the Marco Biagi case[14], one might infer that truthful, *absolutely loyal* and complete collaboration is needed to prove the disengagement of the accomplice from the criminal network and activities[15].

The judgement at hand also defines disengagement itself[16] as the fact of breaking with the criminal environment and abandoning terrorist goals[17]. Ten years earlier, the Court of Cassation found the "joint conditions for […] disengagement" in the "disclosure of the activities" and in the clear and explicit "rejection of violence as a method of political struggle"[18].

In presence of the requirements described in the previous sections, Courts must grant the rewarding measure[19] even if aggravating circum-

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[10] Assise Court of Genoa, judgment 5 January 1987, *Revello*, in *RP*, 1987, 341; Court of Cassation, judgment of 21 January 1986, *Sovente*, in *RP*, 1987, 487; Court of Cassation, judgment of 11 March 1985, *Solimeno*, in *RP*, 1986, 429; Court of Cassation, judgment of 17 March 1986, *Cattaneo*, in *RP*, 1987, 877.

[11] Court of Cassation, *B.*, cit., p. 35.

[12] Court of Cassation, *Algranati*, cit.

[13] Court of Cassation, *B.*, cit., p. 35.

[14] Court of Cassation, *B.*, cit.

[15] Court of Cassation, *B.*, cit., p. 27.

[16] See paragraph 1.3.3.

[17] Court of Cassation, *B.*, cit., p. 34.

[18] Section V, judgment No. 1801 of 22 January 1997, *Bompressi e altri.*

[19] See Court of Cassation, Section I, judgment No. 4906 of 27 October 1988, *Atzeni.*

stances apply[20]. With reference to Article 2 of Law No. 34 of 18 February 1987, the Supreme Court argued that cooperation triggers a rebuttable presumption of disengagement. Moreover, if all the objective requirements established by the law are met, rewarding measures shall apply at the sentencing phase automatically[21].

1.3.4. *The concepts of "disengagement" and "outstanding relevance": objective vs subjective interpretation*

Notably, as regards the meaning of "disengagement", the case law of the Court of Cassation has adopted dissenting objective and subjective interpretations. According to the *objective*, disengagement means usefully contributing in such a way that is logically antithetical to the collaborator's membership in the terrorist organisation and his or her engagement in its criminal activity.

According to the *subjective*, disengagement necessarily implies also an inner repentance. The latter must arise concretely and unequivocally from the conduct of the collaborator, considering notably the subjective *post factum* criteria set out by Article 133 of the Italian Criminal Code to assess the criminal attitude of the convicted.

The clash between objective and subjective interpretations emerges also with reference to the contributions of outstanding relevance. Notwithstanding, arguably, the *objective* standpoint prevails. To assess the outstanding importance of the contribution, the Court considers the procedural result that the statements and information produced or at least their concrete suitability to achieve the goals pursued by the law[22]. The *subjective* standpoint[23] does not comply with the material nature of the *contribution* of exceptional relevance nor with the rationale of rewarding legislation in the rule of law.

1.3.5. *The post-conviction phase: the special regime of conditional release*

As for the *post*-conviction phase, the Italian case law addressed interpretative issues concerning the granting of *conditional release*.

In the judgment No. 189 of 23 May 1995 (*Mallardo*), the Constitutional Court found a discrepancy between the purpose of ordinary conditional release and that of special conditional release for terrorist offences, which is treated as a reward for cooperation with judicial authorities (law of 29 May 1982, No. 304, Articles 8 and 9). The latter Article granted the power to revoke conditional release *sine die*, thus preventing ancillary criminal sanctions and other effects provided for by law to be extinguished. The Constitutional Court acknowledged that the special conditional release regime unreasonably distinguished between two different categories of offenders (notably, ordinary criminals and terrorists) and pursued mere deterrence,

[20] See Court of Cassation, judgment of 18 December 1987, *Berardi*.
[21] See Court of Cassation, *Atzeni*, cit.
[22] See Court of Cassation, *Solimeno*, cit.
[23] See the *Bettini* case: Court of Cassation, judgment of 26 February 1985.

rather than also social rehabilitation. However, the Court rejected the application. Although the breach of Articles 3 (equal treatment) and 27 (social rehabilitation) of the Constitution could be maintained *in abstracto*, the Constitutional Court argued that the exceptional nature of special conditional release could not allow to compare its rules to those on ordinary conditional release, in the absence of an adequate *tertium comparationis*[24].

1.3.5.1. *Objective and subjective meanings of "repentant"; protection of victims of terrorist crimes; seriousness of the offence, dangerousness and criminal attitude of the offender*

With respect to the *post*-sentencing phase, the most relevant case law concerns the meaning of "repentance" for granting special parole. In the *Acanfora* case[25], the Court of Cassation ruled that unequivocal proof of a shown repentance, as a "change of life resulting from the acknowledgement of errors or faults" on the *ethical-moral* level, is required. In other words, the "repentant" must internally assume the "collective values" that had been breached. According to *Acanfora*, the offender cannot have repented and be dangerous at the same time. Such *inner root* of repentance is to be ascertained regarding both prison and non-prison conduct.

Against this background, differences between *objective* and *subjective* meanings of repentance reappear.

According to the *objective* meaning, the inner sphere of the "repentant" and the adherence to the values expressed by the institutional and legal framework is irrelevant for the purposes of granting special parole. Such principle also applies with respect to the facts the offender is sentenced for[26]. "Repentance" is matched with social rehabilitation: its evidence shall be inferred from the overall conduct, and the latter shall enable to predict that the individual will not reoffend[27]. In other rulings, the Court of Cassation requires to verify an evolution of the personality of the offender towards socially adequate models of life[28].

The case law takes also into account the need to protect victims of terrorism. The Court of Cassation attempted to strike a balance between objective and subjective understandings of "repentance" by requiring: *i*) adherence to the ethical and social values that have been breached by the crime committed; *ii*) satisfaction of the needs of the victims, notably restoration of the damages and other consequences of the crime, as well as assistance and

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[24] Constitutional Court, *Mallardo*, cit., § 2.

[25] Section I, judgment of October 8 1990, No. 3235.

[26] Court of Cassation, Section I, judgment of 11 March 1997; Court of Cassation, Section I, judgment of 10 December 2004.

[27] Court of Cassation, Section I, judgment of 25 September 2015, No. 486; Section I, judgment of 10 December 2004, cit.; Section I, judgment of 11 March 1997, cit.; Section I, judgment of 26 June 1995; Section I, judgment of 26 March 1992; Section V, judgment of 18 December 1991.

[28] Court of Cassation, Section I, judgment of 21 June 2001; Section I, judgment of 6 November 1989; Section I, judgment of 7 April 1993; Section I, judgment of 13 May 1991; judgment of 19 November 1990.

other means of solidarity[29]. Notwithstanding, victims' failure to forgive the offender is not an obstacle to granting special conditional release[30].

As regards the assessment carried out to grant conditional release, the Court of Cassation considered the mere absence of signs of dangerousness to be insufficient. To this effect, positive and tangible markers towards social rehabilitation are necessary[31]. Likewise, in some cases the Supreme Court argued that the mere regular prison conduct of the offender does not suffice[32].

According to the *subjective* meaning, in order to grant special conditional release, evidence of moral redemption, a critical review of the offender's past life and an aspiration to social reintegration are necessary[33]. Likewise, some rulings of the Supreme Court required markers of the acknowledgement of moral blame[34]. Moreover, according to some rulings which combined objective and subjective understandings of "repentance", dedication to work and voluntary activities and the critical review of past criminal conducts do not suffice in the absence of a both moral (including by means of requests for forgiveness) and material interest in restoring victims of the crime committed.

The case law of the Court of Cassation in the field of special conditional release displays dissenting interpretations regarding the relevance of the crime the "repentant" committed and his or her criminal attitude[35]. The Supreme Court resolved this divergence by means of an intermediate interpretation, according to which the seriousness of the offence and the criminal attitude of the offender are relevant in the initial phase of the assessment. The latter must be integrated with the rigorous verification of repentance considering all the other markers available during the enforcement of the sentence[36].

2. *Current rewarding legislation (where existing)*

From an experiential rather than normative point of view, we have at least two "rules", which are well known in the Italian doctrinal and judicial panorama. The first is that to defeat internal political-ideological terrorism –

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[29] Court of Cassation, Section I, judgment of 16 January 2007; Section I, judgment of 15 February 2008.

[30] Court of Cassation, Section I, judgment of 18 May 2005; Section I, judgment of 11 May 1993.

[31] Court of Cassation, Section I, judgment of 23 November 1990.

[32] Court of Cassation, Section I, judgment of 9 March 2005; Section I, judgment of 4 October 1991.

[33] Court of Cassation, Section I, judgment of 11 July 2014, No. 45042; Section I, judgment of 17 July 2012, No. 34946; Section I, judgment of 4 February 2009; Section I, judgment of 26 March 1992; judgment of 3 December 1990; Section I, judgment of 19 February 2009; Section I, judgment of 26 September 2007; Court of Turin, judgment of 10 June 2009.

[34] Court of Cassation, Section I, judgment of 29 May 2009; Section I, judgment of 9 March 2005.

[35] See Court of Cassation, judgment of 9 May 1988; Section I, judgment of 11 January 1985; judgment of 24 February 1983; Section I, judgment of 29 May 1978; *contra*, Section I, judgment of 11 May 1993; Section I, judgment of 5 July 1982; judgment of 27 April 1982.

[36] Court of Cassation, Section I, judgment of 28 April 2005; Section I, judgment of 7 October 1992; judgment of 27 June 1990.

therefore, a series of criminal organisations that use pseudonyms or passwords to communicate, as well as paramilitary techniques to act – repression, however essential, is not enough. Either there were informers ready to cooperate with the judicial authority or the jurisdiction must, sooner or later, lay down its arms. The difference in information characterising the relations between the State, on the one side, and the members of terrorist associations of an ideological matrix, on the other, increases the likelihood of the former to fail; but to be informed, penitents are needed. The second "rule" is that reward measures, if used temporarily and for the sole purpose of countering truly emergency phenomena, could be the right antidote to moderate the cognitive gap we have just mentioned, without giving up too much of some essential guarantees of the weaker party in the proceedings (the defendant)[37]. The most serious problem is that the "reward measures" that Italy has experienced over time of ideological terrorism have remained largely operational, contributing to the sad phenomenon (widespread not only in Italy) of the normalisation of the emergency.

From a regulatory point of view, in extreme summary, it can be said that, out of the reward measures against terrorism, the profile of reduction (and in some cases, extinction) of the penalty granted pursuant to Articles 4 and 5 of the so-called "Cossiga Law" (Law No. 15 of 1980) primarily remained, being applicable only to the repentant terrorist who intends to cooperate. This is, as has been properly specified, the "cornerstone of the counter-terrorism reward strategy".

The extenuating circumstances referred to in Article 4 are excluded from the logic of balancing with the aggravating circumstances pursuant to Article 69 of the Italian Criminal Code and there is no discretion: if the conditions are met, the court *must* grant them. From a strictly systematic point of view, however, it remains complicated to frame them: given that their substantial content results in an active dissociation that affects the sanction but does not touch the "fact", nor does it really help to understand it, some scholars have spoken of improper circumstances or have even come to deny their circumstantial nature altogether.

Article 5, on the other hand, is nothing more than a special case of withdrawal-reward (case of non-punishability), the operation of which must be limited only to the context of the attempted crime.

Once convicted, the possibility of obtaining prison benefits and alternative measures to imprisonment remains despite the presence of Article 4-*bis* of the Italian Prison System (which denies them, as a "general rule", also to terrorists): also in this case, if the *offender* dissociates and cooperates, he can access the benefits during the enforcement of the sentence, otherwise he is foreclosed. Let us recall that Article 4-*bis* of the Italian Prison System has been reformed by Article 3 of Law No. 38 dated 13 April 2009, on the "Conversion into law, with amendments, of Decree-Law No. 11 dated 23 February 2009 on urgent measures concerning public safety and the fight against sexual violence, as well as persecutory acts".

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[37] Voir A. Spataro, *Magistratura ed Istituzioni negli "anni di piombo": un modello virtuoso*, cit.

This law has divided the article into four paragraphs, which we can summarise as follows. Assignment to outside work, reward permits and alternative measures to imprisonment provided for in Chapter VI, excluding early release, may be granted to detainees and prisoners for certain serious crimes – including those of terrorism – only and exclusively if they have taken action to prevent the crime from causing further consequences, to secure evidence of the crimes, to identify any accomplices or to seize the sums or other benefits transferred.

There is a "shock absorber", a mechanism capable of attenuating, in some cases, the system of foreclosures described above. This happens in the event in which elements are acquired such as to rule out a connection of the perpetrator with the terrorist association or if the limited participation in the criminal act (ascertained in the sentence of conviction) renders a useful collaboration with the justice impossible; or, in conclusion, if the collaboration offered was irrelevant, or if the mitigating circumstances provided for in Article 62, No. 6, of the Italian Criminal Code, 114 and 116, paragraph 2, of the Italian Criminal Code have been granted (in the sentence).

The absence of evidence regarding the existence of current connections with a certain type of crime (e.g., terrorism), is decisive for the granting of benefits also to detainees or prisoners for other crimes expressly provided for by Article 1-*ter* of the provision, as well as for some crimes against the person, specifically against individual personality (e.g., Articles 600-*bis*, 600-*ter* of the Italian Criminal Code, etc.) and personal freedom (e.g., Articles 609-*bis*, 609-*ter* of the Italian Criminal Code, etc.). In the latter cases dictated in paragraph 1-*quater*, however, prison benefits may be granted to detainees and prisoners also on the basis of the results of scientific observation of the individual conducted collectively for at least one year, including with the participation of experts (pursuant to Article 80 paragraph 4 of the Italian Prison System).

The rewarding nature of the system, of course, does not end here: although it is off topic here, it should be remembered that the Italian legal system also proceeds in this sense by other means, such as administrative means (e.g., protection measures granted to informants) pursuant to Article 9, paragraph 3, of Law Decree No. 8 dated 15 January 1991, (converted in Law No. 82 dated 15 March 1991 and subsequent amendments).

2.1. *Applicability conditions*

For crimes committed for the purposes of terrorism or subversion of the democratic order, Article 4 of the "Cossiga law" allows the perpetrator to take advantage of various "rewards" (not punishability and serious reduction of the penalty).

The reduction in sentence (mitigating circumstances: life imprisonment is replaced by imprisonment from twelve to twenty years and other sentences are reduced from a third to half) is subject to the presence of certain conditions:

– *dissociation*;

– the activation to prevent the criminal activity leading to further consequences;

– the concrete help provided to the judicial authority in gathering decisive evidence to identify or capture accomplices.

"Non punishability", on the other hand, requires:

– having prevented the damaging event;

– the provision of decisive evidence for the exact reconstruction of the event and to identify any accomplices.

As regards the reward profile during enforcement, Article 4-*bis* of the Italian Prison System subjects the granting of prison benefits in the event of a crime for the purposes of terrorism or subversion to the presence of the conditions specified either by Article 58-*ter* of the Italian Prison System or by Article 323-*bis* of the Italian Criminal Code. The alternative conditions are as follows:

– having taken action (even after conviction) to prevent the criminal activity from leading to further consequences;

– having concretely assisted the police or judicial authority in the collection of decisive elements for the reconstruction of the events and for the identification or capture of the perpetrators.

2.2. *Types of rewarding measures*

The classification of rewarding measures is not easy.

A possible *macro*-breakdown could be made between "rewards" that follow conduct capable of affecting the offence (even in part) and "rewards" that are awarded as a result of conduct that does not interfere in any way with it.

In the first group, it is possible to include the more classic cases referred to in Article 56 of the Italian Criminal Code. When an action, or a "typical" omission, has begun at least in the form of an attempt, it is in the common interest to let the *offender* know that if he voluntarily desists, no one will be able to punish him, because this information will likely stimulate his attachment to freedom, directing – even at a rather advanced stage – his will away from the commission of the criminal offence. Similarly, it is appropriate to ensure the *perpetrator* of the discounts subject to a sufficient active withdrawal to avoid commitment. Those just described, as far as it is possible to discuss the obligatory nature and *quantum* of the reward (depending on the "weight" that each person gives to the "disvalue of the action"), are nothing more than the graduated reward logic of the personal and supervened cause of non-punishment of voluntary desistance (Article 56, paragraph 3, of the Italian Criminal Code) and the extenuating circumstance of active withdrawal (Article 56, paragraph 4, of the Italian Criminal Code). In addition, of course, it is not only a matter of political-criminal choices that are free from scientific evidence: in front of the same (only attempted) crime, in the fact of those who desist, there remains an undoubtedly lower "disvalue of action" than that (integral) embodied by a mere withdrawal. On

the one hand, the perpetrator almost does not materialise the work completely, on the other hand, the "fact" is almost complete (certainly the action or omission is), even if later, if fate gives him time, he recedes by preventing the event.

On the other hand, the second group includes reward measures that make the reward conditional on the mere cooperation of the accused or the offender with the judicial authorities in order to obtain useful information. It suffices to mention, for example, the reward that for cooperation during the enforcement of the penalty (see § 2.3???).

2.3. *Rewarding measures that exclude or mitigate the penalty, initiated at the post-sentencing stage*

Reward logic is not a specific feature of substantive criminal law in the strict sense, but also (and sometimes above all) operates in the post-sentencing phase. In this way, the enforcement becomes a *de facto* favourable context also for useful and efficient investigative activities, defined by some agreeable inquisitions. Well, if we understand reward in general terms we must also (and above all) talk about licences, reward permits, semi-freedom, parole, etc., whilst what we want to discuss is something else. Many reward provisions in the strict sense of the term have entered into our legal system, mainly with Law Decree No. 152 of 1991 (converted in Law No. 203 of 1991) and with Law Decree No. 306 of 1992 (converted in Law No. 306 of 1992). 356/1992).5

The basic logic has always been that of the "control" of the granting of prison benefits and the worsening of the prison regime of those convicted for mafia or terrorist crimes. If the *offender* cooperates, the prison system is not differentiated (benefits are accessible), or at most can be *softly* differentiated (benefits are partially accessible); if, on the other hand, the offender does not cooperate (benefits are not accessible).

One such example is Article 4-*bis* of the Italian Prison System; a central article for the understanding of many other cases in the prison system that allow for the differentiation mentioned above. Well, in its first formulation, this article differentiated the granting of benefits according to whether or not the *offender* had received a conviction that was in some way related to a certain crime. In the case of serious criminal offences, the benefits were conditional on the acquisition of clear evidence of the offender's dissociation; evidence was needed to rule out links to that specific criminality.

A few weeks after the murder of Giovanni Falcone, Law Decree No. 306 dated 8 June 1992, amended Article 4-*bis* of the Italian Prison System, requiring that, for crimes relating to organised crime, the granting of benefits should also be subject to collaboration with the legal process pursuant to Article 58-*ter* of the Italian Prison System. The social significance of this small-to-large legislative change was very clear; according to *id quod plerumque accidit*, the perpetrator-mafioso maintains firm contact with the criminal association; therefore, the benefit must be granted only after the incontrovertible proof of his dissociation: tipping off. There is no turning back from betrayal:

the legislator knows very well that "whistleblower" and "associate" are mutually exclusive concepts, either one is a mafioso/terrorist or one is (forever) a repentant whistleblower. In this way, Article 4-*bis* of the Italian Prison System, although largely unchanged from a technical point of view, is culturally distorted or, at least, revised in its deepest meaning: from a basis for the construction of a reinforced testing regime for the verification of the absence of connections with organised crime to a disposition-incubation of informers, collaborators, repentants.

Not to be forgotten, therefore, is Article 10 of Law No. 663 dated 10 October 1986, containing "Amendments to the law on the penitentiary system and on the enforcement of custodial and liberty-restrictive measures" (the so-called "Gozzini" law), which introduced another specific "differentiated" regime: the events of Article 41-*bis* of the Italian Prison System (the so-called hard prison) are tangible and clear evidence of this. This is, as is well known, a model of "prison life" aimed at preventing (almost entirely) the prisoner's contact with the community inside and outside the institution. We then specify that Article 41-*bis* of the Italian Criminal Code was subsequently amended, with the addition of the second paragraph, by Article 19 of Law Decree No. 306 of 1992 (converted into Law No. 356 dated 7 August 1992).

In any case, the *offender* subjected to such a prison regime is induced to cooperate with the judicial authorities to discontinue that awfully hard experience. With Law Decree No. 152 dated 13 May 1991 (converted in Law No. 203 dated 12 July 1991) Article 58-*ter*, which provides that the limitations to the granting of benefits provided for, such as outside work, reward permits, etc. and which we will discuss later (see § 3) was, in fact, added to the Italian prison system. It will suffice to point out here that it is the Supervisory Court, in agreement with the Public Prosecutor, that decides on the existence of collaborative conduct.

A perhaps interesting point is the detention arrangements offered to the collaborator. In this regard, Article 13-*bis* of Law No. 82 of 1991 introduced a (not too concise) protection procedure. If the sentence is already being carried out (or if it has been carried out but its enforcement has not yet begun), in the presence of serious and urgent reasons, the Chief Appeal Court Prosecutor of the Republic at the Court of Appeal in the district of which the prison institution is located, at the request of the Chief of Police (who will inform the Minister of the Interior), may authorise the custody of the collaborator in a place other than the institution where the enforcement is in progress, for the time necessary to draw up the protection programme. If the person is subject to an alternative measure to imprisonment (other than early release), the Chief Appeal Court Prosecutor at the Court of Appeal in the district of which the person is detained or has his residence or domicile may authorise specific methods of enforcement of the alternative measures. Article *13-ter*, on the other hand, establishes that, for collaborators included in a protection programme, the benefits can be arranged only after having heard the authority that deliberated the "programme", which must contact the Public Prosecutor at the competent court to acquire the necessary information on the collaboration carried out. These benefits can be provided even beyond the penalty limits set out in the prison system.

2.4. *Counterpart of rewarding measures: the obligations of the repentant*

See § 2.1.

2.5. *Revocation of rewarding measures*

Generally, "rewards" granted are subject to revocation. Take, by way of example, Articles 2 and 3 of Law No. 304 dated 29 May 1982, which provide for the full confession of all offences committed as an essential requirement for the application of the "reward". A very central point is that in the realisation of the alleged conduct required for the granting of mitigation or non-punishment it is better not to lie nor omit what is known. Article 10 of Law No. 304/1982, for example, specifies that "when it appears that the cases of non-punishability provided for in Articles 1 and 5 and the mitigating circumstances provided for in Articles 2 and 3 have been applied as a result of false or reticent declarations, the judgement may be revised at the request of the Chief Appeal Court Prosecutor at the Court of Appeal in the district of which the judgement was passed, or of the Chief Appeal Court Prosecutor at the Court of Cassation, ex officio or at the request of the Minister of Justice […] the court may impose a more serious penalty by specific case or quantity and withdraw the benefits granted".

2.6. *Conditions for the application of the measures (procedural aspects)*

In examining the procedure for the application of reward measures in favour of those who decide to cooperate with the legal process, a distinction must be made according to the case in point.

In the case of measures capable of affecting the *an* and the *quantum* of the penalty such as, for example, those provided for in Article 270-*bis*.1 of the Italian Criminal Code (see § 1.2), it is simply up to the court on the merits, at the outcome of the proceedings, to assess the applicability of the benefit according to the requirements of the law in each case.

The same will happen with reference to mitigating circumstances and cases of non-punishability provided for in special laws and described in the preceding paragraphs.

As regards the conditions for the applicability of such measures, it should be noted, incidentally, that, under Article 16-*quinquies* of Law Decree No. 8 of 1991, certain mitigating circumstances may be granted only to those who – within the terms and in the manner provided for in Article 16-*quater* of said decree – have signed the minutes describing the contents of the collaboration, in which the content of the statements made by the collaborator is reported in detail. The descriptive report represents an instrument to control the reliability of what reported by the collaborator, clarifying the cognitive contribution of the declarant and outlining the boundaries of the collaboration made[38]. It must be signed within a certain period to con-

[38] Confirming the fact that this is a document aimed at obtaining reliable statements are also the provisions of Article 13 of Legislative Decree No. 8 of 1991 concerning the need

tain the phenomenon of the so-called "instalment" declarations[39] and its regular formation is a prerequisite for the procedural usability of the collaborator's statements.

By subjecting the recognition of the reward to the valid formation of the minutes, the law therefore intends to limit the discounts to the existence of a tangible, reliable and usefully expendable collaboration in court.

Specific conditions are set out for reward measures that can be applied during the enforcement of a possible conviction. The reference standards are to be found in Law No. 354 dated 27 July 1975[40] (the so-called prison system, hereinafter the Italian Prison System) and in Law Decree No. 8 dated 15 January 1991[41].

Specifically, Article 4-*bis* of L. No. 354 of 1975 identifies, in general terms, certain crimes that prevent people from enjoying the benefits provided for by the law. The original text of the standard has been amended several times over the years and most recently (in the field of terrorism) by Law Decree No. 7 dated 18 February 2015[42] and (with reference, however, to crimes against the public administration and the protection of victims of gender-based violence respectively) by Law No. 3 dated 9 January 2019[43] and by Law No. 69 dated 19 July 2019[44].

Firstly, it must be noted that, as regards those convicted of one of the crimes referred to in Article 4-*bis* of the Italian Prison System (which includes terrorist offences) does not operate, pursuant to the provisions of Article 656, paragraph 9, section *a*) of the Italian Criminal Code, the mechanism of suspension of enforcement. As a general rule, the latter rule makes it possible to suspend the enforcement of the detention order for short prison sentences pending a decision on the applicability of any alternative measures to detention. However, the seriousness of terrorist offences justifies, from the legislator's point of view, the immediate imprisonment of the

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for the collaborator detained or subjected to special protection measures to be guaranteed the absence of contact with other persons who have made the same procedural choice, precisely in order to avoid any form of conditioning or breach. The sanction due to failure to comply with these precautions shall be that the statements made after the date on which the breach occurred cannot be used in court. R.A. Ruggiero, *L'attendibilità delle dichiarazioni dei collaboratori di giustizia nella chiamata in correità* (Giappichelli 2012) 173.

[39] *Ibid*., 172.

[40] Law No. 354 of 26 July 1975, '*Norme sull'ordinamento penitenziario e sull'esecuzione delle misure privative e limitative della libertà*'.

[41] Decree Law No. 8 of 15 January 1991, *'Nuove norme in materia di sequestri di persona a scopo di estorsione e per la protezione dei testimoni di giustizia, nonché per la protezione e il trattamento sanzionatorio di coloro che collaborano con la giustizia'*, converted, with amendments, by Law No. 82 of 15 March 1991.

[42] Decree Law No. 7 of 18 February 2015, 'Misure urgenti per il contrasto del terrorismo, anche di matrice internazionale, nonché proroga delle missioni internazionali delle Forze armate e di polizia, iniziative di cooperazione allo sviluppo e sostegno ai processi di ricostruzione e partecipazione alle iniziative delle Organizzazioni internazionali per il consolidamento dei processi di pace e di stabilizzazione', converted, with amendments, by Law No. 43 of 17 April 2015.

[43] Law No. 3 of 9 January 2019, '*Misure per il contrasto dei reati contro la pubblica amministrazione, nonché in materia di prescrizione del reato e in materia di trasparenza dei partiti e movimenti politici*'.

[44] Law No. 69 of 19 July 2019, '*Modifiche al codice penale, al codice di procedura penale e altre disposizioni in materia di tutela delle vittime di violenza domestica e di genere*'.

convicted person regardless of the future applicability of an alternative measure to imprisonment.

With reference to the scope of application of the provision in question, although Article 4-*bis* of the Italian Prison System is unequivocally aimed at regulating access to prison benefits, case law has stated that the discipline is to be considered applicable – where possible – also to persons in custody[45]. Such an extension of application is, however, to be criticised given the exceptional nature of this forecast.

The first paragraph of Article 4-*bis* of the Italian Prison System sets out that detainees and prisoners who have been detained for crimes committed for the purposes of terrorism, including international terrorism, or subversion through the commission of acts of violence can access the benefits provided for therein and alternative measures to detention, except for early release, only if they cooperate with the legal process in accordance with Article 58-*ter* of the Italian Prison System Specifically, the prison benefits subject to the requirements examined are the assignment to outside work pursuant to Article 21 of the Italian Prison System, the reward permits pursuant to Article 30-*ter* of the Italian Prison System[46] and the alternative measures to detention provided for in Chapter VI (excluding early release), i.e., probation with the social service pursuant to Article 47 of the Italian Prison System, the various forms of home detention pursuant to Article 47-*ter* of the Italian Prison System and semi-freedom pursuant to Article 50 of the Italian Prison System. Access to parole for persons convicted of the crimes referred to in Article 4-*bis* of the Italian Prison System is also subject to the existence of the requirements provided for therein in accordance with the provisions of Article 2, paragraph 1 of Law Decree No. 152 dated 13.5.1991.

Paragraph *1-bis* of Article 4-*bis* specifies, however, that the above benefits may also be granted in cases where:

a) collaboration is "impossible" due to limited participation in the criminal act, ascertained in the conviction or, in any case, in light of the ascertainment of the facts and responsibilities established by irrevocable judgement;

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[45] Court of Cassation, judgment of 23 April 2004, Virga, in *C.e.d. No.* 230807; Id., 14 March 03, Ganci, in *C.e.d. No.* 226629; Id., 27 November 1996, Piarulli, in *C.e.d.*, 206447.

[46] On the subject of reward permits, the Constitutional Court recently issued a ruling with sentence No. 253/2019 in relation to life imprisonment for mafia offences. A question had been raised as to the constitutional legitimacy of Article 4-*bis* of the Italian Prison System insofar as it prevents the crimes specified therein from being allowed to reward convicts who do not cooperate with the legal process.

The Constitutional Court has declared the constitutional illegitimacy of Article 4-*bis*, paragraph 1, of the Italian Prison System in the part in which it does not provide for the granting of reward permits in the absence of collaboration with the legal process, even if elements have been acquired such as to rule out both the topicality of participation in the criminal association and, more generally, the danger of re-establishing links with organised crime.

The presumption of "social dangerousness" of the non-cooperative prisoner with reference to the granting of reward permits is no longer to be considered absolute, but relative. This "may be passed by the supervising magistrate, whose assessment on a case-by-case basis must be based on prison reports and information and opinions from various authorities, from the Anti-Mafia or Anti-Terrorism Prosecutor's Office to the competent Provincial Committee for Public Order and Security".

b) the cooperation offered is "objectively irrelevant", but one of the mitigating circumstances provided for in Article 62 No. 6 (compensation for damages) has been applied to said detainees or prisoners, even if the compensation for damages was paid after the conviction, in Article 114 (minor criminal participation) or in Article 116, paragraph 2 (event more serious than that intended) of the Italian Criminal Code.

However, no benefit can be granted to detainees and prisoners for malicious crimes "when the National Anti-Mafia Prosecutor or the District Prosecutor communicates, on his own initiative or on the recommendation of the Provincial Committee for Public Order and Security competent in relation to the place of detention or imprisonment, the topicality of connections with organised crime" (Article 4-*bis* paragraph 3-*bis* of the Italian Prison System).

Again, it is not difficult to grasp the *rationale* of the forecasts under consideration. Given the seriousness of the crimes listed in Article 4-*bis* of the Italian Prison System, the Legislator intends to avoid the application of favourable treatment during the enforcement of the sentence in the absence of indices of penitents by the offender, amongst which there is also conduct of collaboration indicative of the discontinuation of the ties with the criminal environment. Essentially, there is an absolute presumption of social dangerousness for those convicted of terrorist crimes, a presumption that can only be overcome if such persons decide to cooperate pursuant to Article 58-*ter* of the Italian Prison System.

A central element in the governance referred to in Article 4-*bis* of the Italian Prison System is therefore that of the collaboration described in Article 58-*ter* of the Italian Prison System. It takes the form of the conduct of "those who, even after conviction, have taken steps to prevent the criminal activity from leading to further consequences or who have specifically helped the police or judicial authorities in the collection of decisive elements for the reconstruction of the events and for the identification or capture of the perpetrators of the crimes" and whose assessment is up to them, in accordance with the provisions of the second paragraph of the Article 58-*ter* of the Italian Prison System to the "supervisory court, having obtained the necessary information and consulted the public prosecutor with the court competent for the crimes for which cooperation has been provided".

As mentioned above, the hard-preclusive logic of the double track is partially rebalanced by the provisions of paragraph 1-*bis* of Article 4-*bis* of the Italian Prison System, which governs cases of so-called irrelevant collaboration and the so-called impossible or unreasonable collaboration. In both of these situations, in fact, the final effect is that of breaking down the barrier to access to benefits.

As regards irrelevant cooperation, it would be unfair to prevent the application of prison benefits to a person who is unable to report useful elements only due to the fact that he himself lacks such knowledge. Prerequisites for the application of the governance as regards irrelevant collaboration are as follows: 1) the acquisition of elements such as to suggest that there is no connection with terrorist crime (see below); 2) the recognition – in the

sentence of conviction – of one of the mitigating circumstances referred to in Articles 62, No. 6), 114 or 116, paragraph 2 of the Italian Criminal Code.

The criterion that distinguishes so-called irrelevant collaboration from collaboration pursuant to Article 58-*ter* of the Italian Prison System is a purely quantitative criterion. In this context, there are no elements of a subjective nature such as the reasons that led the condemned person to collaborate, the spontaneity of the collaboration or the possible penitents. Collaboration must in any case be full and the willingness to cooperate must be ascertained in practice. In any case, deliberately limited or partial cooperation are not permitted.

The other case considered by paragraph 1-*bis* of Article 4-*bis* of the Italian Prison System is that of so-called impossible collaboration. On this point, the contribution made by the case law of the Constitutional Court, which extended the concept of irrelevant collaboration – already present in the formulation of the rule under the terms described above – to all those cases in which the convicted person finds himself in the objective impossibility of collaborating is essential. This can happen for two reasons: *a*) the convicted person had such a marginal role that he could not have known anything useful for the judicial authorities[47] or *b*) because the conviction had already fully established the facts and responsibilities[48]. Also in this case, it would clearly be unfair to exclude the applicability of prison benefits to a convicted person who is unable to make a useful contribution to the judicial authorities for reasons beyond his control, such as limited participation in the facts of the crime, the secondary role he plays, or in cases in which the judgement on the merits of the case has proved suitable to clarify every aspect both in terms of ascertaining the facts and in terms of the persons to whom they should be attributed.

Currently, when the path of collaboration is completely impracticable, in order to remove the foreclosures, set forth in Article 4-*bis* of the Italian Prison System, the existence of elements suitable to exclude connections between the condemned person and terrorist activity must be considered sufficient.

With reference to the marginality of the role played by the convicted person, the supervisory court will have to ascertain its existence on the basis of what has been ascertained with the conviction, with any difference assessment being foreclosed, due to the intangibility of the judged person. It must clearly emerge from the sentence of conviction that, regardless of the acknowledgement of the mitigating circumstance of Article 114 of the Italian Criminal Code, the convicted person has played a marginal and negligible role in relation to the criminal act and that this has foreclosed him from having access to information expendable for collaborative purposes[49]. To this end, the grounds for the judgement applying the penalty at the request of the parties[50].

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[47] Constitutional Court No. 357 of 1994.
[48] Constitutional Court No. 68 of 1995.
[49] Court of Cassation, judgment of 15 May 1995, *Enea* (1996) 2 GP 250.
[50] Court of Cassation, judgment of 12 July 1995 (1996) RP 518.

The Constitutional Court[51] specified that, in any event, the assessment as to impossible cooperation could not be based on the condemned person's protest of innocence which, it stated, could not be relevant at the enforcement stage to the outcome of a final judgement.

The moment to which reference must be made as regards the ascertainment of the impossibility and unreasonableness of collaboration coincides, according to case law, with the moment in which the application for access to benefits is submitted. In this way, the silence kept by the defendant during his proceedings should not adversely affect the assessment made by the supervisory court.

According to the prevailing case law, it is for the defendant to attach to the application for access to the benefit the documentation capable of proving the circumstances, objective and subjective, which make it impossible to cooperate usefully, circumstances which will then be ascertained by the competent court. However, it should be noted that the court is not foreclosed from making an *ex officio* finding of its own motion as to the existence of further elements capable of establishing a finding of impossibility of cooperation.

The order by which the supervisory court rejects the sentenced person's request must in any event be reasoned[52].

A recent ruling of the Supreme Court of Cassation has intervened on the subject of collaboration pursuant to paragraph 1-*ter* of Article 4-*bis* of the Italian Prison System stating that, for the purposes of granting the prison benefits referred to therein, the doubt as to the existence of the presupposition of the impossibility or irrelevance of the collaboration of the person concerned with the judiciary due to the limited participation in the fact or the complete ascertainment of the facts and responsibilities, conditions equated by the regulatory provision to the requirement of collaboration with the judiciary which must necessarily concur with that of the lack of current links with organised crime, cannot be to the detriment of the applicant, given that the rule of judgement according to which, if two meanings can equally be attributed to a given evidence, the one most favourable to the person concerned must be preferred, which can be set aside only where it is irreconcilable with other unambiguous elements of the opposite sign. The maximum constitutes shareable projection of the scope of the rule of *in dubio pro reo* operating with knowledge of the facts.

In any case – as anticipated – in both situations (irrelevant collaboration and impossible collaboration), there must be elements such as to exclude the actuality of connections with terrorist criminality and, therefore, sufficient to corroborate the case of an effective detachment from the criminal organisation.

The problems in relation to such an assessment arise, in the first place, with reference to all those cases in which the commission of the crime does not depend on the existence of an organised criminal structure since what is

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[51] Constitutional Court No. 306 of 1993.
[52] Court of Cassation, judgment of 9 June 1998, Di Quarto (1999) CP 2284.

required to prove is, essentially, the dissolution of an associative bond which has never existed. With specific reference to the terrorism phenomenon, it suffices to consider, for example, how the conviction for a crime with the purpose of terrorism committed by means of violence against the person, which in itself is an obstacle to the granting of the benefits, could well disregard the protest of an associative crime[53].

If it is not possible to ascertain the detachment from the criminal organisation, nor if, however, there are any indications of continuing membership of the bond, the only solution consistent with the Italian trial system seems to be that of *in dubio pro reo*: if two meanings can equally be attributed to a given evidence, the one most favourable to the person concerned must be given priority, which can be set aside only where it is irreconcilable with other unambiguous elements of the opposite sign.

In line with this conclusion, the most recent case law of the Court of Cassation seems to be in line with this conclusion, which states that the existence of elements that exclude the topicality of links with crime constitutes a condition that is concurrent but independent from that of the so-called impossible or irrelevant collaboration[54]. Given that this is an independent assessment, all the rules laid down in the Code concerning the investigating and assessing powers of the supervisory judiciary will have to be applied, including precisely that which prevents decisions unfavourable to the convicted person in the absence of positive evidence of the circumstances justifying them.

As regards the procedure, Article 4-*bis* of the Italian Prison System imposes on the supervisory magistrate the obligation to decide on the granting of the benefit requested after obtaining detailed information through the provincial committee for public order and safety (so-called "*Comitato provinciale per l'ordine e la sicurezza pubblica*", "Provincial Committee for Public Order and Security", hereinafter C.P.O.S.), which is competent in relation to the convicted person's place of detention.

The C.P.O.S. was established under Law No. 121 of 1981, with the aim of improving police coordination. These are bodies with consultative functions, set up at each Prefecture. They are presided over by the Prefect and are composed, by law, of the Chief of Police, the Mayor of the municipality of the capital and the President of the province, the Provincial Commanders of the *Carabinieri* and the *Guardia di Finanza* (Italian Finance Police), as well as by the exponents of the public administrations, of the judiciary, of the structures of public security, which the Prefect may invite to participate (Article 20 Law No. 212 of 1981).

The choice to include a typically preventive body that is dependent on the executive body (specifically, the Ministry of the Interior) in a delicate phase such as that of enforcement, has raised several perplexities in doctrine[55]. The composition and the (public security) functions attributed to

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[53] See, also for further references, L. Caraceni, '*sub* Art. 4-*bis*', in F. Dalla Casa, G. Giostra, *Ordinamento penitenziario commentato* (Cedam 2019) 73-76.

[54] Court of Cassation, judgment of 7 April 2017, Cataldo, in *C.e.d.* n. 270864.

[55] *Ibid*., 80-83.

these bodies, in fact, condition the impartiality that should characterise a judicial procedure, given that the C.P.O.S. is able to form, through independently acquired sources, a large part of the cognitive platform on which the court will rely for the decision.

In any event, it should be noted that, although the request for information is a due act by the supervisory judiciary, such information is not binding on the decision. On the contrary, the court is in any case obliged to decide after thirty days from the request (this term can be extended by a further thirty days if the C.P.O.S. communicates that there are "specific security needs or that connections could be maintained with organisations operating in non-local or non-national areas").

Lastly, the governance described so far does not apply, in accordance with the provisions of paragraph 3-*bis* of Article 4-*bis* of the Italian Prison System, in the event that the National or District Anti-Mafia Prosecutor (and, as of, 2015, also Anti-Terrorism) should communicate, on his own initiative or upon notification of the provincial committee for public order and security competent in relation to the place of detention or internment, the topicality of connections with the organised crime of the offender.

The rule, which is much criticised by the doctrine, ends up attributing a real power of veto to an investigative body, capable of preventing access to benefits for those convicted of terrorist crimes[56]. On this point, case law has attempted to trace these communications back to the same parameters elaborated for the information of the C.P.S.O. and, therefore, has affirmed that the opinion of the Public Prosecutor cannot be considered binding and that the court, which must decide on the possibility of access to the benefit is in any case under an obligation to verify the validity of the information transmitted by the Public Prosecutor, since it cannot be uncritically accepted[57].

Turning to the special governance dictated in matters of terrorism by Article 1*6-nonies* of Law Decree No. 8 of 1991 – as last amended by Law Decree No. 7 of 2015 – it is established in paragraph 1 that as regards the convicted persons who have provided, also after the conviction, some of the conduct of collaboration which allows the granting of the mitigating circumstances provided for by the Criminal Code or by special provisions, the parole, the granting of the reward permits and the admission to the measure of home detention provided for by Article 47-*ter* of Law No. 354 dated 26 July 1975, and subsequent amendments, are ordered upon proposal or after hearing the National Anti-Mafia and Anti-Terrorism Prosecutor.

Given the characteristics and the social alarm caused by terrorist offences, it is therefore intended to make the granting of certain measures subject to a further opinion by the authority specifically responsible for the repression of the phenomenon.

The proposal or the opinion of the national prosecutor must contain the assessment of the convicted person's conduct and social dangerousness, taking into account the conduct of the convicted person in the course of the

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[56] *Ibid.*, 85-87.

[57] Court of cassation, judgment of 15 March 1994, Meles, (1995) CP 3069; Court of cassation, judgment of 11 January 1994, Bellavia, (1995) CP 703.

criminal proceedings (specifically, it is required to specify whether the convicted person has ever refused to submit to questioning or examination or other act of investigation in the course of the criminal proceedings for which he has cooperated), as well as any element considered relevant "for the purpose of ascertaining the convicted person's penitents, also with reference to the relevance of the links with organised or subversive crime" (paragraph 3).

As regards the requirement of penitents, the case law has specified that the existence of penitents cannot be inferred from the mere fact of collaboration.

The sentenced person, in accordance with the second paragraph, must provide the judicial authority competent to decide on the granting of the benefit with any useful information on the characteristics of the collaboration provided, attaching to the proposal or opinion, if requested by the court or the supervisory magistrate, a copy of the report explaining the contents of the collaboration and, if he is a person subject to protection measures, the relevant implementing measure.

The competent court, once it has obtained the proposal or the opinion of the national prosecutor, will have to decide on the grant of the benefit having regard to the importance of cooperation and provided that there is penitents and no evidence to suggest links with organised or subversive crime. The granting measure may be adopted by the court or by the supervisory magistrate also in derogation of the provisions in force, including those relating to the penalty limits set out in Article 176 of the Italian Criminal Code and Articles 30-*ter* and 47-*ter* of Law No. 354 dated 26 July 1975 and subsequent amendments. The measure – specifies paragraph 4 of Article 16-*nonies* – must be "specifically reasoned" if the national prosecutor has expressed an unfavourable opinion.

If the convicted person decides to cooperate as regards facts other than those for which the conviction was given, the fifth paragraph specifies that the benefits referred to above may be "granted by way of derogation from the provisions in force only after the judgement at first instance concerning the facts which are the subject of the cooperation". Case law has intervened to clarify the scope of this provision, which differs from the cases referred to in the preceding paragraphs in relation to the subject matter of the cooperation. In the case referred to in the fifth paragraph, the convicted person makes statements only with reference to facts other than those for which he has been convicted and, therefore, the collaboration has, as its object, statements exclusively incriminating third parties; in other cases, on the other hand, the convicted person makes statements concerning the facts for which he has been convicted, as well as, possibly, statements on the fact of others. In the presence of statements exclusively incriminating third parties, therefore, the granting of benefits is subject to the issue of a sentence – even if not final – that confirms that what has been declared by the convicted person during the collaboration meets the requirements of Article 9, paragraph 3 of Law Decree No. 8 of 1991, i.e., the intrinsic reliability and considerable importance of it in terms of novelty, completeness or other elements, as regards the structural connotations, equipment of weapons, explosives or goods, ar-

ticulations and internal or international connections of mafia-type or terrorist-subversive criminal organisations, or as regards the objectives, aims and operating methods of the same organisations. Also in this case, the favourable treatment is therefore subordinate to the effectiveness and importance of the collaboration offered.

From a different point of view, the characteristics of the cooperation may also be relevant for the withdrawal or replacement of any precautionary measures applied to the declarant. Article 16-*octies* of Decree-Law No. 8 of 1991 provides, however, that the amendment *in melius* cannot constitute an automatic consequence of the collaborative conduct. The measure of pre-trial detention may also be revoked or replaced only in the event that, in the context of the investigations carried out as regards the existence of pre-trial detention, the proceeding court has not acquired elements from which it is possible to deduce the topicality of the links with terrorist crime. To this end, it will in any case be necessary to hear the National Anti-Mafia and Anti-Terrorism Prosecutor, as well as the Chief Appeal Court Prosecutors at the relevant courts of appeal and to verify that the collaborator, where subject to protection measures, has complied with the commitments made under Article 12.

2.7. *Conditions for the use of the declarations obtained (probative value of declarations)*

The question arises as to how statements made by those who decide to cooperate can be brought in and used in other criminal proceedings.

The reference legislation is dictated by Legislative Decree No. 8 of 1991[58] as amended by Law No. 45 of 2001[59] and, specifically, by the provisions contained in Chapter II-*ter*, concerning the sanctioning treatment of those who cooperate with the justice system.

Article 16-*quater* of Legislative Decree No. 8 of 1991 establishes, firstly, that whoever intends to cooperate with the judiciary for the purpose of granting special protection measures, recognition of mitigating circumstances or access to prison benefits must make his or her statements to the Public Prosecutor's Office within one hundred and eighty days of the aforementioned manifestation of will.

The deadline of one hundred and eighty days is important in two respects: firstly, failure to comply with the deadline makes it impossible to grant the protective measures provided for informants by the same Legislative Decree No. 8 of 1991 (if they have been granted, they must be revoked). Furthermore, declarations made outside that period may not be currencies

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[58] Decree Law No. 8 of 15 January 1991, '*Nuove norme in materia di sequestri di persona a scopo di estorsione e per la protezione dei testimoni di giustizia, nonché per la protezione e il trattamento sanzionatorio di coloro che collaborano con la giustizia*', converted, with amendments, by Law No. 82 of 15 March 1991.

[59] Law No. 45 of 13 February 2001, '*Modifica della disciplina della protezione e del trattamento sanzionatorio di coloro che collaborano con la giustizia nonché disposizioni a favore delle persone che prestano testimonianza*'.

for the purposes of proving the facts stated in them against persons other than the declarant, unless they are unrepeatable (see below). This is intended to oblige the registrant to immediately share *all* information in his possession, avoiding reticent, partial and, therefore, unreliable stories.

The content of the statements made must be transcribed – in accordance with the procedures set out in Article 141-*bis* of the Italian Criminal Code – in the so-called minutes explaining the contents of the statement.

The descriptive minutes are included in their entirety in a special file held by the Public Prosecutor who received the statements. In addition, an extract from the minutes is included in the file provided for by Article 416, paragraph 2, of the Code of Criminal Procedure, i.e., in the file sent to the court at the preliminary hearing, relating to the proceedings "to which the statements respectively and directly refer".

The minutes are covered by secrecy as long as the acts contained in the file of the Public Prosecutor responsible for the proceedings to which the statements refer are secret and, in any case, their publication is prohibited pursuant to Article 114 of the Italian Criminal Code. The provision is clearly intended to protect the functionality of the investigations and also to protect the registrant himself.

As to the content of the minutes, the convicted person must declare to the Public Prosecutor, in accordance with the first paragraph of Article 16-*quater*, all the information in his possession useful for the reconstruction of the facts and circumstances on which he is interrogated, as well as the other facts of greater gravity and social alarm of which he is aware, in addition to the identification and capture of their authors and also the information necessary so that it may proceed to the identification, seizure and confiscation of the money, goods and any other usefulness of which it itself or, with reference to the data available to it, others belonging to the criminal groups directly or indirectly dispose.

It has already been said that it must be a full cooperation, as partial or limited cooperation cannot be considered sufficient in certain circumstances. In fact, the fourth paragraph of Article 16-*quater* specifies that the person who makes the declarations must certify, in the descriptive report, that he "is not in possession of news and information that can be used in court on other facts or situations, also not connected or connected to those reported, of specific seriousness or in any case such as to highlight the social dangerousness of individuals or criminal groups". This statement is of particular importance as regards the granting of protection measures: if the statement proves to be "untrue", the protection measures cannot be granted or, if they have already been applied, must be revoked.

All the statements and information that are included in the descriptive minutes are those "that can be used in court and which, pursuant to Article 194 of the Italian Criminal Code, may be the subject of testimony".

The rule specifies – similarly to what is generally provided for by the Code of Criminal Procedure – that the statements in the descriptive minutes cannot be the subject of testimony if the convicted person has "inferred from current rumours or similar situations". Similar to what is generally pre-

scribed by the Code of Criminal Procedure, such information could not be adequately verified in contradictory manner, thus lacking a minimum reliability coefficient.

In addition, they may not be used in proceedings to which statements made after the 180-day period referred to above relate. This is a subjectively relative physiological unusability, which needs to be addressed.

Firstly, with reference to the *dies a quo* of the term in question, the case law of the Court of Cassation has intervened by specifying that "for the purposes of the usability of the declarations made by the so called "informants", the moment from which the term of one hundred and eighty days starts to run within which the person who has expressed the willingness to cooperate must make known to the Public Prosecutor all the information in his possession, coincides with the drafting of the minutes describing the contents of the cooperation and not with that when such will was only generically expressed" (C 25.3.2011, No. 14556).

Furthermore, the Supreme Court specified that the unusability of the statements made by "informants", beyond the term of one hundred and eighty days from the beginning of the collaboration, does not fall within the categories of "pathological unusability", from which the evidentiary acts taken "*contra legem*" are affected and cannot, therefore, be deduced nor detected in the abridged judgement. This conclusion is currently confirmed by the text of Article 438, paragraph 6-*bis*, of the Italian Criminal Code, as amended by Law 103 of 2017. In fact, according to the rules currently in force, the request for an abbreviated judgement entails the non-detectability of the unusability other than that resulting from the breach of an evidentiary prohibition.

The statements made by the collaborator outside of the term referred to in paragraph 1 of Article 16-*quater*, therefore, can be used in the preliminary investigation phase, specifically for the purpose of issuing the personal and real precautionary measures, as well as in the preliminary hearing and in the abbreviated trial[60].

As regards the tangible modalities of acquisition of what has been declared by the collaborator, the governance is dictated by Article 16-*sexies* of Law Decree No. 8 of 1991, the content of which must necessarily be coordinated with the governance of the code of ritual.

The aforementioned statement states that, when the collaborator is to be interrogated or examined as a witness or accused person in a related proceeding or of an offence connected with the case provided for in Article 371, paragraph 2, section *b*) of the Italian Code of Criminal Procedure, the court, at the request of the party, shall order that the minutes illustrating the contents of the cooperation referred to in Article 16-*quater* be obtained from the Public Prosecutor's Office's file, limited to those parts of it which concern the liability of the accused in the proceedings.

Due to the specific qualification held, some special rules are dictated for the assessment of the statements made by the collaborator. He could in

[60] Court of Cassation, judgment of 25 September 2008. Magistris, in *C.e.d.* No. 241882.

fact be led to report untrue circumstances for the sole purpose of profiting from the benefits of the cooperation and is, therefore, subject to a relative presumption of unreliability.

In general terms, Article 192, paragraphs 3 and 4 of the Italian Criminal Code establishes that statements made by any defendant for the same offence for which proceedings are being carried out or for related or connected offences are assessed together with other evidence confirming their reliability. The provision, evidently applicable also to the collaborator who is also accused, therefore introduces a special rule of assessment that prevents the statements coming from the perpetrator from being considered in the absence of further and autonomous elements capable of confirming their genuineness.

The case law has further reaffirmed the need for an in-depth deliberation of the personal reliability of the collaborators, consisting of a preventive, general and unfailing examination, without which the subsequent ones of intrinsic credibility of internal coherence and logic and the search for external feedback appear incomplete and not self-sufficient as well as secondary.

The court must therefore firstly assess the reliability of the collaborator in relation to his personality, his social-family conditions, his delinquent past, his relationships with the accused of complicity and the remote and imminent genesis of his resolution to the confession or accusation of the co-perpetrators or accomplices. Only in a second step will the intrinsic coherence of what is referred to have to be verified in the light of the criteria of precision, coherence, constancy, spontaneity. Lastly, the statements made must be considered in relation to external elements capable of confirming their genuineness.

2.8. *Measures for the protection of the repentant*

The Italian law provides an articulated system of protection for the so-called informants. The reference framework is contained in Chapter II of Decree Law No. 8 of 1991.

The system is divided into three levels, due to the increasing danger for the safety of the collaborator. The existing measures are in as follows:

1) ordinary protection measures, which are taken by the public security authority or, in the case of detained or imprisoned persons, by the prison administration;

2) the provisional protection plan referred to in Article 13, paragraph 1 of Decree Law No. 8 of 1991;

3) the special protection measures referred to in Article 13, paragraph 4 of Decree Law No. 8 of 1991;

4) the special protection programme referred to in Article 13, paragraph 5 of Decree Law No. 8 of 1991.

The instruments of protection referred to in points 2), 3) and 4) are the responsibility of the Commission under Article 10 of Decree Law No. 8 of 1991.

The bodies involved in the procedure for applying, amending or withdrawing the special protection measures and the special protection programme are the Commission referred to in Article 10 and the Central Protection Service referred to in Article 14 of Decree Law No. 8 of 1991.

The Minister of the Interior and the Minister of Justice also play an important role. Specifically, with reference to the time before the enforcement of the measures, it is up to them to appoint the Commission referred to above.

For the application of special protection measures, cooperation or statements made in the course of criminal proceedings are relevant. They must have the character of "intrinsic reliability", as well as of "novelty", "completeness" and, in any case, must "appear of considerable importance for the development of the investigations or for the purposes of the judgement or for the activities of investigation on the structural connotations, the endowment of arms, explosives or goods, the articulations and the internal or international connections of the criminal organisations of mafia or terrorist-subversive type or on the objectives, purposes and operative modalities of said organisations".

In any case, these measures can only be applied if "the inadequacy of the ordinary protection measures adopted by the public security authorities or, in the case of persons detained or interned, by the Ministry of Justice – Department of Prison Administration" is apparent. In addition, it must appear that these persons are in serious and current danger due to the collaborative conduct described above in relation to certain crimes, including those committed for the purposes of terrorism.

The protection measures must be appropriate to ensure the safety of the recipients, including, where necessary, their assistance.

Article 9 paragraph 4 specifies that in the event that the special protection measures are not appropriate to the seriousness and topicality of the danger, they may also be "applied through the definition of a special protection programme". Paragraph 5 specifies that the measures identified in this way may also be applied to those who live permanently with those who decide to collaborate, as well as, in the presence of specific situations, also to those who are exposed to serious, current and tangible danger due to relations with the same persons. With reference to the latter category of persons, the need to apply the protection measure will have to be assessed from time to time in relation to the specific needs of the case: the rule, in fact, specifies that the relationship of kinship, affinity or marriage alone, does not determine, in the absence of stable cohabitation, the application of the measures.

With reference to the assessment as regards the situations of danger, paragraph 6 establishes that "in addition to the depth of the conduct of collaboration or the relevance and quality of the declarations made, also the reaction characteristics of the criminal group in relation to which the collaboration or declarations are made are taken into account, assessed with specific reference to the intimidating force which the group is locally able to use".

As regards the procedure for the application of those measures, in accordance with the provisions of Article 11 of Decree Law No. 8 of 1991, the

proposal for admission to the special protection measures is, as a rule, made by the public prosecutor whose office proceeds or has proceeded with the facts set out in the statements made by the collaborator who is assumed to be in serious and current danger. If the District Anti-Mafia Directorate is proceeding or has proceeded and a district attorney has not been appointed to the latter, but rather a representative of the district attorney has been appointed, the proposal is made by the latter.

In the event that the statements made relate to proceedings for crimes committed for the purposes of terrorism in relation to which it appears that several offices of the Public Prosecutor proceed with investigations connected pursuant to Article 371 of the Italian Criminal Code, the proposal is formulated by one of the proceeding offices in agreement with the others and communicated to the National Anti-Mafia and Anti-Terrorism Prosecutor, who is also competent to decide on any disputes between prosecutors.

The Chief of Police also has the power to make proposals, in agreement with the other legitimate authorities or after obtaining their opinion.

As regards the content of the proposal, information and elements useful for assessing the seriousness and topicality of the danger to which the persons concerned may be exposed as a result of the choice to cooperate with justice, the characteristics of the contribution made and any protective measures already taken, together with the reasons why they are not considered adequate, must be specified.

On receipt of the proposal, the Commission will have to decide whether or not to apply the security measures. In carrying out this task, the Commission has extensive investigative powers: pursuant to the provisions of Article 13, the Commission may acquire specific and detailed information on the prevention or protection measures already adopted or to be adopted by the public security authority, the Prison Administration or other bodies, as well as any other element that may be necessary to define the seriousness and topicality of the danger in relation to the characteristics of the conduct of collaboration. It is also provided that, in order to assess the existence of the conditions for the application of the measures, the Commission may also proceed to the hearing of the authorities that formulated the proposal or opinion and of other judicial, investigative and security bodies, being able to use for the purposes of its decision also acts covered by secrecy pursuant to Article 329 of the Italian Criminal Code and obtained by the Minister of the Interior pursuant to the provisions of Article 118 of the Italian Criminal Code.

When signing the special protection measures granted, the collaborator is required to provide all the documentation indicated in paragraph 1 of Article 12 of Decree Law No. 8 of 1991 (relating to the living conditions of himself and his family, marital status, family status, pending criminal, civil and administrative proceedings, educational qualifications, etc.), to elect domicile in the place where the Commission has its headquarters, as well as to personally undertake a series of commitments. This is a step of fundamental importance, given that the breach of the same involves the activation of the mechanisms for replacing and revoking protective measures. Specifically,

the collaborator personally undertakes to: *a*) comply with the required safety standards and actively cooperate in the enforcement of the measures; *b*) undergo interrogation, examination or other investigative measures, including the drawing up of a report explaining the contents of the cooperation; *c*) comply with the obligations set out by law and the obligations contracted; *d*) not to make statements to persons other than the judicial authorities, the police and their defence counsel concerning facts of interest for the proceedings in relation to which they have cooperated or are cooperating and not to meet or contact, by any means or through any means, any person involved in the crime or, except with the authorisation of the judicial authorities when there are serious needs inherent in family life, any person cooperating with the justice system; *e*) to specify in detail all property owned or controlled, directly or through a third party, and other benefits available to them directly or indirectly, and, immediately after admission to the special protection measures, to pay the money resulting from illegal activities. The judicial authority shall ensure the immediate seizure of the aforementioned money and assets and utilities.

Article 13 of Decree Law No. 8 of 1991 sets out the manner in which the Commission decides on the granting of protection measures and defines, in part, the content of the special protection measures which may be adopted, with reference to the implementing decree for detailed rules.

It should be noted, firstly, that provision is made for provisional measures to be taken in cases of urgency. Paragraph 1 empowers the Commission to decide on the application of a provisional protection plan in cases of urgency and where there is a request from the proposing authority on the matter. The decision can also be taken without formalities and, in any case, within the first session following the request, if necessary, information from the Central Protection Service as per Article 14 of Decree Law No. 8 of 1991.

The request for application of the provisional measure must contain: 1) the information and elements useful for assessing of the seriousness and topicality of the danger to which the persons concerned are or may be exposed as a result of the choice to cooperate with justice made by the person who made the declarations; 2) any protective measures adopted or made to be adopted and the reasons why they do not appear adequate; 3) at least a brief indication of the facts on which the person concerned has expressed the willingness to cooperate and the reasons why the cooperation is considered reliable and of considerable importance; 4) the circumstances from which the specific seriousness of the danger and the urgency of providing it result.

The measure by which the Commission applies the provisional protection plan ceases to be effective if, after one hundred and eighty days (which may be extended by the President of the Commission), the authority empowered to formulate the proposal for admission under Article 11 of Decree Law No. 8 of 1991 has not forwarded it and the Commission has not decided on the application of the special protection measures in accordance with the ordinary forms and procedures of the procedure.

During the ordinary procedure, it must generally be observed that the Commission referred to in Article 10 decides on the proposal for admission to the special protection measures by a majority of its members and provided that at least five of them are present at the meeting. The rule gives precedence, in the event of a tie, to the vote of the President. The intention to give more weight to the positions of the executive appears evident, the President being an Undersecretary of State for the Interior.

In order to decide on the application of the special protection measures, the Commission has a broad investigative power, being entitled to obtain information both from the relevant administrative bodies and from the authorities entitled to submit the proposal.

With specific reference to the content of the special protection measures and the provisional plan, this is determined by a ministerial decree[61]. It can be represented by the preparation of protection measures to be carried out by the competent territorial police bodies, the preparation of technical security measures, the adoption of the necessary measures for transfers to municipalities other than those of residence, the provision of contingent interventions aimed at facilitating social reintegration as well as the use, in compliance with the rules of the prison system, of special methods of custody in institutions or the enforcement of translations and planting.

If these measures do not prove sufficient to ensure the protection of the collaborator, a special programme may be adopted by the Commission. This will have to be elaborated and modulated from time to time in relation to the needs and situations concretely proposed and may include, in addition to the protection measures mentioned above, also the "transfer of persons not detained in protected places, special methods of keeping documentation and communications to the computer service, personal and economic assistance measures, change of personal details, measures to promote the social reintegration of collaborators and other persons under protection as well as extraordinary measures that may be necessary". There is also a specific framework for economic assistance measures, to be assessed also in relation to the working capacity of the person under protection, as well as the possibility of using cover documents.

When, on the other hand, detainees or prisoners are in need of protection, it is up to the Department of Prison Administration to assign them to institutions or sections of institutions that guarantee the specific security needs. In the case of detained persons, there is the possibility that forms of protection may also be applied in view of the formulation of the proposal, at the request of the Public Prosecutor who has collected or is about to collect the statements of collaboration or the minutes describing the contents of the collaboration.

Also in this case, for the definition of the specific methods of protection, reference should be made to the provisions of the relative implement-

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[61] Ministerial Decree No. 161 of 23 April 2004, '*Regolamento ministeriale concernente le speciali misure di protezione previste per i collaboratori di giustizia e i testimoni, ai sensi dell'articolo 17-bis del decreto-legge 15 gennaio 1991, n. 8, convertito, con modificazioni, dalla legge 15 marzo 1991, n. 82, introdotto dall'articolo 19 della legge 13 febbraio 2001, n. 45*'.

ing decree; in any case, it will be necessary to ensure that the collaborator is "subjected to prison treatment measures, especially organisational measures, aimed at preventing him from meeting other people who already appear to be collaborating with the legal process and aimed at ensuring that the genuineness of the declarations cannot be compromised". During the drafting of the minutes and, in any case, until the drafting of the descriptive minutes, it is forbidden "to submit the person making the statements to the investigative interviews referred to in Article 18-*bis*, paragraphs 1 and 5, of Law No. 354 dated 26 July 1975 and subsequent amendments", as well as "to have correspondence by letter, telegraph or telephone" and "to meet other persons who collaborate with the legal process, unless authorised by the judicial authorities for purposes connected with protection needs or when serious needs relating to family life occur".

Failure to comply with these requirements shall result in the sanction of unusable statements made to the public prosecutor's office and the judicial police after the date on which the breach took place unless they are unrepeatable.

Lastly, it should be noted that the enforcement and specification of the implementing rules of the special protection programme decided upon by the Commission is carried out by the Central Protection Service. This arrangement is established within the Department of Public Security by decree of the Minister of the Interior in agreement with the Minister of Economy and Finance.

2.9. *Evaluation and control of the measure*

As regards the assessment of the conditions for access to prison benefits under Article 4-*bis* of the Italian Prison System, it has been mentioned in the preceding paragraphs that the Provincial Committee for Public Order and Security plays a fundamental role. It is a body with prevention functions and is dependent on the Ministry of the Interior which is assigned, by Article 4-*bis* of the Italian Prison System, the task of providing the supervisory judiciary with any elements relating to the existence, or not, of current links between the convicted person and crime. On this point, case law has, from the outset, made it clear that the task of assessing the existence of such elements is, in any case, a matter for the supervisory judiciary, whose powers of appreciation as regards the granting of benefits cannot be considered limited by the opinion of the C.P.O.S. Specifically, it was stated that the information provided for by Article 4-*bis* of Law No. 354 of 1975 (the so-called Italian Prison System) is mandatory but not binding, given that the Supervisory Court can draw *aliunde* upon useful elements for the purposes of the judgement it must formulate, with the sole obligation, if it disagrees with the conclusions of the provincial committee for public order and security, to provide a suitable, rigorous and detailed explanation[62]. It is, therefore, an obligatory but not binding act for the judiciary to decide.

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[62] Court of cassation, judgment of 20 January 1992, in *C.e.d.* No. 189278.

Also as regards the so-called veto power of the National Anti-Mafia Prosecutor referred to in paragraph 3-*bis* of Article 4-*bis* of the Italian Prison System, the case law of legitimacy has intervened in order to specify that the communications provided by the latter constitute the premise for the ascertainment of a situation of preclusion to the granting of the benefit: a situation which, therefore, must be ascertained, in tangible terms, by the Supervisory Court, with the – autonomous – assessment of the elements on which the assertion object of the communication is based[63].

With reference to the collaborative conduct referred to in Article 58-*ter* of the Italian Prison System, suitable to make the foreclosure of access to the benefits referred to in Article 4-*bis* of the Italian Prison System fall, the assessment thereof is entrusted to the Supervisory Court, which decides after obtaining the necessary information and consulting the Public Prosecutor with the court competent for the crimes for which the collaboration was provided (Article 58-*ter* paragraph 2).

As noted above, the Commission, acting under Article 10 of Decree Law No. 8 of 1991, decides on the granting, amendment and withdrawal of the protective measures and their content. It is a body with a mixed composition: it is formed by a Undersecretary of State for the Interior (who takes on, by law, the duties of President), a Lawyer of the State, two magistrates, five officials and officers. Article 10 specifies that the members of the Commission, other than the President and the Lawyer of the State, shall preferably be chosen from amongst those who have specific experience in the field and who have knowledge of current trends in organised crime, but who are not employed in offices carrying out investigations or preliminary investigations into facts or proceedings relating to organised mafia crime or terrorist-subversive type crime.

Paragraph 2-*quinquies* of Article 10 establishes that "the protection against the measures of the Central Commission with which the special protection measures are applied, modified or revoked, even if of an urgent or provisional nature in accordance with Article 13, paragraph 1, is governed by the Code of Administrative Procedure.

2.10. *Revocation of rewarding measures*

In general, all benefits granted to perpetrators of crimes committed for terrorist purposes are revocable if they have been granted on the basis of non-genuine cooperation. This is clearly intended to ensure that someone can unjustly benefit from the advantages of cooperation.

Firstly, there are mechanisms for reviewing the sentences with which mitigating circumstances and special causes of non-punishability have been applied. In view of what has just been said, this is clearly a vastly different institution from the "traditional" review, which is designed to obtain the revocation of the sentence in the presence of elements likely to lead to the acquittal of the convicted person.

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[63] Court of cassation, judgment of 3 February 1993.

More specifically, Article 10 of Law No. 304 of 1982 establishes that when it turns out that the causes of non-punishability or mitigating circumstances provided for by the same law "have been applied as a result of false or reticent statements, the revision of the sentence is permitted". Entitled to the request for review, *ex officio* or at the request of the Minister of Justice, are both the Chief Appeal Court Prosecutor at the Court of Appeal in the district of which the judgement was delivered and the Chief Appeal Court Prosecutor at the Court of Cassation. In this case, there is no limit to the decision-making powers of the court, which may either impose a more serious penalty by case or quantity, or withdraw the benefits granted.

The rule specifies, however, that in the event that elements concerning the falsehood and reticence of the statements should come to light before the judgement has become final, the documents must be forwarded to the public prosecutor's office at the court of first instance for renewal of the proceedings.

Similar mechanisms are also provided for by Article 16-*septies* of Decree Law No. 8 of 1991 in relation to sentences issued, also for crimes other than those covered by Law No. 304 of 1982. Specifically, the rule establishes what the consequences should be if 1) the mitigating circumstances provided for in the Italian Criminal Code or in special laws on cooperation with the judiciary are found to have been applied as a result of false or reticent statements; 2) the person who has benefited from it commits, within ten years of the judgement becoming final, a crime for which there is provision for mandatory arrest in flagrante delicto, indicative of his permanence in the criminal circuit.

In the event that the situations described above emerge before the judgement has become irrevocable, the Public Prosecutor is entitled to request restitution by the deadline for lodging an appeal pursuant to Article 175 of the Italian Code of Criminal Procedure, limited to the point in the decision relating to the application of the mitigating circumstances.

If, on the other hand, the *nova* emerges once the sentence has become final, it may be subject to review. This is, again, a special case of revision *in peius*[64]. The Chief Appeal Court Prosecutor is entitled to submit the request to the Court of Appeal in the district in which the sentence was given. For the rest, the provisions set out in Title IV of Book IV of the Italian Code of Criminal Procedure, which governs the extraordinary means of appeal against the revision, are observed "insofar as they are applicable".

During the review proceedings, the court, at the request of the public prosecutor, may order the application of the precautionary measures provided for by law.

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[64] The instrument of revision *in malam partem* is, as a rule, extraneous to the Italian Code of Criminal Procedure. Articles 630 et seq. constitute revision as a means of appeal prior to the removal of an irrevocable conviction (or a criminal decree of conviction) that should be issued against those who should have been acquitted. To put it another way, it means that the legislator intended, as a rule, to make the judged person reviewable only when an unjust sentence was given and for the sole purpose of exonerating him. On the consistency of the revision *in peius* with the Italian procedural system, please see R.A. Ruggiero (n. 26) 283 ff.

Similarly to what has just been seen in relation to the benefits pertaining to the sanctioning treatment of the convicted person, the protection measures applied to the informant (even if not imputed) under Chapter II of Decree Law No. 8 of 1991 may be revoked or modified both for reasons relating to the actuality of the danger, its seriousness and the suitability of the measures themselves to protect the collaborator and in relation to the conduct of the collaborator.

Specifically, under Article 13-*quater*, they entail the withdrawal of protective measures:

1) non-compliance with the commitments undertaken pursuant to Article 12, paragraph 2, sections *b*) and *e*);

2) the commission of crimes indicative of the subject's reintegration into the criminal circuit.

They also constitute conduct that can be assessed for the purposes of amending or revoking the measures:

1) non-compliance with other commitments undertaken pursuant to Article 12;

2) the commission of offences indicative of the change or cessation of the danger resulting from the collaboration;

3) the express waiver of the measures;

4) refusal to accept the offer of appropriate employment or business opportunities;

5) unauthorised return to the places from which he/she has been moved;

6) any action involving detection or disclosure of the identity assumed, the place of residence and other measures applied.

More generally, the special protective measures are, in addition, not definitive measures which are, in any event, subject to continuous monitoring by the Commission under Article 10 of Decree Law No. 8 of 1991. The Commission shall verify whether the conditions are met at the express request of the authority that proposed the application of the special protection measures or, by its own motion, within the period of time set by the Commission when it admitted the person concerned to the special protection measures, which may not be less than six months nor more than five years. In the absence of such an assessment, the legislator shall set the deadline for such an assessment at one year from the date on which the measure was applied.

Another reason for revocation of the protection measures is provided for in Article 16-*quater*, paragraph 7, of Decree Law No. 8 of 1991. The rule, in fact, provides that these must be revoked if, within the period of one hundred and eighty days provided for therein, the statements are not made and are not documented in the minutes explaining the contents of the cooperation. Furthermore, paragraph 8 below establishes that the protection measure may be revoked even if the declaration referred to in paragraph 4 of said rule, in which the collaborator certifies that he has provided all the information in his possession, is untrue.

The benefits obtained by the sentenced person during the enforcement of the sentence are also revocable. Specifically, paragraph 7 of Article 16-

nonies of Decree Law No. 8 of 1991 provides that the modification or revocation of prison benefits is ordered *ex officio* or upon proposal or opinion of the National Anti-Mafia and Anti-Terrorism Prosecutor. In cases of urgency, the supervisory magistrate is given the power to order suspension by reasoned decree; however, such suspension ceases to be effective if, given that it is a decision of the supervisory court, it does not take action within sixty days of receipt of the documents.

The same rule specifies which conduct of the convicted person must be taken into account when deciding on the modification, revocation or precautionary suspension of prison benefits. Specifically, conduct which, in accordance with Articles 13-*quater*, may lead to the modification or revocation of the special protection measures, as well as conduct which, in accordance with Article 17-*septies*, may lead to the revision of the judgements which have granted, such mitigating circumstances as regards cooperation, must be assessed.

3. *Current relevant case law (where existing)*

There are currently no reports of proceedings for religiously motivated international terrorism offences in which reward measures have been applied. However, the first national discussion group and the roundtable held there listed a few cases that have led to significant investigative and judicial results. As reported in Vincenzo Di Peso's contribution[65], in addition to the hundreds of non-criminal administrative reward measures – namely residence permits[66] – applied to migrants who cooperate with the police and judicial bodies from 2005 to date, information provided by three disengaged terrorist offenders[67] has enabled the Italian authorities to identify active recruitment cells and to gain insight into the growing network of unofficial channels disseminating online terrorist propaganda.

However, we have highly accurate and meaningful data: we now have valuable documents, including Europol's famous annual "Terrorism Situation and Trend Report", which can help us to understand different dynamics, which are not always clear in the scientific (and public) debate on these sensitive issues. We shall now look at some of them.

From a general point of view, in the three-year period 2016-2018, in Europe, there was a significant increase in the number of persons prosecuted for crimes related to the various aforementioned terrorism offences; since2015, the most numerous sentences have been those against the members of Jihadist terrorism and the trials, in general, are more frequent in France, Belgium and Spain. It should be noted that, excluding non-prison penalties, the highest number of convictions in 2018 is held by Greece (16),

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[65] *Collaborators of justice in the context of the countering international terrorism italian cases*, in this *Volume*.

[66] L'art. 2 de la d.l. 27 juillet 2005, n° 144, actuellement en vigueur en vertu de la loi n° 155 du 31 juillet 2005.

[67] Tlili Lazhar, Jelassi Rihad et Zouaoui Chokri.

followed by Spain (8), the United Kingdom (7) and Italy (6). The sanctions imposed in practice, as is easy to imagine, still continue to increase in the *quantum*: the "average" prison sentence for crimes related to terrorism is generally seven years, compared with five in the previous two years.

As regards religious (Jihadist) terrorism, data show, from 2014 to 2018, a high number of arrested suspects: in the last year, following seven Jihadist attacks carried out, thirteen people were killed and forty-six wounded (none in our country), France (273), Holland (45) and Italy (40) stand out for the number of arrests.

With reference to the (different) political-ideological terrorism (anarchist or extreme left and extreme right), in Europe, in the last year, there have been nineteen attacks (not all of them carried out) of the left-wing; a slight decrease compared with the previous two years. Almost all the attacks mentioned above come from Greece, Spain and Italy, "… the three countries continued to be the epicentre of left-wing and anarchist terrorist activity in the EU". On the other hand, although the policies of the extreme right are spreading like wildfire in the European Union, black terrorism (right-wing) is no longer a relevant phenomenon: neither the number of suspects arrested (44) nor that of the attacks (1) denote a growing trend. Among other things, the only terrorist attack reported in 2018 was that of Luca Trani, which took place in Macerata.

Other data is certainly of interest: one of the most accurate (wide-ranging) studies of recent decades on internal and international ideological terrorism of a religious matrix, highlights that, in our continent, the ideological attacks from 1970 to 1990 were infinitely superior, from a numerical point of view (*inter alia*), to those with religious background occurred in the new millennium. Furthermore, all this, if it were not for the enormous media coverage of the sad events that have occurred since 2001, would, to some extent, clash with the perception that one normally has of "new" terrorism, often described as "… danger to common life, a threat that brings disorder and denies the most elementary values of human coexistence […], absolute evil, that negative pole of the ordinary order of the world that was once symbolised by the figure of the devil".

4. *Conformity of the current rewarding legislation to Art. 16 of Directive 541/2017/EU*

Article 16 of Directive 541/2017/EU has not had any top-down effect on the Italian counter-terrorism legislation[68]. From a wider perspective, the interplay between Article 16 of the Directive and national rewarding measures will be analysed in Section II.

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[68] From a comparative perspective, about the influence of Italian counter-terrorism rewarding legislations Europe wide, see D. Castronuovo, *Quale lezione dagli "anni di piombo"? La legislazione dell'emergenza e sui pentiti in prospettiva storica e comparata*, in *Diritto penale XXI secolo*, 1, 143-168; C. Ruga Riva, *Il premio per la collaborazione processuale*, cit., 5; F. Diamanti, *Misure premiali e terrorismi. Dall'esperienza italiana all'ultima evoluzione del terrorismo islamista*, in *Legislazione Penale*, 5 décembre 2019.

"A"

JUDICIARY AND INSTITUTIONS DURING THE "YEARS OF LEAD": A VIRTUOUS MODEL[1]

ARMANDO SPATARO

1. *Judiciary and Judicial Police in the years of lead: the importance of self-organisation and close cooperation*

The role of the Italian judiciary in the fight against domestic terrorism during the so-called *"anni di piombo"* ("years of lead") has been – and still is – the object of analysis and comments, sometimes of which opposing. Some critical judgements, however, have also been formulated in Italy without the necessary historical and scientific investigation, almost as happened in France on the basis of false stories sold by those who had taken refuge there, "with the same technique with which fraudsters sold defective goods in the 1950s"[2]. It is intended to specifically refer to those who claimed that, between the end of the 1970s and the beginning of the 1980s, the Italian magistrates would have followed the logic of the "laws of emergency", paying little attention to the breach of the rights and guarantees of the defendants, which would have been the natural consequence of those laws. Interestingly, in recent years, Italian prosecutors and judges have instead been "accused" of not being able to face the tragic phenomenon of international terrorism

[1] Armando Spataro. The author has always acted as a magistrate in the role of public prosecutor: since 1977, he has worked in the field of domestic and – since 2003 – international terrorism, long coordinating the work of the specialised groups of the Public Prosecutor's Office of Milan and, since 30.6.2014, of Turin, where he exercised the functions of Public Prosecutor. He has also been a member of the Milan DDA (Anti-Mafia District Directorate) since 1991, dealing with the mafia and organised crime. From 1998 to 2002, he was a member of the CSM (High Council of the Judiciary). The text published here contains extensive passages from his book *"Ne valeva la pena. Storie di terrorismi e mafie, di segreti di Stato e di giustizia offesa"* (Laterza, 2010), from his contribution to *"Il libro degli anni di piombo. Storia e memoria del terrorismo italiano"* (Rizzoli, 2010, edited by Marc Lazar and Marie-Anne Matard-Bonucci), as well as from his reports held in training courses at the Scuola Superiore della Magistratura or from several of his articles published in legal journals, specifically *"Questione Giustizia"*.

[2] Barbara SPINELLI, *La Stampa*, 7 March 2004.

with the necessary firmness, exceeding in guaranteeism and not realising that *"this terrorism cannot be countered with the code in hand"*[3]. For the past, therefore, an accusation of insensitivity to the principles on which every democracy is based; for the present, the opposite, that is, ignoring that the rules have now changed and that, more than the trial and the judicial response, intelligence and borderline methods are currently relevant.

We shall see how things really are, starting from a summarised reconstruction of what happened between the end of the 1970s and the 1980s, years during which, in full respect of the rules, the Italian magistrates faced terrorist criminality, seeking highly professional specialisation, "inventing" the group work amongst the judicial offices involved in the investigations and enhancing the relationship with the judicial police bodies.

The situation of these bodies, before the Moro kidnapping (16 March, 1978), was substantially as follows: in 1974, after the kidnapping of Judge Sossi and the Piazza della Loggia bombing, the Inspectorate for Action against Terrorism (entrusted to the Vice-Chief of Police, Emilio Santillo) and the Special Judicial Police Unit of the Carabinieri (headed by General Carlo Alberto dalla Chiesa and different from that to be established in 1978) were constituted, partly to give support to the judicial authorities of Turin in the first investigations on the Red Brigades, but both these departments, notwithstanding the excellent results achieved, were then dissolved, most likely on the basis of the erroneous conviction that the Red Brigades had been defeated with the arresting of Curcio and other historical members of that organisation. This choice had not, however, produced an effective weakening of the investigative apparatus, determining rather a different structure, with the loss of centralised guidance and the ability to move easily throughout the territory of the State. Furthermore, at the beginning of 1978, the regional nuclei and the political offices of the State Police were replaced by the Digos (General Investigations and Special Operations Directorates) – established at the police headquarters of the regional capitals as well as in Padua and Catania – to which the competence for investigations in matters of terrorism was attributed.

However, whilst the Judicial Police Force had already undertaken the path towards a more widespread knowledge of this subject, the Judiciary, except in Turin, was decidedly behind: the culture of reciprocal exchange of information between judicial offices and the capacity to coordinate those of the Judicial Police was still lacking. It then is explained why the kidnapping of Aldo Moro caught the institutions unprepared: fragmented investigations, sometimes approximate and, in any case, lacking effective coordination, constituted the norm almost everywhere.

However, it was precisely that tragic event which determined the autonomous initiative of investigating prosecutors and judges who, in the absence of legislative interventions or political directives, gave rise to spontaneous coordination between the judicial offices concerned by the phenome-

[3] Silvio Berlusconi, Prime Minister, December 2005.

non, until the creation, within them, of groups specialising in the field of terrorism. Yet the legal system of the time did not provide for any rules on coordination, but rather rules that hindered the exchange of news.

Those magistrates (who worked in the cities most affected by terrorism, such as Turin, Milan, Genoa, Padua, Venice, Bologna, Florence, Rome and Naples), did not exceed the number of twenty-five units and, during their frequent meetings, exchanged information on the investigations in real time and prepared jurisprudential guidelines to be applied uniformly. For example, the technical requirements of the crime of armed gangs (provided for by a now obsolete provision of the Italian Criminal Code), of the "external" participation in this crime of association and of the "moral" participation of the leaders of terrorist associations in the murders and wounds committed and claimed. Case law identifiers confirmed by the Court of Cassation.

When, between the end of 1979 and the beginning of 1980, the collaboration of the first "repentant" terrorists was formed, those magistrates immediately circulated amongst themselves the minutes of the declarations acquired, agreeing on the division of responsibilities "to do" and on the times and methods of eventual and consequent operative outlets (searches and arrests). Also, the evolution of the strategies of the armed groups, their "strategic resolutions" and the handouts of claim were analysed by those magistrates, some of whom had the task of comparing and summarising the documents of interest: in the absence of computers and databases, they became the historical data storage of the ideological production of the terrorist groups.

That kind of specialisation and self-organisation – it is not superfluous to recall it – saw, as protagonists, only the prosecutors and investigating judges operating at the time, without any political directives or other forms of conditioning and without anybody invoking the creation of special Courts or a single Public Prosecutor's Office competent throughout the national territory for the investigation of that kind of crime. Bodies which did not exist at the time and which, unlike the systems of many other European states, do not exist in Italy even now, as the National Public Prosecutor's Office is responsible only in cases of critical issues, tasks of coordination and not of direction of investigations which remain the responsibility of the District Public Prosecutors' Offices.

In short, those meetings were also attended by those in charge of the investigative bodies of the Judicial Police who were further increasing their specialisation (the new special inter-force nucleus commanded by the General Dalla Chiesa was established on 10 August 1978): precisely due to this close relationship between magistrates and police forces it was possible, not only to fully implement the constitutional principle (Article 109) and procedural principle of the functional subordination of the Judicial Police to the directives of the Public Prosecutor and, at the time, of the investigating judges, but also to reciprocally promote, through the comparison of the respective experiences, a consistent growth of professionalism and of the capacity of coordination of all the institutions involved in the judicial investigations on terrorism.

This happened without any need to resort to the intervention of the Information Services, the competence of which – according to the Italian system – concerns the prevention of risks for national security, without the possibility of interference or functional relations with the judiciary.

It is no coincidence that the reformed Services, in 1977, were obliged, confirmed by Reform Law No. 124/2007, to report the news of crime to the Judicial Police, through their respective summits. The police, as is known, must also immediately inform the Public Prosecutor. The final law legitimises only a delay in the transmission of the news to the Judicial Authority on the justified measure of the Prime Minister, but no legislation has ever allowed, in Italy, not even in the fight against international terrorism, the improper use of the information services for the purposes of judicial investigations, as is the case in other States.

Therefore, neither confusion nor short cuts in the fight against terrorism, but, essentially, the creation of a sort of task force comprising magistrates and Judicial Police, capable of jointly assessing the procedures and times of the investigative developments with the attention paid to the rules and necessities of the future trial, as well as prudent in analysing the real pertinence or otherwise of the phenomena of so-called social antagonism (physiological in any advanced democracy) to the practice of real terrorism.

2. *Minister Rognoni, the so-called emergency legislation and the cooperation of the "repentant"*

It was precisely in 1978, specifically in the period following the kidnapping of Moro, that the situation recorded a further positive development: alongside the described capacity of self-organisation of the judiciary, was the positive boost given to the Institutions by the Minister of the Interior, Virginio Rognoni (allocated to this role after the discovery of Moro's body in Via Caetani in Rome and the resignation of Francesco Cossiga) and a legislative production resulting from a political climate which, at least in the effort to fight terrorism, promoted initiatives shared by the majority and the opposition.

The appointment of Rognoni, an academic and man of great political experience, gave vigour to the fight against terrorism. He was always at the side of the forces of law and order and attentive to the needs and technical proposals that the judiciary represented but, at the same time, he was guardian and guarantor of the competences of the executive power, which were exercised in a framework of consultation with every sensitive and responsible political force.

It is worth immediately recalling the – entirely uncontroversial – judgement of the late Professor Vittorio Grevi on the legislation of the "years of lead", that is, the years between the end of the 1970s and the first half of the 1980s: essentially, he affirmed, some legislative interventions were approved in that period, which sometimes resulting in the risk of breaching individual rights, also with regard to the personal freedom of the defendants but, in the end, the institutions had held up and if terrorism had been defeated, this

had not only depended on the capacity of the police forces and the judiciary, but had also been determined by a legislative body which, as a whole, had continued to ensure the protection of those rights. In short, if special measures were adopted, the term should be understood in the sense of measures that had promoted specialisation in the fight against terrorism, making it more effective, not of rules that were detrimental to the system of subjective rights.

The trend of the legislative line during those years was, however, oscillating: between 1968 and 1972, there was an expansion of individual guarantees in Italy. That is, a line that was anything but an emergency line prevailed. Precisely during those years, for example, in Italy, the extension to the investigations of the Judicial Police of the defensive guarantees provided for the corresponding investigative acts of prosecutors and examining magistrates was recorded: judgement No. 190 of 1970 of the Constitutional Court recognised, in fact, the right of the defender to attend the interrogation of the defendant by the Legal Entity. Furthermore, later, between 1975 and 1976, the law reforming the prison[4] system and its implementing[5] regulations were introduced: on the whole, legislation inspired by the humanisation of prison treatment. More or less at the same time, however, there was a reversal of the trend, due to an increase in the delinquency indices, which first occurred in 1974 with a legislative decree[6] which was significantly entitled "*Urgent measures on criminal justice*" (recalled, above all, due to amendments made to the discipline of the maximum terms of preventive custody) and then, six months later, with another law entitled "*New regulations against crime*"[7], mainly concerning the offences of robbery, extortion and kidnapping

Then, in May 1975, the so-called legge Reale[8] arrived, by various scholars mistakenly considered the first of the emergency anti-terrorism laws, whilst it was a law on public order. On its contents, beyond the obvious possibility of criticising them, there are still free statements, such as that – for example – according to which the police would have been authorised to shoot in the square (whilst it is true that a favourable procedural regime was provided for in the case of crimes committed in service related to the use of weapons) or to make arrests and detentions of suspects without warning magistrates and lawyers. In fact, even then, as now, the police had to make those arrested in act of committing an offence or those arrested within 48 hours available to the judiciary and could not question them, unlike in other jurisdictions[9]. The *legge Reale* had, rather, introduced certain prohibitions to

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[4] Law No. 354 dated 26 July 1975: Rules on the prison system and the enforcement of custodial and restrictive measures.

[5] Presidential Decree No. 431 dated 29 April 1976: Approval of the Regulation implementing Law No. 354 dated 26 July 1975 on the rules governing prisons and the enforcement of custodial and restrictive measures.

[6] Decree Law No. 99 dated 11 April 1974, converted into Law No. 220 dated 7 June 1974: Urgent measures on criminal justice.

[7] Law No. 497 dated 14 October 1974.

[8] Law No. 152 dated 22 May 1975: "Provisions for the protection of public order".

[9] Reference should be made to the provisions in force in France and the United Kingdom.

the granting of bail, the possibility of arrest by the Police for certain serious crimes and those concerning arms, the punishment of crimes concerning the reorganisation of the Fascist Party, as well as the possibility of a wider recourse to personal "on the spot" searches without the authorisation of the Judicial Authority. It was, however, a law dating back to a period in which terrorism – at least, that of the "extreme left" – had not yet manifested itself in its most bloody forms: that law sought to confront, above all, the effects of the violent demonstrations in the streets of the early 1970s. It was, for this reason, a law little used for the fight against terrorism, which, due to some of its questionable features, was also submitted, but with a negative result, to a repealing referendum (11 and 12 June 1978).

However, it was in 1977 that laws were passed which, for the first time, contained specific responses to the spread of terrorism: this first happened with Decree Law No. 151 dated 30 April 1977, later converted into Law No. 296[10]. dated 7 June 1977, which intended to achieve a precise objective in the aftermath of the murder of lawyer Fulvio Croce (28 April in Turin): to avoid the release of the defendants detained for the commencement of the terms of pre-trial detention (as it was referred to at the time). In fact, the long duration of trials for terrorism resulted in this risk both due to the number of defendants and the crimes for which they were put on trial (the definition of "maxi trials" was created at the time) and due to the "rite" of the members of the Red Brigades who, at the beginning of the trials which involved them as defendants, revoked the appointment of their trusted defenders, affirming that they had nothing to defend themselves with, like the "*Stato imperialista delle multinazionali*" (S.I.M.) (Imperialist State of the multinationals). However, this forced judges to lose days or weeks in the necessary search and appointment of public defenders[11]. whilst popular jurors sometimes called in sick with the consequence of having to replace them with new ones. For this reason, the decree law in question established the suspension of the period of pre-trial detention during the time in which the trial was postponed "*for reasons of force majeure which prevented the formation of judicial panels or the exercise of the defence*".

Fortunately, however, the hypothesis of introducing the self-defence of defendants into our trial system, which would have recognised the dignity and value of the "rite" described, was rejected.

With another law, that of 8 August, 1977, No. 533, containing "*Provisions on public order*", the hypotheses of prohibition of the granting of bail were further extended, the penalties for theft and robbery of arms were increased and the obligatory seizure of real estate premises of organisations, groups in which explosives and weapons (so-called *hideouts*) had been found.

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[10] "Causes of suspension of custody".

[11] Lawyer F. Croce was killed precisely because, before the beginning of the trial of the historical nucleus of the Red Brigades, he had communicated to the President of the Court of Assizes in Turin, the willingness of himself and his colleagues of the Bar Association to assume the defence of the members of the Red Brigades *ex officio* in the case of revocation – later intervened – of the appointments of trust.

1978 saw the massacre of Via Fani, with the kidnapping and, later, the murder of Aldo Moro. A very few days after the massacre, the legislator intervened with a decree law, that of 21 March, 1978, No. 59, converted with Law No. 191 dated 18 May 1978[12]. exclusively aimed at the fight against terrorism. Some particular criminal figures were introduced into the system, such as kidnapping for the purpose of terrorism (Article 289-*bis* of the Italian Criminal Code) and the attack on public utility plants (Article 420 of the Italian Criminal Code); on a trial level, with Articles 165-*bis* and 165-*ter* of the Italian Criminal Code, on the one side, the possibility of exchange of documents between judicial authorities and, on the other, the power of the Minister of the Interior to request and obtain them, even if covered by a secret investigation. With the first rule, the possibility of spontaneous coordination and exchange of documents between magistrates, which was previously unforeseen and even hindered, was finally introduced into the procedural system. On a trial level, other important regulations were introduced, such as, for example, the possibility for the Judicial Police to collect the summary information of the arrested and detained person, including in the absence of the defendants, for the sole purpose of continuing the investigation (Article 225-*bis* of the Italian Code of Criminal Procedure): a choice that could certainly be criticised, but the regulation, which effectively risked damaging the rights of the defendants and the suspected terrorist, was, in fact, breached due to the position of the Judiciary and Judicial Police, evidently, well aware of the importance of acquiring solid elements from a trial point of view. In fact, in Italy, we have never come to tears of legality like those still in force in other very civilised European States to combat international terrorism. In France, for example, the "*garde à vue*" institution allows any person suspected of terrorism to be detained for four days, interrogating them without a lawyer, without notifying the judicial authorities and with the further serious outcome of being able to use the statements made by the suspect as evidence. In Britain, even the detention of suspected terrorists can be extended for 28 days[13].

Having amended and extended the system of telephone interceptions (with the introduction of the preventive systems pursuant to Article 226-*sexies* of the Italian Code of Civil Procedure), it was provided, again with Law No. 191/1978, for the obligation for the owners of buildings to denounce the lease agreements thereof: this rule disoriented many terrorists, at least those of the "*Prima Linea*" ("Front Line"), the leaders of which – as various collaborators later recounted – decided to prudently abandon, but with positive effects in various investigations, many apartments which they had used as bases of the organisation for fear of being discovered.

It is appropriate now to move on to the examination of what can be defined as the most effective of the laws against terrorism: Decree Law No.

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[12] "Criminal and procedural rules for the prevention and suppression of serious crime".

[13] Prime Minister Gordon Brown wanted to extend the deadline from 28 to 42 days: the bill, approved in June 2008 by the House of Commons, was later overwhelmingly rejected the following October by the House of Lords.

625, approved on 15 December 1979 and later converted into Law No. 15 dated 6 February 1980, specifically containing two important reward regulations, as well as the aggravating circumstance (not comparable with the extenuating circumstances) of having committed the crimes for the purposes of terrorism and subversion with consequent obligatory "arrest warrant" (as the order of pre-trial detention in prison was referred to at the time) and extension of the terms of pre-trial detention. New forms of crime were also introduced into the criminal code: *association for the purposes of terrorism and subversion of the democratic order* (Article 270-*bis* of the Italian Criminal Code, a provision which, with the amendments made in 2001[14], now also punishes membership of groups operating in the field of so-called international terrorism) and the *attack for terrorist purposes or subversion* (Article 280 of the Italian Criminal Code).

It is worth considering, however, the extenuating circumstances provided for in Article 4 of that law for terrorists who, by disassociating themselves, had cooperated with the investigators[15].

For the second time – given that, already with the decree law of March 1978, consequent to the Moro kidnapping, a reduction in punishment was foreseen for those who, by collaborating, had helped the investigators in identifying those responsible for the crime of kidnapping for the purpose of terrorism – in a very incisive manner, a reward regulation approved on the wave of emotion entered into the system which had provoked, a few days earlier, on 11 December 1979, the execution of ten by "kneecappings" by Prima Linea terrorists, inside a company training school in Via Ventimiglia in Turin.

The reward regulation was even more successful than expected and was the real distinguishing feature of that law. The magistrates who dealt with terrorism were not aware of the development of that project in the political sphere: the approval of the Decree Law in December, 1979, which occurred precisely as the first former terrorist collaborator in judicial history, Carlo Fioroni was interrogated in the prison of Matera by the Public Prosecutor's Office of Milan. Very soon after, when the floodgates opened, the statements of the so-called "repentant" began to pour into the trial documents, channelled in the right direction, that – one would currently say – of the right trial, causing hundreds and hundreds of arrests, as well as the discovery of bases and the seizure of deadly weapons and explosives.

The reward measures, which also included the provision of Article 5 of the law (exclusion of punishability for those who voluntarily prevented criminal offences by providing information useful for identifying those responsible for those offences), certainly had delicate application aspects.

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[14] The standard was amended with Decree Law No. 374 dated 18.10.2011, converted into Law No. 438 dated 15.12.2011 and is now entitled: "*Association for the purpose of terrorism, including international terrorism or subversion of the democratic order*".

[15] The extenuating circumstance (penalty from 12 to 20 years' imprisonment for crimes punishable by life imprisonment; penalty reduced from one third to two thirds in other cases) still applies to those who "*strive to prevent the criminal activity from leading to further consequences, i.e., to concretely help the police and judicial authorities in gathering decisive evidence for the identification or capture of accessories to crimes*".

It is still possible to discuss the opportunity of such important reductions in sentences for perpetrators of serious crimes, but, beyond the fact that these possibilities are practised in every part of the world, moreover through less guaranteed procedures than in Italy, it should be remembered that the Italian system provides for a mechanism entirely controlled by the judge: collaborators who aspire to a substantial reduction in sentence must earn it in public hearing, before those they accuse, subjecting themselves to the cross-examination of their defence counsel. Essentially, reductions in sentences only result from a very thorough examination of the credibility of the statements made by so-called "repentant", which must be corroborated by identifying precise objective evidence of their content. This is a guarantee of the correct application of the institute.

This *reward* regulation is still in force: it is not, therefore, an exceptional law, but an ordinary instrument introduced into the system, which proved so useful that it was then extended to combat many other criminal phenomena, such as the mafia, drug trafficking, people trafficking and international terrorism.

One regret remains: had this law been approved before December 1979, several murders would perhaps have been avoided, amongst which the very dear Vittorio Bachelet, killed by the "Brigate Rosse" in Rome on 12 February 1980 when he was Vice-President of the "Consiglio Superiore della Magistratura".

However, the temporary nature of its effectiveness, characterised, about two and a half years later, a further law in favour of collaborators, i.e., Law No. 304 dated 29 May 1982, which provided for even greater[16] reductions in punishment, in addition to cases of non-punishability (Article 1). This prediction was also the result of an intercourse between political power and the judiciary, but it was precisely the magistrates with expertise in terrorism, aware of the exceptionality of the time and of that choice, who declared themselves against a further and permanent extension of the possibilities of such a high reduction of the sentence, but in favour of its temporary nature. In this way, the rule in question was passed, which applied only to crimes committed before 31 January 1982 and provided that the collaboration took place within a strict and short period (120 days, then extended only once more by a further 120 days), starting from the entry into force of the law: in this way, it was intended to avoid the predisposition of an infinite *passepartout* towards the reductions of punishment of which even terrorists, still in activity, could take advantage, convinced that, in the event of arrest, they would be able to collaborate and obtain said reductions.

Also with Law No. 34 dated 18 February 1987 *(Measures in favour of those who dissociate themselves from terrorism)*, approved when the season of terrorism was about to close, good results were obtained by rewarding those who, even if definitively condemned, had definitively abandoned the

[16] The extenuating circumstance (penalty from 10 to 12 years' imprisonment for offences punishable by life imprisonment; penalty reduced by half in other cases; penalty reduced by a further third in cases of collaboration of exceptional importance) was provided for by Article 3 of the law, which is no longer in force

organisation of which they were part, behaving in a manner incompatible with the continuation of the associative bond, admitting the activities effectively carried out without the need to accuse accomplices and repudiating violence as a method of political struggle.

It is worth remembering that, even trials *in absentia*, i.e., against fugitives, were held in those years in full respect of their rights and with the effective participation of the defenders, as the European Court of Human Rights in Strasbourg recognised in December 2006 by defining the appeal of a fugitive like Cesare Battisti, one of the worst assassins in the history of Italian terrorism, however, much loved by the French *intellò*, as "*manifestly unfounded*", at least until, finally extradited to Italy, he admitted his own responsibility for all the murders and other crimes that he was accused of.

3. *The end of the "years of lead" and the positive balance of institutional action*

In short, it can be said that, as a result of the professionalism of the police forces and of the Italian magistracy, together with the described legislative production (specifically, the reward regulation), terrorism – both right-wing and left-wing – headed its definitive defeat in the second half of the 1980s: the end of the years of lead can be placed – in the writer's opinion – in 1988, the year of the murder of Christian Democrat Senator Roberto Ruffilli.

Between this murder (the last of those years) and that of Massimo D'Antona in Rome on 20 May 1999, which broke the long silence of the Red Brigades after eleven years. It is true that the Red Brigades killed again: on 19 March 2002, in Bologna, labour law expert Marco Biagi and on 2 March 2003, in Castiglion Fiorentino, State Police Superintendent Emanuele Petri, but, considering the time that has elapsed since this latest tragedy, it is possible to say that even those defined as the "new Red Brigades", responsible for these latest tragic events, have been disrupted: the last militants of the Red Brigades (about twenty in all) were arrested between 2006 and 2009 in Milan, Turin, Padua and Rome.

In any case, it is not possible to lower one's guard even now, given that, since 2003, even though only one wound has been suffered (on 7.5.2012, terrorists of the Informal Anarchist Federation - F.A.I.), Roberto Adinolfi, director of Ansaldo Nucleare, was shot in Genoa with a gunshot in one leg. Two perpetrators have been definitively condemned. Other forms of politically motivated violence have developed in Italy, even during public demonstrations: the events of groups characterised by anarchist ideology or the so-called "No-Tav" or "antagonistic" movements should also be referred to. It is obvious that these are crimes which must be prosecuted and punished with the maximum determination, as Italian magistracy and police bodies know how, but it is equally evident that these are crimes committed by groups and sometimes by criminal associations the extension, structure and danger of which for the Institutions are in no way comparable to those of the Red Brigades, Prima Linea and other groups operating in the "years of lead".

Vittorio Grevi's words on the legislation of those years ("*The institutions have therefore upheld*") come to mind, as do those of historical importance of President Sandro Pertini who, at the end of the years of lead, recalled that Italy could proudly claim to have defeated terrorism in the courtrooms and not in the stadiums, alluding to torture, breach of fundamental human rights and South American practices during the years of dictatorial regimes.

Yet those years have not even left us with unsolved mysteries, as some people still insist, inevitably citing the kidnapping and murder of Aldo Moro and his escort in Via Fani. One member of the last parliamentary committee which dealt with the case described it as a massacre that was devised and organised by the American, Russian and Israeli secret services, by diverted pieces of Italian intelligence, with the complicity of the Italian mafias and freemasonry: the Red Brigades almost become, according to the theories of those who love such false mysteries, occasional appearances of a story yet to be revealed. The truth is that there are certainly still unknown circumstances relating to some of the tragedies that took place during those years, but they are in any case marginal compared with the general and reliable knowledge that we have gained on those facts as a result of the synergistic institutional efforts that have been described so far.

Those who state the opposite do not hurt so much those who were the protagonists of that "fight", but rather the truth and the memory of those who no longer have the possibility of rebuttal, amongst whom are the magistrates and the men of the institutions vilely killed by the terrorists, only because they applied the law, it being absolutely false that justice was administered in Italy, on the side of the fight against terrorism, by special Courts and in a summary manner against thousands of convicted militants, without proof, only due to their political ideas and on the basis of false statements of the paid "repentant": all those proceedings, instead, always and only concerned concrete facts, of organisation or execution of violent actions.

Another "master forgery" circulating is the narration of those who maintain that, during those years, a civil war was going on in Italy, terrorism being a mass phenomenon. It was, if anything, a war declared by only one side, the elitist side and, with a few exceptions, that of the petite bourgeoisie. Its action, without effective rootedness in the country itself, has even hindered the development of democracy in Italy, resulting in widespread attitudes of social defence, forced homogeneity amongst the political sides and the consequent slowing down of political dialectics.

This also refers to other more topical considerations: when such trends take shape, legislation, especially when fragmented and dictated by contingencies and the emphasis on security, is always full of risks to the rights of citizens, which the judiciary is responsible for protecting, including through the telling of the truth.

That is exactly what the magistrates did, right in the heat of the "years of lead", when they felt the duty to get out of their buildings to discuss legality in schools and universities, in neighbourhood clubs and factories, in cultural associations and wherever possible: then, to spread the knowledge of the perverse terrorist ideology and thus to firmly oppose the words of

those who theorised neutrality ("neither with the State, nor with the Red Brigades"), in the following years – and still today – against the logic of the mafia and corruption, as well as to defend the constitutional principles and the principle of solidarity.

4. *From the anti-terrorism of the years of lead to the anti-mafia and the fight against international terrorism: brief notes*

It is not out of place, at this point, to cite what happened in the final period of the *years of lead*, when a group of Sicilian magistrates (including Giovanni Falcone) who dealt with the mafia participated in various meetings of colleagues who dealt with terrorism: this was certainly not because there were connections between the Red Brigades, Cosa Nostra, 'Ndrangheta and Camorra, but to become aware of the methods of the spontaneous coordination which they had realised and to share the legal guidelines on the subject of crimes of association. For example, of historical importance, were the aforementioned guidelines drawn up with regard to *external participation* in the crime of armed gangs (Article 306 of the Italian Criminal Code), which were then implemented in relation to the crime of mafia-type association (Article 416-*bis* of the Italian Criminal Code)

It was also understandable, given the excellent results that the working method described so far had led to, that it was codified and applied to the fight against the mafia.

In fact, in terms of anti-mafia, the Parliament gave rise to a specific legislation which – as far as it is concerned – led to, in 1991, the introduction, into the Italian system, of the National Anti-Mafia Directorate (DNA, with tasks involving merely the coordination of investigations) and of the Anti-Mafia District Directorate (DDA), one for each of the 26 districts of the Country (with tasks involving the direction of investigations for Mafia-type crimes and for other specifically indicated crimes), i.e., of Offices previously and unnecessarily invoked by the magistrates who had dealt with anti-terrorism.

In 1991, benefits were also introduced for mafia collaborators, similar, as regards possible reductions in punishment, to those provided for repentant terrorists. The results were immediately exceptional and the trial collaborators proved decisive in bringing the Mafia gangs to their knees.

The specialisation of the police forces in terms of anti-Mafia was also increased with the creation, within each of the three traditional judicial police corps, of ad hoc bodies and with the formation, also, of a further interforce body, the Anti-Mafia Investigation Directorate.

Lastly, moving on to the most recent fight against international terrorism, it is easy to say that the positive action of our institutions has been guided, even in this area, according to the same principles that have been described so far. Firstly, it must be recalled that, since the second half of the 1990s, the first investigations into international terrorism have taken place in Italy, with the first arrests and convictions of the militants of the groups under investigation. On the threshold of the year 2000 and even before 11

September, these investigations were extended and progressively involved numerous judicial venues in the North, Centre and South of Italy.

Meanwhile, the tragedy of 11 September dramatically brought to the world's attention the issue of international terrorism (or so-called Islamic terrorism) and how to combat it. Many years have passed since those events, during which philosophies that can be traced back to two main "strands of thought" "clashed": on the one hand, that of the Anglo-Saxon countries (the United States, Great Britain, Canada and, to some extent, Australia) and, on the other, that of the countries of continental Europe, within which, however, especially in the period immediately after 11 September, there was no lack of yielding to Anglo-Saxon theories and practices. Fortunately, not in Italy, where the theorisation of the *War on Terror* (*W.O.T.*) was rejected by the Bush Administration and supported by overseas academic circles capable of arguing that the principles can be flexible and that "grey areas" in which rights exist in a mitigated form and in which, in the name of security, activities normally considered *contra legem*[17] become lawful. The Italian Judiciary has also rejected the practice of the "extraordinary renditions" of terrorist suspects (i.e., real kidnappings of persons to be transported to *secret prisons* in complicit countries where they can be tortured): in terms of torture, that of waterboarding (practised by the French in the 1950s against members of the Algerian *National Liberation Front* and later in Vietnam, as well as by the Khmer Rouge in Cambodia, between 1975 and February 1979) was considered by the US Administration as a mere "interrogation technique"[18].

Other techniques used for the fight against terrorism have also been deemed unreliable in Italy, such as secret interceptions, or "*the digital tsunami*" relating to the indiscriminate and useless collection of millions of data relating to the movements of people in the world (collection of P.N.R.- Passenger Name Records), banking transactions of black lists, which are ineffective for the purposes of countering terrorism financing, as also considered by the Court of Justice of the European Communities in September 2008[19] and by the Parliamentary Assembly of the Council of Europe, which examined the compatibility between the black list system and the principles of the Convention for the Protection of Human Rights and Fundamental Freedoms[20].

Therefore, also in the fight against international terrorism, the Italian judiciary has given priority attention to the due respect for the rights of the

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[17] Harvard law professor Alan M. Dershowitz, for example, has argued that it would be acceptable to torture a captured terrorist who refused to reveal where a bomb is about to explode that will cause death and destruction. From this hypothesis, Dershowitz concludes that it would be better, in such cases, for torture to be regulated by some legal authorisation to "reduce the incidence of abuse".

[18] Thus, in the August 2002 memorandum of Assistant Attorney General Jay Bybee, whose theories were also supported by President Bush in October 2007 before the US Senate Justice Commission.

[19] The *"Kadi-Al Barakaat", 3 September 2008* judgement stated that the fundamental rights protected by the European Community, specifically the right of defence, the right to a fair trial and the right to property, must also be respected in the fight against terrorist financing.

[20] "Resolution No. 1597" and "Recommendation No. 1824" of the Parliamentary Assembly of the Council of Europe dated 23.1.2008.

persons under investigation, rejecting the worldwide tendency to believe that the prevention of risks, to be carried out with the use of every possible means, must prevail over the freedoms and the reason of the laws.

In fact, the District Attorneys' Offices competent in matters of terrorism and subversion[21] since early 2003 and on the initiative of some magistrates with expertise in that sector, have again chosen to organise and intensify spontaneously – as occurred as of 1978 and with the same procedure – their coordination and that to be carried out in the international field (given the not always satisfactory level of cooperation between the judicial authorities and the judicial police of different States[22]), refreshing themselves on the investigations in progress in each office and preparing strategic and jurisprudential guidelines on the subject. For this purpose, the Italian member of Eurojust was also invited to take part in coordination meetings to which liaison magistrates from Spain, France and the United Kingdom operating in Italy were sometimes also invited.

These meetings, from a certain point on, were also held permanently at the Superior Council of the Magistracy, in a room specially equipped and provided therefor.

The attendees at the meetings in question often made IT supports for their colleagues in other Prosecutors' Offices in order to facilitate the exchange of information: no different from what was carried out in the late 1970s and early 1980s through the exchange of photocopies. In this case, however, the exchange of information on IT support also served to feed the system of databases that, always spontaneously, some of the 26 District Attorneys' Offices had developed.

This "culture" of coordination and respect for rights has certainly and positively influenced the Italian Legislator, who has been able to say "*no*!" to the inadmissible strategies mentioned above (including, for the reasons already set out as regards the content of Law No. 124/2007, that of the priorities in the tasks of investigation which in many other countries are attributed to the Information Services), notwithstanding the fact that the three principal laws specifically intended to counter this phenomenon have been approved in the aftermath of real tragedies, that is, during times of true crisis.

The intention is to refer to the legislative interventions of *2001* (Decree Law No. 374 dated 18.10.2001, converted into Law No. 438 dated 15.12.2001),

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[21] Following Decree Law No. 374 dated 18.10.2001, converted into Law No. 438 dated 15.12.2001 (Urgent provisions to counter international terrorism), paragraph 3-*quater* was added to Article 51 of the Italian Code of Criminal Procedure and, with it, the competence of the 26 Public Prosecutor's Offices at the district offices to conduct investigations in matters of domestic and international terrorism.

[22] In this regard, it must be said that the international community does not need to tear up the rules, but only common strategies based on the adoption of an intelligent specialist legislation, the strengthening of collaboration (which too often does not work) and the refinement of investigation techniques (i.e., strategies far from the much-lauded and useless collection of millions of data that evokes a worrying future of "big data"). Specifically, it is necessary that all governments work to extend the competences of the newly established European Public Prosecutor's Office to the field of international terrorism: but this choice is impeded for political reasons, the same that suggest to many European States to prioritise, in the fight against terrorism, the intelligence agencies that answer to governments and certainly not to an independent judiciary.

which, subsequent to 11 September, introduced the crime of "*association with the purpose of international terrorism*" (Article 270-*bis* of the Italian Criminal Code) and provided for the district jurisdiction for crimes with the purpose of terrorism; of *2005* (Decree Law No. 144 dated 27.7.2005, converted into Law No. 438 dated 31 July 2005), approved after the London attacks of 7 July 2005, which, *inter alia*, provides for the definition of "*conduct with the purpose of terrorism*"; and, lastly, that of *2015* (Decree Law No. 7 dated 18 February 2015, later converted into Law No. 43 dated 17.4.2015), shortly after the massacre of Paris on the 7 January 2015, at the headquarters of the satirical magazine, "Charlie Hebdo", with which the competence of the National Anti-Mafia Directorate, now known as the National Anti-Mafia and Anti-Terrorism Directorate (D.N.A.A.), was extended, thus realising the intention formulated by the italian magistrates who dealt with terrorism. A tightening of the web propaganda, a key tool of the IS and other terrorist formations, has also been envisaged.

In these cases, also, as in the years of lead, the laws passed have introduced procedural and substantive innovations such as to promote greater effectiveness in the fight against international terrorism and the specialisation of the bodies of the judiciary and judicial police responsible[23] for this, rejecting decisions that are detrimental to individual rights.

Only an independent judiciary, extraneous to any political logic, that is, operating according to the model dear to Vittorio Bachelet, can guide the effective fight against all criminal phenomena – including terrorism of any kind – with absolute respect for the fundamental rights of the people.

It is to be hoped that other European judiciaries also – regardless of the diversity of their respective legal systems – will be able to play a balancing role in view of emergency pressures that have proved incompatible with the rules of our democracies: as the former President of the Supreme Court of Israel, Aharon Barak, wrote in a historic judgement in 2004, democracies are forced to fight terrorism with one hand tied behind their backs, but it is precisely this apparent factor of weakness that ultimately proves to be the reason for the resilience and success of democratic systems. There is no more effective display for explaining our duties in democracy than that which the Italian judiciary has shown to be well aware of in its action against all terrorism and all forms of criminal activity.

[23] In summary, the special legislation on international terrorism covered the areas of criminal law, criminal procedure, execution of sentences, security measures, prevention activities, expulsions of foreigners, organisation of the judiciary and police forces, as well as the administrative governance of a number of activities considered worthy of attention in order to prevent the risk of attacks. The regulations briefly cited herein enable us to state that, in the Italian system, we have efficient and well-regulated tools to investigate in various criminal sectors, including that of terrorism, using the data that interceptions (telephone and environmental, judicial and preventive), intrusions into the web, mobile phone records and traces and undercover activities enable us to find out and gather: tools that our specialist police forces know how to use well, as excellent results in many delicate investigations have shown.

"B"

COLLABORATORS OF JUSTICE IN THE CONTEXT OF COUNTERING INTERNATIONAL TERRORISM ITALIAN CASES

VINCENZO DI PESO

1. *Tlili Lazhar and Jelassi Rihad: the reference context*

In Italy, the Judicial and Anti-Terrorism Authorities have consistently opposed the phenomenon of religious extremism since the first half of the 1990s.

Investigations have concerned the spread, throughout Italy (especially in Lombardy and Emilia Romagna), firstly, of several Algerian and Egyptian cells and, subsequently, of Tunisians and Moroccans, operating under the so-called "relocation strategy" of segments of terrorist organisations of jihadist origin that have arisen in North Africa.

Tunisians Tlili Lazhar and Jelassi Rihad – to date, the two main collaborators of justice in the context of countering Islamist terrorism – both emerged as part of the investigations conducted in Lombardy between the late 1990s and early 2000s.

In addition, Tunisian Zouaoui Chokri should also be mentioned, whom we shall discuss later.

The parables of Tlili Lazhar and Jelassi Rihad are closely interconnected and are both linked to *Operation Al Moruhajirun* – coordinated by the Public Prosecutor's Office of the Republic of Milan and conducted by the DIGOS (General Investigations and Special Operations Division) of Milan and Varese – divided into three tranches (4 April, 10 October and 29 November 2001) and which intervened during a very specific stage of militant Islamism.

In order to understand the importance of those counter-terrorism investigations, it is worth recalling, with brief mentions, the international context relating to those few years, from 1998 to 2001, during which the events we are talking about took place.

In fact, during those years, we witnessed, firstly, a profound shuffling of the structures of the various jihadist formations as a result of the repressive actions carried out by the security agencies in the Arab countries, namely the processes of internal pacification, as was the case of Algeria.

Secondly, in the context of *Al Moruhajirun* there was a progressive disintegration of certain major signs of North African terrorism (consider, for instance, *Al Jihad* and *Al Jama'a al Islamiya* in Egypt, the *Tunisian Combatant Group* and the *Libyan Islamic Fighting Group*) and a simultaneous realignment of their militants amongst the ranks of new and more ambitious Islamist organisations, such as the Algerian organisation known as the *Salafist Group for Preaching and Combat* and the transnational organisation *Al Qaeda*.

Specifically, in the summer of 2000, it emerged that the European Islamist networks, notably the Algerian network headed by *Abu Doha*[1] and the Tunisian network led by Seifallah Ben Hassine, both residing in London, converged from abroad to support the activities of the *Salafist Group for Preaching and Combat* in Algeria and *Al Qaeda* in Afghanistan.

In February 1998, the dissemination of *Al Qaeda's* programmatic manifesto, namely, the *World Islamic Front for Jihad against Jews and Christians*, contributed to accelerating these transformations.

With this document and with striking terrorist acts that followed shortly thereafter – on 7 August 1998 two bomb attacks simultaneously hit the US embassies in Kenya and Tanzania, killing 224 and injuring 4,000; on 12 October 2000, in the Bay of Aden, a suicide attack was carried out on the cruiser *USS Cole*, killing 17 sailors – Bin Laden aspired to gather, under a single leader, the various jihadist energies scattered around the world, which were still responding to local dynamics.

Based on this analysis, Italian Anti-Terrorism realized during those years that Italy, like other European countries, no longer constituted a "neutral ground" (assuming it ever was), sheltered from the reverberations of crises that shook the Islamic world.

Italy, on the other hand, had become one of the possible direct targets of terrorist actions that responded to distant logics that were incomprehensible to most, but no less dangerous to the security of the state.

That said, the polar star of Italian Anti-Terrorism has always been the prevention of the threat that comes from violent extremism. In other words, we have always tried to *think ahead*, to steer our efforts mainly towards the early protection of good security.

It goes without saying that the success of prevention activities is closely linked to the gathering of information to prevent the carrying out of terrorist acts.

With this in mind, the tools that provide for forms of reward for those who, with their disclosures, have contributed, in both in-court and out-of-court contexts, to ensure a security framework for Italy (to date, not compromised by shocking acts) are viewed with extreme favour by the police and security agencies.

Furthermore, the need for the early obtaining of information related to the security of the state is all the more felt when the terrorist threat comes from afar – and I am not only referring to a geographical distance, but also

[1] Alias Amar Makhlulif, born on 11.8.1964 in Algeria, also known as Abu Doha, Samir Al Haidera, Rachid Keffous, Rachid Boukhalfa, Dr Heider.

to a cultural remoteness that makes the process of gathering, analysing and contextualising this news problematic and cumbersome.

2. *Tlili Lazhar's collaboration*

Tlili Lazhar arrived in Italy in 1996, settling immediately in Milan where he made a living dealing hashish. In the Lombard city, he met his compatriot, Riabi Zouheir, who later died in Tunisia in January 2007, during a large counter-terrorism operation.

Riabi Zouheir convinced him to go to Afghanistan to train in the use of weapons and explosives.

Riabi Zouheir's brother, Riabi Zied, handed Tlili his employment contract. The latter, with no job, used it to renew his residence permit in Italy. Riabi Zied also died a few years later in a firefight in Algeria whilst fighting in the ranks of the *GSPC*.

In 1997, he met Riadh Jelassi in Milan, who was also, at the time, a small-scale drug dealer.

In 1998, he moved closer to the Islamic religion. At that time, the Riabi brothers and others convinced him to attend the *Islamic Cultural Institute* on Viale Jenner, one of the most important centres for the spread of Salafi Islam in Europe.

It was at the *ICI* that Tlili began – with the blessing of Imam, Egyptian *Abu Imad*[2] – viewing jihadist propaganda videos. Images obsessively showing the violence suffered by Muslims, especially in Chechnya, but also the "value" on the ground of the *mujaheddin*, their victories against the infidels, the hurried executions of captured Russian soldiers. The videos are artfully edited to ester the desire for vengeance against the *kuffars*, the infidels and, at the same time, to exalt the actions of fighters for jihad and, ultimately, entice believers to emulate them.

At the mosque annexed to the ICI, Tlili first met Essid Sami Ben Khemais, who called himself *Saber*. The latter, residing in Gallarate and administrator of a service cooperative based in Legnano (MI), was, in fact, the main contact in Italy of the Tunisian network. Essid – Tlili later recalled – from the first meeting, told him of the misery and exploitation suffered by Muslims worldwide, especially in Afghanistan and Chechnya, and asked him for money "for the cause".

Upon his return from Afghanistan, Tlili Lazhar became one of Essid Sami's lieutenants and was mainly involved in obtaining stolen phones and identity documents that are used by Afghan camp veterans or would-be fighters to cover their travels.

In those circumstances, he learned that Essid Sami was in direct contact with Hassan Hattab, the emir of the *Salafist Group for Preaching and Combat*, who urged him to send "Afghan Tunisians", i.e., Tunisians already trained in combat, to Algeria. The transfer from Italy to Algeria took place through a short stay in Spain, so as not to leave traces of direct passages.

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[2] Motion name Egyptian Arman Ahmed El Hissiny Helmy, born in Kena (Egypt) 14.1.1961.

Essid Sami's Italian cell, however, was in operational and strategic contact with counterparts in London, Brussels and Frankfurt. In this regard, it is recalled that, in December 2000, a joint Franco-German operation enabled the so-called "Frankfurt Group", also known as the "Meliani Group"[3] to dismantle, before it carried out a terrorist plot against the cathedral and Christmas markets in Strasbourg.

In April 2001, the Public Prosecutors of Milan and Busto Arstizio issued a detention order against Essid Sami, Tlili himself, and six other foreigners all being investigated for crimes of conspiracy to traffic weapons, forgery of documents and receiving of stolen goods (Operation *Al Mouhajirun 1*). Among the recipients of the restraining order were also Maaroufi Tarek, a resident of Belgium and co-founder of the *Tunisian Fighting Group* and Iraqi Thaer Mansour, who lived in Munich and who was also involved in the aforementioned "Meliani Group".

Tlili escaped capture. In fact, French counter terrorism tracked him down in Marseille on 10 October 2002, arresting him as part of the investigation of the "Meliani Group".

Tlili's collaboration with justice began in France immediately after his arrest.

When questioned by French investigators, Tlili Lahzar identified Essid Sami as the *emir* of the "Afghan Tunisians" in Italy and admitted that he had also been in Afghanistan in 1998, for about seven months.

Firstly, in the Khalden camp and later in Jalalabad he had been trained in the use of several firearms, grenade launchers and explosives. In these places, he met several other extremists who he later met again in Milan amongst Essid Sami's trusted men. Amongst others, in training camps, he met the leader of the Algerians in Europe, Abu *Doha* (alias boukhalfa *Rachid*) and Algerian Meliani, leader of the group of the same name, which was dismantled in Frankfurt in December 2000.

The statements made in France by Tlili later merged in Italian criminal proceedings through international rogatory[4].

Once extradited to Italy[5], Tlili began a journey of collaboration with the Public Prosecutor's Office in Milan in the autumn of 2006. His statements found a specific investigative outcome, especially (but not only) in the context of Operation *Rakno Sadess*, conducted on 7 June 2007 by the Milan Guardia di Finanza.

In fact, in that context, the Investigating Judge of Milan issued a pre-trial detention order against nine Islamic extremists, investigated for the crime of conspiracy to commit, for terrorism purposes, more crimes of illegal immigration, receipt of stolen goods, forgery of identity documents, per-

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[3] From the nickname used by its leader, later identified as Algerian Mohamed Bensakhria, born on 16.10.1966 in Beni Louna (Algeria). Sentenced in France for terrorism to 10 years in prison, he was deported on 24 January 2009 to his country.

[4] This is the case with criminal proceedings No. 5236/02 of the Criminal Records Registry of the Public Prosecutor's Office of Milan, focused on the so-called *Rete Mera'i*.

[5] *Inter alia*, in Italy Tlili, was also wanted because he was the recipient of a pre-trial detention measure issued by the Examining Judge in Milan on 18 May 2005 at the end of an investigation conducted by DIGOS in Milan. (*Operation Haidora*) that we shall discuss later.

sonal violence, purchasing and spending of fake coins, within a cell constituting a national articulation of the *Salafist Group for Preaching and Combat*, operating in direct connection with a network of similar and related groups operating in Germany, England, Spain, Belgium, France and other countries outside of Europe, including Algeria, Pakistan, Afghanistan and Tunisia.

It is worth pointing out that the stack of statements made by Tlili showed the role of absolute depth played in the supply chains of recruitment to Afghanistan by two other Tunisians, protagonists to this day of jihadist activism in international contexts.

Namely, Fezzani Moez and Nasri Riadh.

Between 1997 and 2001, Fezzani was responsible for the logistics of the Tunisian *mujaheddin* from Italy, including Tlili himself, who was settled in Peshawar, in Pakistan and then went to the training camps of Farouk and Kaldem in Afghanistan where they received training in the use of weapons and explosives. Fezzani also organised the return of the *mujaheddin* to Italy, especially in Milan, obtaining travel documents, identity documents and promoting the collection of funds for their travels.

Nasri Riadh – who lived in Bologna and was already a fugitive in connection with a pre-trial detention order issued against him in 1998 by the Investigating Judge in Bologna, as he considered himself a participant in an attested Algerian GIA cell in Emilia Romagna. He had previously become the head of the Tunisians in Jalalabad, Afghanistan, where he was responsible for the logistics of his would-be *mujaheddin* compatriots from abroad.

Fezzani Moez and Nasri Riadh met them the following year in the Guantanamo Delta Camp. The Americans handed Nasri over to Italy in November 2009 and Fezzani in December of that year, as part of President Obama's efforts to dismantle the Guantanamo detention facility.

Both were convicted in Milan of terrorism[6] offences and expelled from Italy to Tunisia. Fezzani and Nasri are currently included in the list of foreign fighters linked to Italy for having joined the *Daesh* militias operating in Derna[7], Libya, and in Syria, respectively.

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[6] In March 2012, the Court of Assise in Milan acquitted Fezzani on 7 July 2013. The Court of Appeal overturned the judgement at first instance, sentencing him to 5 years, 8 months and 27 days' imprisonment for association with terrorism purposes, in connection with his role as organiser of the Tunisian supply chain from Italy to the camps of *Al Qaeda* in Afghanistan (a judgement which became final in November 2013).

As regards Nasri Riadh, his court case is a little more complex. On 31 January 2011, the Investigating Judge of Milan, in the summary judgement, sentenced him to the penalty of 6 years' imprisonment, as he pleaded guilty for the offence referred to in Article 416 of the Italian Criminal Code aggravated by terrorism purposes pursuant to Article 1 of Law 15/80, for his conduct committed until 18.10.2001 and pursuant to Article 270-bis of the Italian Criminal Code for subsequent conduct. In February 2012, The Milan Court of Appeal acquitted him. The foreigner was then released and sent off to Tunisia. In April 2013, the Court of Cassation annulled the judgement ordering the renewal of the trial. On 7 January 2014, the Milan Court of Appeal, deciding on the renewed trial ordered by the Court of Cassation, upheld the Examining Judge's conviction. In 2015, his presence was detected in Syria and he had then become part of the *Daesh*. Since then, his traces have been lost and it cannot be ruled out, indeed it is likely, that he had also been killed in that conflict.

[7] The rise, in 2012, of several Islamist formations in both post-Ben Ali Tunisia and Gaddafi-free Libya was an irresistible temptation to Fezzani, who moved to Libya and became the manager of a training camp set up in the parts of Derna, where the levers of new generations of *moujahedin* to be sent into the Syrian-Iraqi conflict were being trained.

Ultimately, the information contribution made by Tlili Lazhar appeared, following rigorous investigative findings, of enormous importance because, as the Investigating Judge of Milan noted in 2007, in the pre-trial detention order relating to the anti-terrorist operation known as *Radko Saddess*, for the first time in Italy, a justice worker had reported his direct experience in the training and indoctrination camps in Afghanistan.

Said Investigating Judge also noted that Tlili's statements, whilst containing numerous novelty elements relating to his stay in Afghanistan, completely overlapped the statements made by Jelassi Riadh.

3. *The collaboration of Jelassi Riadh*

It must be noted that, although Jelassi Riadh's collaboration began after that of Tlili Lazhar, the results of his important contributions were gathered in the anti-terrorism operation *(Haidora)* carried out in May 2005, two years before that of which we have now explained the outcomes.

The operation known as *Haidora* (from the "code" name that the defendants attributed to Afghanistan) was the logical continuation of the *Al Mouhajirun* investigation mentioned several times above, which resulted, between April and November 2001, in three restrictive measures that led to the arrest, in total, of around fifteen Islamic extremists, including Jelassi Riadh himself (as part of the second tranche of the operation, carried out on 10 October 2001).

Some suspects within *Al Mouhajirun*, however, remained fugitive – this was the case, for example, of Es Sayed Abdelkader, who likely died in Afghanistan at the end of 2001, and Waddani Habib, who died in a suicide attack Iraq in 2003 – while others belonging to the same network of extremists remained unknown.

A fundamental contribution to bring to light the entire – or a good part – of the supply chain came from the statements of Jelassi, who initiated his collaboration with the Public Prosecutor's Office of Milan in September 2003, which resulted in the arrest, in May 2005, of 12 Islamist extremists plus others investigated in state of freedom[8].

His statements covered a rather large period of time from 1997 to the end of 2001. In this regard, I recall that Jelassi was arrested in October 2001 and then sentenced to 4 years and 6 months by the Court of Milan (for the offence referred to in Article 416 of the Italian Criminal Code and other offences).

Having arrived in Italy in the mid-nineties and settled in Milan, Jelassi also made a living by the small-scale dealing of drugs and false banknotes, as well as car thefts. His experience as a car thief would come in handy when he became an Islamic extremist.

He converted to radical Islam mainly through the speeches he repeatedly heard from some of his compatriots with whom he shared his accom-

[8] The most important of which was Arman Ahmed El Hissiny Helmy the Egyptian Imam of the ICI in Viale Jenner, better known as Abu Imad.

modation. For Jelassi, as had been the case for Tlili, brothers Riabi Zouheir and Zied also contributed decisively to his radicalisation. In fact, Jelassi had arrived in Italy with the latter, of whom he was a childhood friend.

I think it is important to point out that, in the summer of 1997, Jelassi, at an early stage of his radicalisation, was sent to the province of Caserta to carry out inspections of an American base. Riabi Zouheir confided to him that he was testing the possibility of hitting the military facility with a truck filled with explosives.

Moreover, Jelassi reiterated that the main purpose of the cells he had joined was to recruit would-be fighters to be sent to *Al Qaeda* camps in Afghanistan to train in the use of weapons and explosives. Once trained in combat, the militants were transferred mainly to Algeria where they joined the *GSPC*.

Jelassi, on the other hand, never went to Afghanistan or other jihad territories, most likely because he spent much of 1998 in prison for drug dealing. He was also considered more useful in Milan because he was able to procure fake money and passports for the cell thanks to his activities as a petty criminal. Amongst other things, his militancy was unknown to most, even to the Police Forces, so he was free to move to carry out investigations on possible targets of attacks.

In this regard, his compatriot, Maaoui Lotfi, had told him, shortly after his return from Afghanistan, that Italy had to be hit also, because a well-known television journalist had spoken ill of Muslims.

At that time (June 2000), he was entrusted with the task of carrying out a series of inspections inside the Carabinieri Barracks in Via Moscova (he had been stopped by the Carabinieri, staging a fight near the facility voluntarily) and at the Milan Police Headquarters (which he had accessed under the guise of reporting the false loss of his driving license).

Other targets taken into account by his cell were a nightclub (considered a sacrilegious place because it was believed that the dance floor had the inscription "Allah", which was later found to be untrue), Linate airport, Milan Central Station and the Tunisian Consulate.

At a time of despondency, Jelassi had also accepted the proposal to die in a suicide bombing that had successively been cancelled. He also said that, in 2001, when he was arrested, he was ready to strike, either in Italy or in another country.

Jelassi's statements also served to understand the encrypted languages used by his former associates (sweet/cake for explosives, *Haidora* for Afghanistan, brushing hair backwards meant carrying weapons, crossing and extending arms was a reference to the explosive).

4. *The collaboration of Zouaoui Chokri*

Tunisian Zouaoui Chokri was a collaborator of justice characterised by an abnormal path compared with that of Tlili Lazhar and Jelassi Riadh.

He, in fact, unlike his two compatriots, had never joined Islamist cells and, although he knew several other foreigners who had joined, he had re-

mained in that underworld of small-scale drug dealers and procurers of forged documents from which Tlili and Jelassi originated.

In the autumn of 2002, Zouaoui Chokri, whilst detained in Milan for drug offences, reported that he was aware of a planned attack on the Milan metro and Cremona Cathedral.

The investigations carried out at the time showed that the news was unfounded or, in any case, the impossibility of obtaining any evidence to the statements made by Zouaoui.

At the same time, it emerged that Zouaoui had real knowledge of Tunisians and Moroccans based in Cremona and Milan who were already known for having joined Islamist groups. Some had already emerged in 1998, as they were detained in Cremona in 1998 (Operation *Atlas*), following a search that led to the seizure of the largest number of documents from jihadist organisations ever in Italy.

They ranged from the founding act of the *Moroccan Islamic Fighting Group*, with notes and corrections in the margins, to operating manuals for the use of weapons, explosives, communication techniques etc., used in Al Qaeda camps in Afghanistan. A letter with Bin Laden's handwritten signature was also found.

The extremists identified by Zouaoui were later arrested in February 2004 by DIGOS in Brescia and convicted of terrorism offences, following a trial in which the evidence obtained in 1998 (*inter alia*, not valued before their rediscovery in 2002) converged.

The Tunisian national subsequently collaborated with the Carabinieri Special Operations Group and the Public Prosecutor's Office of Milan as part of the third tranche of Operation *Bazar*, which ended in May 2005 with the capture of 10 Islamic extremists.

In 2005, Zouaoui assumed the status of *collaborator of justice*, which he later lost in 2011, partly due to the various crimes for which he has since been held responsible.

Lastly, in April 2015, Zouaoui, from the prison in Padua where he was being held in connection with an apartment burglary, sent a letter to an Inspector at the Police Headquarters in Bari in which he claimed to be aware of unspecified terrorist plans that a group of Tunisian extremists intended to carry out in Rome.

5. *Recent collaboration cases*

However, all of this happened over 15 years ago.

Meanwhile, there have been *Arab Springs*. Some regimes in North Africa fell. Conflict broke out in Syria, then extended to Iraq. The old opposition in the Islamic world between Sunnis and Shiites further increased, leading to further negative reverberations on the security framework in the Middle East. New jihadist groups have emerged. In the same jihadist world, new doctrines and strategies have been developed to strike the West.

But, above all, there has been an advent of social networks that has profoundly affected the way in which jihadist propaganda is transmitted and the means of communication between extremists.

For example, it went from the group viewing of VHS cassettes in a secluded room of a mosque or in an apartment, to *Telegram*, *Facebook*, *WhatsApp*, *Twitter* etc., through which each extremist, in complete (apparent) solitude, can interact with an obscure series of Internet users.

The recent information provided to justice by a young Gambian asylum seeker, against whom the Public Prosecutor's Office of Naples requested the application of the law on the collaborators of justice must be viewed in this context.

Whilst we remember 2018 for the immediate collapse, at least on the military and territorial level, of the *Islamic State* in the Middle Eastern chessboard, the same year is also relevant due to the disclosures made by 21-year-old Touray Elhagie to the investigators and detectives of Naples.

Accusatory self- and external declarations that turned into vivid and tangible images those indications that, for some time now had moved the origin of the most serious and direct risks to the security of Europe and our country from Syria, to Libya and to the Central African quadrant.

The young Gambian was arrested on 20 April 2018 in Naples, in a joint operation of the DIGOS and Special Operations Group, as soon as we got aware in an intelligence context, that, via *Telegram*, the same foreigner had taken the oath of allegiance to Abu Bakri al Baghdadi in view of an attack soon to be carried out.

Also via *Telegram*, Touray had received general instructions on the objective of the attack and how to carry it out.

A few days after his arrest, Touray decided to collaborate with the Judicial Authority. Initially, in a recalcitrant way, especially due to the possible consequences of his collaboration on the family members who remined in the country of origin and, later, in a convinced manner.

The evidence that emerged from Touray's statements made it possible to trace the existence of a more extensive "drawing" of Libyan elements, which are to date unknown, attributable to *Daesh*, which involves the recruitment of young extremists in the countries of the central-western belt of Africa, their training in mobile camps in the Libyan desert (the *Moaskar*), their exfiltration to the jihad conflicts or to Europe via migration routes. In the latter case, their "activation" is planned, even months later, via a series of communications via *Telegram*, as had been the case for Touray.

The difficulties encountered by investigators and detectives in the case of Touray are essentially attributable to the geographical origin of the declarant. In fact, if Anti-Terrorism has, over time, developed a good knowledge of the culture, the mentality and the customs linked to the Middle Eastern and North African countries, with the extremist originating from Gambia, it has found itself having to face a world that has remained substantially outside, at least until a few years ago, the sphere of influence of radical Islam and, consequently, of the investigations.

One only needs to think of the difficulties encountered in finding reliable interpreters, given that Touray spoke a mixture of Mandinko, Wolof and Gambian English.

It should also be borne in mind that the Republic of Gambia is a very small country, an enclave with fewer than 2 million inhabitants within Sene-

gal, the extremely small size of which means that its inhabitants have a very extensive relationship of mutual knowledge and kinship.

This made Touray particularly concerned about the possibility that his recruiters in Gambia could get in touch with his many family members in order to retaliate against them once news of his collaboration with the Italian judiciary had come out in the media (as actually happened later).

In this regard, the case in question should make us reflect, amongst other things, also on the specific possibility of implementing a protection programme for the relatives of the collaborator who remained in his or her country of origin. It should also be noted that critical issues can already be encountered only in having to identify these family members, given that, often – just as in the case of Touray – there are households comprising of dozens of brothers and sisters, with different mothers, often not even registered by a government office.

Similar difficulties were encountered in the case of Jelassi Riadh, given that, amongst other things, he could not identify all the members of his household, whose dates of birth and actual domiciles, for instance, he was unaware of.

6. *Managing the protection programme*

The first three collaborators mentioned enjoyed penalty benefits and were subjected to a protection programme once they had been released.

Whilst for Tlili, the programme continued linearly and smoothly until its recent consensual termination. The programme prepared for Jelassi, which was terminated early, was punctuated by a series of critical episodes stemming mainly from violent conduct committed by the Tunisian citizen against his cohabitant, a Romanian citizen who did not want to convert to Islam, and his under-age son, whom he had stopped attending school given that it would inculcate precepts contrary to Islam.

In particular, Jelassi, after a period in which he reported having converted to Christianity, specifically to the worship of Jehovah's Witnesses, returned to radical Islam and poured his frustrations firstly onto his family and then against the Italian authorities who, due to violence against his family, had arrested him and convicted him of the crimes referred to in Articles 572 and 582 of the Italian Criminal Code and, at the same time, had ordered him to be banned from approaching his family, who had been transferred to a protected location.

The protection programme offered to Zouaoui was also terminated early due to the repeated offences for which he was responsible, having continued to make a living from petty theft and drug dealing.

As can be seen from the above, the reward measures adopted in favour of Tlili and Jelassi have had a very different outcome, despite the two subjects coming from the same backgrounds and having gained very similar experiences.

This contrast is likely the consequence of the different psychological profiles shown by the two Tunisians.

Tlili decided to collaborate a few days after his arrest in France and showed that he was an extroverted subject, not fully convinced of the jihadist message and that – at least in his words – had never agreed to "sacrifice himself" in a suicide bombing. Indeed, the hard training carried out in the camps in Afghanistan also contributed towards increasing his existing uncertainties.

Jelassi, on the other hand, made the decision to collaborate when he was detained in Milan for several years and appeared immediately characterised by an introverted, despondent and tormented personality.

7. *Conclusions*

Ultimately, it is not often that a jihadist agrees to collaborate with justice, on the grounds that Islamist formations are characterised by an ideological-religious bond and by a clan culture.

In fact, terrorist networks are frequently involved with subjects that engage with family ties or friendships that date back to childhood, that frequent the same neighbourhood and the same mosque in the country of origin.

It is, in other words, a double chain – the ideological and the relational-affective chain – that keeps the militias in the organisation.

At least that is how it was until a decade ago. For some time now, the threat posed by the traditional networks and cells of Islamic extremists has been accompanied, to an increasingly dominant extent, by that originating from individuals, that is, from extremists acting in the absence of training characterised by minimal structure and direct relations between associates.

Often, cells made up of flesh-and-blood subjects have been replaced by *Telegram* groups, in which Internet users participate, whose mutual knowledge is based solely on a nickname and whose relationship is fuelled only by the sharing of an ideology.

This aspect leads to critical profiles for the establishment of a collaborative relationship with justice by the terrorist/extremist, but also opens up new perspectives with a view to strict prevention.

From a critical point of view, it is noted that the contribution to the collaboration of the so-called lone wolf is inevitably very limited, given that it is based on extremely fragmented knowledge. In other words, said lone wolf rarely has information that builds a broader picture than his own personal path of radicalisation.

However, at the same time, the lone wolf's collaboration can prove to be of fundamental importance to lead the investigator to lands that are very difficult to penetrate, such as those representative of cyber-terrorism, from the dark web and from specific social networks (see *Telegram*).

In this scenario, the reward measures in favour, for example, of a so-called "Islamonaut", can contribute significantly to push him towards a path of de-radicalisation and, in parallel, through his collaboration, to open gaps in the wide audience of active users in the so-called *unofficial* online jihadist propaganda that, by quantity, has now largely surpassed that coming directly from the media houses of *Daesh* or *Al Qaeda* or other terrorist organisations.

Allow me to say that, in such cases, we will, in fact, witness an activity of intelligence-gathering in a manner typical of intelligence and with a heightened prevention purpose, but conducted under the direct control of the Judicial Authority.

Therefore, in the general framework of countering terrorism and violent extremism, all initiatives aimed at implementing and improving the use of reward measures, in order to overcome the exclusively securitarian and repressive approach, are welcome.

On the contrary, reward measures, in this context, support and strengthen all the tools that, as a function of special prevention, are aimed to recover, de-radicalize and reintegrate extremists.

On the other hand, starting from the countries of Northern Europe, a new culture is becoming increasingly assertive in the fight against violent extremism, which sees the perpetrator (or the potential perpetrator) of crimes inspired by ideological or religious motives as a subject that needs encouragement and support in view of his or her recovery, or rather, of his or her de-radicalization.

Furthermore, the issue of re-socialisation is becoming very pressing in light of the emergency of the dozens of *Daesh* prisoners currently held in camps run by the Kurdish Forces. Many of them are European and are women, wives or widows of militiamen, who have with them children taken away from their countries of origin or born in Syria.

This is a humanitarian crisis on an incalculable scale. Or rather, data already exist: the Al Hol "refugee" camp (in north-eastern Syria, on the border with Iraq), for example, where only women and children are detained, currently hosts between 70,000 and 75,000 human beings. A recent press report by the *Washington Post* (published on 3 September) documented that, within said camp, a militia of women in fact exercised *religious police* functions has been reconstituted and there have also been cases of murders of women deemed "unholy" and three cases of stabbings by Kurdish guards. However, the most fanatical, as reported by the guards, were the European women – often converted – as well as Eurasian women.

Sooner or later we will have to deal with the return to Europe of at least some of these individuals. Considering dealing with this crisis only using the usual tools of the punitive system is, at best, merely deceptive.

Lastly, and only as a mere statistical fact, to get an idea of the extent of the phenomenon, in relation to the non-procedural benefits granted to those who have collaborated with investigators or with the information and security sector in the context of counter-terrorism, I would point out that, from 2005 to the present day (specifically to 4 September 2019), a total of 401 foreigners have obtained the residence permit provided for by Article 2 of Decree Law No. 144 dated 27 July 2005, converted into Law No. 155 dated 31 July 2005 (the so-called residence permit for investigative purposes).

The period of time during which the majority of this type of document was released was between 2008 and 2011, with the peak reached in 2010 (121 permits). Subsequently, foreigners who have benefited from this reward tool are on average 12 units per year.

CHAPTER 2

BELGIUM

YVES CARTUYVELS, CHRISTINE GUILLAIN, THIBAUT SLINGENEYER

General introduction

When referring to "repentants" in Belgium, what is generally meant is the perpetrator of a criminal offence who, in exchange for collaboration with the legal authorities, is rewarded with some type of penal measure such as having their sentence reduced or waived. These "deals" are made with the aim of improving the efficiency of criminal justice in discovering crimes and prosecuting and punishing their perpetrators, and as a result the suspect, defendant or convicted person becomes a "collaborator of justice".

This term can, however, cause confusion. Although repentants are indeed "collaborators of justice", this is not the only case where the term can apply. At police level, other "collaborators of justice" exist such as "indicators" or "informants" who may also obtain certain personal benefits in exchange for assistance provided to the police. However, although these two types of collaboration can overlap and are sometimes quite similar, there are important differences between them. The criminal status of the person concerned may not be the same, the negotiations do not take place between the same parties, they do not always have the same aim and the rewards system does not work in the same way.

This paper is concerned with the particular type of collaborator embodied by the repentant. There has been a certain level of interest surrounding this concept for some time in the United States, where there is a traditionally utilitarian conception of criminal justice and therefore a greater openness to forms of bargaining, but in Europe it was not transposed into legal regulations until much later.

In Belgium, legal provisions for repentants were not truly envisaged until the end of the 1990s, at a time of growing awareness of their usefulness in the fight against organised crime and terrorism. However, no law existed on collaborators of justice or repentants until 22nd July 2018, when legal provisions on negotiation practices were adopted. It is difficult to determine whether these already existed informally within other mecanisms (closing of cases by the Public Prosecutor, penal transaction, suspension, etc.) before this law.

We will now examine the socio-historical context which led to the creation of this "law on repentants" (1), and then analyse the law of 22nd July 2018 which enshrines it (2), consider the few instances in which it has been used as case law (3), and examine the compliance of Belgian law with article 16 of Directive 541/2017/EU (4).

1. *History: the emergence of law on collaborators of justice or "repentants" in Belgium*

1.1. *Legislative developments and their historical context*

1.1.1. *From informal practices to the first partial formal recognition*

1.1.1.1. *The informal power of negotiation between the Public Prosecutor and perpetrators of crimes*

In Belgian criminal law, the Public Prosecutor has the power of the principle of expediency of prosecution, "taking into account the directives

on criminal policy" (Criminal Code, art. 28-*quater*, 1st subparagraph). Pursuant to this power, the Public Prosecutor can decide to close a case without further action for technical reasons or with regard to the principle of expediency, giving reasons for this choice. In theory, the Public Prosecutor could close a case with no further action on expediency grounds as a "reward" for information given by the alleged offender[1]. However, no published directive on criminal policy has included this type of praetorian practice, which would be risky for the "collaborator", who would be at the mercy of the provisional nature of the closing of the case, as well as the possibility of public legal action launched by parties other than the Public Prosecutor[2].

Furthermore, the Public Prosecutor also has the possibility of ending legal proceedings by using the penal transaction or mediation procedure. In the case of penal transactions, (Code of Criminal Procedure, art. 216-*bis*), the Public Prosecutor suggests, in certain cases and subject to certain conditions, that the alleged offender settle the proceedings through payment of a sum of money. Here again, the settlement could, in theory, be accompanied by an informal request for information and negotiation with the alleged offender. The mediation procedure also allows the Public Prosecutor to suggest, in certain cases and subject to certain conditions[3], that legal proceedings could be dropped if the alleged offender agrees to certain measures which constitute an alternative to a sentence (Code of Criminal Procedure, art. 216-*ter*). Here again, even though nothing to this effect is stated in the legal text, there is nothing to stop the Public Prosecutor from making an informal proposal that the mediation procedure could be used on the condition that the alleged offender supplies information; using mediation as a "reward" for collaboration with the law. However, in practice, there is nothing to suggest that prosecutors do use this type of bargaining when proposing a penal transaction or mediation[4]. In its final report submitted in December 1998, the parliamentary committee in charge of studying organised crime in Belgium highlighted that prosecutors deny using such tactics, except the Liège Public Prosecutor which admitted "sometimes having overlooked certain minor offences"[5].

1.1.1.2. *Grounds for mitigation, the first type of reward under Belgian criminal law*

The first formal enshrinement of a penal reward for collaborating with the judiciary was incorporated in Belgian criminal law through the grounds

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[1] *Doc.*, Ch., 2001-2002, n° 1645/1, p. 17.

[2] M.-A. Beernaert, *Repentis et collaborateurs de justice dans le système pénal*: *analyse comparée et critique*, Brussels, Bruylant, 2002, p. 61.

[3] C. Guillain, «Les mesures 'alternatives' au stade présentenciel: un quasi monopole du ministère public», in Y. Cartuyvels, C. Guillain et T. Slingeneyer, *Les alternatives à la détention en Belgique*: *un état des lieux, à l'aune du Conseil de l'Europe*, Bruxelles, la Charte, 2017, p. 59-77; Y. Cartuyvels, C. Guillain et T. Slingeneyer, «Belgium», in A. Bernardi, *Prison Overcrowding and alternatives to detention. European sources and national legal systems*, Napoli, Jovene, 2016, p. 125-142.

[4] It could still be imagined that the prosecutor could negotiate with the perpetrator of a crime at the stage of the closing arguments on sentencing or at the stage of the opinion which is often given on sentence enforcement, although this hypothesis seems highly speculative (M.-A. Beernaert, *Repentis et collaborateurs…*, *op. cit.*, p. 63-65).

[5] *Doc.*, Sén., 1998-1999, n° 1-326/9, p. 427.

for mitigation mechanism. Grounds for mitigation are circumstances under which the judge may reduce a sentence (extenuating circumstance), although the offence still stands, or acquit the defendant (grounds for absolution). Under Belgian criminal law, extenuating circumstances are legal (that is to say, provided for by law). Some of these allow an offender to be acquitted or have their sentence reduced in exchange for information which either allows all perpetrators and accomplices to be punished for a crime committed, or to prevent future crimes from being committed. When applied to crimes which may involve more than one perpetrator, the use of grounds for mitigation as a reward for collaboration with the law is prescribed in article 136 of the Criminal Code (state security offences), article 192 of the Criminal Code (offences against public trust), article 300 of the Criminal Code (publication and distribution of written materials without indicating the name and domicile of the author or printer), article 304 of the Criminal Code (violations of laws and regulations on lotteries, gambling establishments and pawnbrokers) and article 326 of the Criminal Code (offences linked to criminal organisations or crime syndicates established with the aim of causing harm to persons or property). Furthermore, under article 6 of the Law of 24th February 1921 on trafficking of narcotics, as amended by the Law of 9th July 1975, informing on another offender (before or after the launch of legal action) can constitute an extenuating circumstance or grounds for absolution, depending on the severity of the crime or offence committed by the informant[6]. The Law of 11th July 1994 amending the Law of 15th July 1985 on the use of substances having a hormonal or antihormonal action in animals also introduced a provision for grounds for mitigation (extenuating circumstance or grounds for absolution), as does as article 5 of the Law of 12th March 1858 on crimes and offences against international institutions. In these different cases, providing information to the law enforcement authorities or "informing" may be rewarded with absolution, subject to certain conditions being met[7].

It is thus these different grounds for mitigation which represent the first signs, albeit partial and limited, of "law on repentants"[8]. Although the mechanism is debatable from a moral point of view, "informing"[9] or "an incentive for impunity"[10] is encouraged in these cases, with the aim of increasing efficiency in punishing crimes considered particularly serious for

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[6] On these specific grounds for mitigation, see M. Preumont, "Un exemple de politique criminelle: la dénonciation, cause d'excuse prévue par l'article 6 de la loi du 24 février 1921 concernant le trafic des substances vénéneuses, soporifiques, stupéfiantes, désinfectantes ou antiseptiques", in *Mélanges offerts à Robert Legros*, Brussels, ULB, 1985, p. 499-516; Ch. Guillain, "La cause d'excuse en matière de drogues: symptôme de l'ambivalence du système pénal", in Fr. Kuty and A. Weyenbergh (dir.), *La science pénale dans tous ses états. Liber amicorum Patrick Mandoux et Marc Preumont*, Larcier, Brussels, 2019, p. 271-290.

[7] See M.-A. Beernaert, *Repentis et collaborateurs…*, *op. cit*., p. 41-50.

[8] Fr. Tulkens, M. van de Kerchove, Y. Cartuyvels, Ch. Guillain, *Introduction au droit pénal. Aspects juridiques et criminologiques*, Diegem, Kluwer, 2014, p. 644.

[9] G.-H. Beauthier, "La délation: l'impunité dénoncée", *Déviance & Société*, 1998, n° 4, p. 427-433.

[10] Fr. Tulkens, M. van de Kerchove, Y. Cartuyvels, Ch. Guillain, *op. cit*., p. 644.

society, tracking down all perpetrators and accomplices, and preventing similar crimes from being committed in the future.

1.1.2. *The emergence of a true "law on repentants" the catalyst of the "Brabant killings"*

From 1982 to 1985, Belgium was rocked by a wave of indiscriminate and deadly crimes and attacks. It is still unknown whether these stemmed from organised crime or terrorism[11]. Over the same period, numerous attacks were attributed to an extreme-left movement, the CCC (Communist Combatant Cells). There was an atmosphere of tension and the fight against organised crime and terrorism became part of the political agenda. In this context, the issue of a "law on repentants" gradually emerged from the 1990s onwards.

In June 1995, the Dehaene II government proposed in its political programme that legislation should be drawn up "in order to allow a reduced sentence or negotiation in exchange for valuable information" as part of the fight against organised crime[12]. In an "action plan against organised crime", filed a few months later, the government made clear that it wished to set up a system of "exemption from prosecution" or "grounds for mitigation in court" for repentant offenders. The action plan also prescribed "witness protection programmes" for repentants, as well as "measures to make them more difficult to identify"[13]. Finally, in 1996 and under the scope of this "action plan", the Ministry of Justice asked Ghent University to carry out research on the issue of repentants (see below).

Parliament also got involved in the subject. A first parliamentary investigation committee on "the way the fight against crime and terrorism is organised", in relation to the "Brabant killings" submitted its report in April 1990[14], and a new parliamentary investigation committee was established in June 1996, to study "the changes necessary to the organisation and operating of the police and judicial system, based on the difficulties encountered during the investigation into the "Brabant killers". The report written by this committee proposed legalising the practice of using repentants (see below). In July 1996, another parliamentary investigation committee on organised crime was created at the Senate. During its work, the committee also studied the issue of repentants and came to the conclusion that establishing a system for reducing the sentences of repentants can be useful in fighting organised crime[15].

From this point on, scientific and official reports and legislative proposals all contributed to a cumulative process which lasted until the beginning of the 2000s. On 5th August 1996 a first draft law was tabled by senator

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[11] The two hypotheses have successively been investigated, to date without success. On the Brabant killings, see e.a., P. Ponsaers, *Loden jaren. De Bende van Nijvel gekaderd*, Gompel & Svacina, 2019.

[12] *Doc*., Ch., 1995, n° 23/1, p. 45.

[13] *Doc*., Sén., 1995-1996, n° 1-326/5, p. 30.

[14] *Doc*., Ch., 1989-1990, n° 59/8.

[15] *Doc*., Sen., 1998-1999, n° 1-326/9, p. 525.

E. Boutmans, which aimed to "provide repentants with a temporary and one-time exemption from sentencing"[16]. The aim of this draft law was to incorporate extenuating circumstances into the Criminal Code for perpetrators of offences who "reveal the identity of perpetrators, associates, accomplices or receivers to the authorities" or otherwise, who share with the authorities "the information they have, to allow these individuals to be identified and tracked down" (art. 2). Grounds for mitigation could become grounds for absolution if the information concerned "the organisers of the crimes or ringleaders of the groups responsible for organising the crimes" on the condition that the individuals disclosing the information "are not the organisers or ringleaders themselves" (art. 3). The conditions for the application of this clause are such that these grounds for mitigation were in fact limited to potential "repentants" who committed crimes ten years earlier linked to the "Brabant killings"[17]. Like in Italy and Germany, law on repentants and collaborators of justice became part of the political agenda due to events linked to organised crime and terrorism.

A few months later, in January 1997, a draft law "with the aim of strengthening the fight against organised crime and terrorism"[18] was tabled at the Chamber of Representatives. According to the author of the proposal, MP J.-P. Moerman, the state of affairs in the judicial system (including the Brabant killings) underlined the growing threat posed by organised crime, as well as the emergence of terrorist groups. The MP posited that "a state of necessity" therefore justified the adoption of an "emergency law" in the fight against organised crime and terrorism. The aim of this law would be to encourage collaboration with the legal authorities in the areas concerned, providing a protection system for collaborators, whether repentant or not, and waiving their sentence "regardless of their role in the offences on which they inform (art. 3), as long as they provide key information without which criminal cases linked to organised crime or terrorism could not be solved (art. 2 and 3) or which may spare human lives (art. 10)".

In October 1997 the "parliamentary investigation committee on the changes necessary to the organisation and operating of the police and judicial system, based on the difficulties encountered during the investigation into the Brabant killers" filed its report. The committee proposed that there should be a "definitive, general law to regulate the reduction of sentences" which repentants could obtain in exchange for "complete and useful information"[19]. The report set out the first guidelines for a law on repentants based on the following principles: firstly the principle of *subsidiarity*, under which using a repentant for information can only be justified when there are no other means of obtaining results, and secondly *proportionality* between the seriousness of the offence committed by the repentant and the offence

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[16] *Doc.*, Sen., 1995-1996, n° 1-403/1.

[17] The system was designed for informants to reveal crimes which, alone or in conjunction with other linked crimes, caused the death of at least five people and were impossible to solve after ten or more years.

[18] *Doc.*, Ch., 1996-1997, n° 880/1.

[19] *Doc.*, Ch., 1997-1998, n° 573/7, p. 67.

on which information is provided, and between the incentives granted to the repentant and the information provided. The report also highlights the importance of considering the *"protection of the repentant and their family"*, as well as guaranteeing the *rights of the defence* of the individuals accused by repentants, which means that particular attention must be paid to how credible the repentant and their accusations are. Finally, the committee considered that negotiation with the repentant must be possible in terms of the criminal act, sentencing and sentence enforcement[20].

During the same period, at the end of 1997, the report on the research carried out on repentants at Ghent University a year earlier was sent to the Ministry of Justice[21], and was presented and debated at a conference at the Senate on 8th and 9th October 1998. This report also proposed adopting a legal framework for repentants, by means of an exceptional procedure based around three principles which were very similar to those put forward by the above-mentioned parliamentary committee: a principle of *subsidiarity*, meaning that a repentant can only be used for information when the conventional search and prosecution methods are insufficient; a principle of *proportionality* between the seriousness of the crime committed by the repentant and the crime on which they provide information[22] and between the crime committed by the repentant and the incentives they receive[23]; *checks* carried out as far as possible by the judicial authorities on compliance with the legal conditions for rewarding repentants and on the reliability of the statements they make[24], and finally, a law on repentants which is clear and precise enough to comply with the requirements of the *substantial legality principle*[25].

More specifically, both the report and the parliamentary committee propose establishing a mechanism for negotiation with the future repentant. The repentant's case could be closed[26], or their sentence could be reduced via new grounds for mitigation for informants[27], or they could receive preferential treatment in the enforcement of the sentence (possibly even going as far as non-enforcement of the sentence) in exchange for complete and truthful information[28]. The report underlines the importance of protective mea-

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[20] *Ibid*., p. 67 and 68.

[21] T. De Meester, Ph. Traest, *Rapport de recherche concernant les repentis, l'encouragement et la facilitation du témoignage dans* le cadre *de la procédure pénale et le renversement de la charge de la preuve concernant l'origine de biens dont on soupçonne qu'ils sont le produit d'une activité liée au crime organisé*, drafted at the request of the Ministry of Justice, 1996-1997; unpublished.

[22] This relationship of proportionality implies that a reward is only granted to repentants when they inform on, or shed light on, serious crimes and/or crimes which are at least as serious as those committed by the informant *Colloque réforme droit pénal, Sénat, 8-9 octobre 1998*, Antwerpen, Maklu, 1998, p. 130 and 131.

[23] *Colloque réforme droit pénal, Sénat, 8-9 octobre 1998*, *op. cit*., p. 131. M.-A. Beernaert considers that the authors were in fact aiming more for a relationship of proportionality between the importance of the information provided by the informant and the benefits granted to him/her in exchange for this (M.-A. Beernaert, *Repentis et collaborateurs…*, *op. cit*., p. 87).

[24] *Colloque réforme droit pénal, Sénat, 8-9 octobre 1998*, *op. cit*., p. 132.

[25] *Ibid*., p. 132.

[26] *Ibid*., p. 133-138.

[27] *Ibid*., p. 140 and 141.

[28] *Ibid*., p. 140 and 141.

sures for repentants and their families to ensure the efficiency of the system[29]. and of the rights of the defence to ensure that the criminal law judge cannot convict a defendant solely on the basis of information provided by the repentant[30].

In November 1998 two MPs, A. Dusquennes and J.-P. Moerman, tabled a draft law with the aim of "granting repentants immunity from criminal proceedings as part of the fight against organised crime"[31]. Acknowledging the failure of traditional investigation methods in fighting organised crime and terrorism[32], the draft law proposed establishing a system for repentants in the context of the fight against organised crime, through granting immunity from criminal proceedings to the perpetrators of serious offences in exchange for useful information, depending on the importance of this information. The proposal put forward a two-pronged approach: if the repentant provides information before their appearance in trial court, prosecution could be terminated for all or some of the offences committed, depending on the importance of the information disclosed. If information is provided after the repentant faces trial, they could be granted advantages related to sentence enforcement[33]. The text sets the condition of compliance with the principle of proportionality between the offences committed by the repentant and those which they divulge[34], and prescribes various measures in order to uphold the rights of the defence of those concerned by the revelations (including non-anonymity of the repentant and not allowing sentencing solely based on information provided by repentants). The proposal remains classic on these points, but includes a more innovative section on witness protection for repentants, with a non-exhaustive list of non-penal protective measures (new identity, financial assistance, etc.) and suggests creating a "protection mechanism for repentants at European level, as the limited size of the country makes relocating (repentants) difficult"[35].

On 8th December 1998 the parliamentary committee "in charge of studying organised crime" submitted its report[36]. On the issue of repentants, the committee observed that as things stood, there was nothing to prevent the Public Prosecutor from making agreements with repentants in exchange for various types of advantage, from closing the case without further action to delivering more lenient closing arguments before the trial judge[37], The committee was critical of the use of special investigation techniques outside of any specific legal framework[38], and argued that such agreements made in

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[29] *Ibid*., p. 140 and 141.
[30] *Ibid*., p. 137 and 138.
[31] *Doc*., Ch., 1998-1999, n° 1813/1.
[32] *Ibid*., p. 1.
[33] *Ibid*., p. 3, 4 and 8.
[34] The degree of severity of the offence committed by the repentant must be lower than that of the offence which may be brought to trial following the repentant's accusations (art. 4,3°) and certain particularly serious crimes committed by the repentant are not subject to negotiation.
[35] *Doc*., Ch., 1998-1999, n° 1813/1, p. 13.
[36] *Doc*., Sén., 1998-1999, n° 1-326/9.
[37] *Ibid*., p. 427.
[38] *Doc*., Sén., n° 1-326/8, p. 129.

a praetorian manner in the prosecution system undermine the transparency of (criminal) policy[39]. Citing case law on drug and hormone trafficking, the committee argued that it would be preferable to opt for a legal grounds for mitigation system applied "openly, under the supervision of the judiciary"[40] in order to combat organised crime.

1.1.3. *Draft legislation "establishing a system for collaborators of justice" (2001) or the foundations of the future system*

1.1.3.1. *The basic principles: legality, subsidiarity, proportionality and review*

In 1999, under the leadership of the Liberal Minister of Justice M. Verwilghen, a "Federal plan for security and prison policy (31st May 1999) containing a certain draft 34 "Study on the establishment of a system for repentants – witness protection – anonymous witnesses", was published in the context of the fight against organised crime. Draft legislation "*establishing a system for collaborators of justice*" was then drawn up, broadly based on the research carried out at Ghent University and also on the studies undertaken by a Working Group on organised crime set up within the Ministry of Justice. However, this text did not receive universal support from the governing majority and raised a barrage of questions from the opposition[41]. Some of the concerns which the draft raised were the risk of abuse (false testimony), the worry that the promise of receiving an advantage may encourage reoffending, the potential cost of system for collaborators of justice and the immorality of a reward system based on informing[42]. The government therefore commissioned additional research at Ghent University[43], following which the draft text was reworked and submitted on 21st February 2002 in the form of a draft law by two MPs from the governing party, H. Coveliers and J. Herzet[44].

The main ideas outlined in this draft law, and presented below, represented a significant step forward in establishing a law on repentants. Taking into account the ethical objections to the creation of a system for repentants, the proposers of the draft law considered that it was "possible to set up a system for individuals who collaborate with the legal authorities, in certain circumstances and under certain strict conditions", "as an exceptional measure"[45]. This exceptional nature is reflected in the limitation of the measure only to collaborators of justice who have committed offences as part of a criminal organisation, on the basis of article 324-*bis* of the Criminal Code, or have been involved in breaches of international humanitarian law[46]. The fol-

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[39] *Ibid*., p. 73.
[40] *Doc*., Sén., 1998-1999, n° 1-326/9, p. 428, 429 and 525.
[41] See M.-A. Beernaert, *Repentis et collaborateurs…*, *op. cit*., p. 102, notes 65 and 66.
[42] *Doc*., Ch., 2001-2002, n° 1645/1, p. 7.
[43] This research was also followed by a complementary study carried out by the University of Ghent (N. Siron, G. Vermeulen, B. De Ruyver, P. Traest, A. Van Cauwenberghe, *Bescherming van en samenwerking met getuigen*, Antwerpen, Maklu, 2000.
[44] *Doc*., Ch., 2001-2002, n° 1645/1.
[45] *Ibid*., p. 8.
[46] *Ibid*., p. 13.

lowing four principles for the organisation of the system for collaborators of justice, having become somewhat standard, surfaced again in this draft law:

The *principle of legality* entails refusing praetorian forms of agreement "which deviate from the rules generally applicable to criminal procedure" and regulating the system for repentants in a clear, precise and accessible manner, in a *senso strictu* law. The application of this law must uphold the "rights of the defence and the fundamental rights of all parties concerned, and the dignity of justice", whilst ensuring "the credibility of the information provided by collaborators" and guarding against the risk of miscarriage of justice[47].

The *principle of subsidiarity* means, in the areas in which it applies, that collaboration between criminals and the legal authorities is only possible "as a last resort, when the same objective cannot be achieved in another reasonable manner"; that is to say, when traditional investigation techniques are insufficient, subject to evaluation by the Prosecutor. The principle of subsidiarity also means that the Prosecutor must make a balanced choice between the different advantages which may be granted, avoiding promising the most favourable measure in advance if in the end this proves to be unnecessary[48].

The principle of *proportionality* contains three aspects. Firstly, there must be proportionality between the offence committed by the collaborator and the offence which they disclose. When the offence committed by the collaborator is as or more serious than that which they disclose, or when the collaborator is suspected of "certain extremely serious crimes" – crimes which cannot be correctionalised (reclassified as delicts on the basis of Article 2 of the Law of 4 October 1867 on extenuating circumstances)[49], the reward system cannot be used. There must also be proportionality between the advantage granted to the collaborator and the seriousness of the offence on which they provide information (this is to avoid a huge reward being given to the perpetrator of a serious crime for information concerning minor offences). Finally, there must be proportionality between the crime committed by the collaborator and the advantages granted to him or her[50].

Lastly, there is a principle of *review* which means that "to avoid the risk of abuse and miscarriage of justice", the judiciary oversees the legitimacy of the proceedings, to check that the crime in question is indeed defined as such by law and that the collaborator's assertions are "reliable" enough to justify a reward[51].

1.1.3.2. *Practical aspects and "miscellaneous provisions"*

On a practical level, the proposition puts forward three different advantages for collaborators, which come as no surprise. The agreement made according to the rules with the Public Prosecutor or the Federal Prosecutor

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[47] *Ibid.*, p. 10.
[48] *Ibid.*, p. 11.
[49] *Ibid.*, p. 14.
[50] *Ibid.*, p. 11-13.
[51] *Ibid.*, p. 14 and 15.

should allow the *legal proceedings to be ended*, as long as the repentant honours their commitments. Their compliance will be evaluated by the investigative or trial bodies. The Public Prosecutor must ask for an opinion from the Federal Prosecutor before making any commitment to the repentant, and the agreement must be signed by the Federal Prosecutor (art. 5, § 2). The Federal Prosecutor plays a coordinating role, keeping a list of memoranda of agreements made (art. 17, § 3), to avoid different decisions coming into conflict or several promises being made in different judicial districts for the same case, and to ensure that there is consistency between the criteria and conditions for granting a particular promise[52]. The trial courts, when processing a case in which an agreement has been made, will evaluate legality but not expediency: if the trial judge observes that the required conditions for ending legal proceedings are present, that the memorandum has been adequately drafted and the agreement set out within it has been respected, then he/she must end the legal proceedings (art. 9). Collaboration with the legal authorities thus constitutes *legal grounds for mitigation (extenuation or absolution)*, taking into account the principle of proportionality and its many implications. Accordingly, as long as the disclosures are "revealing, truthful and complete", whether they are made before or after legal proceedings commence, or whether or not they lead to positive results, the Prosecutor will draft a written memorandum requiring the application of grounds for mitigation[53]. Here again, the role of the Public Prosecutor is particularly important; although it is not guaranteed that the grounds for mitigation which he/she calls for will be granted, the agreement which he/she signs with the collaborator nevertheless limits the trial courts to assessing legality, i.e. checking "if the legal conditions are fulfilled for exemption from punishment or sentence reduction"[54]. Lastly, the proposal states that the Public Prosecutor or Federal Prosecutor can also promise *favourable treatment concerning sentence enforcement*[55].

Finally, in the "miscellaneous provisions" at the end of the text, three important issues are addressed which concern, directly or indirectly, the rights of the defence. Article 20 firstly stipulates that the statements made by a collaborator of justice can be used to bring legal proceedings for other offences than those mentioned under the draft law but cannot be used as evidence in these proceedings. Article 21 establishes a "legal minimum evidence" system which precludes the use of statements made by collaborators of justice as evidence for one of the offences concerned if they are not "corroborated to a great extent by other forms of evidence"[56]. The statements made by repentants are considered weak, and the aim here is to avoid these statements alone being used as proof of a crime. Furthermore, article 22 states that partial or total anonymity cannot be granted to collaborators of justice, to "guarantee as far as possible that these statements (made by col-

[52] *Ibid.*, p. 20.
[53] *Ibid.*, p. 27-29.
[54] *Ibid.*, p. 37.
[55] *Ibid.*, p. 29 and 30.
[56] *Ibid.*, p. 50.

laborators) can be refuted", which makes it impossible to "combine the status of collaborator of justice and that of anonymous witness, (…) a combination which is considered to limit the rights of the defence too drastically"[57]. However, collaborators of justice can benefit from protective measures created for witnesses with a criminal record.

1.1.3.3. *Opinions of the Council of Europe expert committee and the Council of Public Prosecutors*

It should be noted that the text of the government's 2001 draft legislation, identical to that discussed above, was submitted by Minister of Justice M. Verwilghen for an opinion from an independent expert committee of the Council of Europe. In their report submitted in January 2002[58], the experts broadly endorsed the main lines of the draft. They wondered, however, if in the light of the events of 11th September 2001 crimes linked to terrorism should fall under the scope of the crimes covered in the draft. They recommended that the collaborator should receive assistance from a lawyer during discussion of the memorandum. As regards the rest, the experts commended the "transparency" of the agreements concluded in relation to the rights of the defence and the adversarial principle. However, they queried the prohibition of the use of collaborators who have committed serious crimes, if their truthful and complete testimony brings to light information on other serious crimes[59].

During the same period, in January 2002, the Council of Public Prosecutors submitted an opinion at the request of the Minister of Justice. The main elements of this were that the Council emphasised the need to protect collaborators, and unlike the experts from the Council of Europe, argued in favour of the possibility of providing information anonymously, stating that anonymity was "the most effective means of protection for the collaborator"[60].

1.1.4. *From 2001 to 2014: variations on a theme…*

1.1.4.1. *The flurry of draft laws continues*

On 10th August 2001, faced with the stagnation of the government's draft law, a legislative proposal "establishing a system for repentants" was tabled by T. Van Parys, J. Vanderzeuren, S. Verherstraeten et G. Bourgeois[61]. The text only differed significantly from the draft law (in Covelier and Herzet's proposal) on two points: firstly, the substantive scope of the law is reserved for offences under article 90-*ter*, § 2-4 of the Code of Criminal Procedure and those committed in the context of a criminal organisation, covered in article 324-*bis* of the Criminal Code; secondly, article 22 of the draft law/initial proposal which states that repentants cannot provide anonymous

[57] *Ibid*., p. 41.
[58] M.-A. Beernaert, *Repentis et collaborateurs…*, *op. cit*., p. 100 and 101.
[59] *Ibid*., p. 100 and 101.
[60] *Ibid*., p. 101.
[61] *Doc*., Ch., 2000-2001, n° 1384/1.

testimony is omitted. On this point, the authors of the proposal are therefore closer to the position of the Council of Public Prosecutors.

Following this, a number of proposals were tabled up until 2014. They were often submitted by the same MPs, and were frequently a literal or very slightly amended "copy-paste" of the draft law. On 29th October 2003, a new draft law establishing a system for repentants, an exact copy of the one submitted on 10th August 2001[62], was tabled by T. Van Parys and J. Vanderzeuren. The two amendments to the government's draft law of 2001 mentioned above were included in this text. A few days later, on 6th November 2003, a draft law "establishing a system for collaborators with justice" was tabled by M. Taelman, F. Borginon and C. Marinowe[63]. Unlike the two previous proposals, it extended the substantive scope of the system for collaborators to offences under article 324-*bis* of the Criminal Code and offences under articles 136-*bis*, 136-*ter* and 136-*quater* of the Criminal Code (crimes of international humanitarian law). Furthermore, article 22 of the initial draft law (refusal of anonymity for collaborators of justice) was reincorporated.

On 16th January 2008, a new draft law establishing a system for repentants was submitted by S. Verherstraeten and associates. In this text the idea of limiting the scope of the system to offences under article 90-*ter*, § 2-4 of the Code of Criminal Procedure and article 324-*bis* of the Criminal Code resurfaced again. Article 22 on the refusal of anonymity for collaborators of justice is also retained. This draft law was re-submitted on 27th June 2011[64]. Later, on 17th November 2014, a new draft law was tabled by S. Becq, S. Verherstraeten and R. Terwingen[65], with a similar text to the previous proposal.

It should be noted that when Framework Agreement 2002/475/JAI of 13th June 2002 was transposed by the Law of 19th December 2003 on terrorist offences[66], certain MPs made an unfinalised proposal to incorporate an extenuating circumstance for specific denunciations concerning terrorist offences[67].

1.1.4.2. *A helping hand from the judicial authorities*

The same year, in an address made on the occasion of the ceremonial reconvening of the Cour d'Appel de Liège on 1st September 2014, the General Prosecutor Ch. De Valkeneer, like his colleague in Brussels, J. Delmulle, launched an appeal for the adoption of a law governing the system for repentants or collaborators of justice. The General Prosecutor expressed his preference for the term "collaborator of justice" rather than "repentant", due to the implication of "regret" or "atonement" that the second term holds, when in fact it is more a case of exchanging reciprocal advantages as a form of settlement[68].

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[62] *Doc*., Ch., 2003-2004, n° 358/1.
[63] *Doc*., Ch., 2003-2004, n° 399/1.
[64] *Doc*., Ch., 2010-2011, n° 1631/1.
[65] *Doc*., Ch., 2014-2015, n° 629/1.
[66] *M.B*., 29th December 2003.
[67] *Doc*., Ch., 2003-2004, n° 258/3, p. 1; *Doc*., Sén., 2003-2004, n° 3-332/2, p. 1.
[68] Ch. De Valkeneer, "Quelques réflexions à propos de la prescription de l'action publique et des 'repentis' ou collaborateurs de justice", *Rev. dr. pén. crim*., 2014, p. 1083-1102.

He pointed out that the European Court of Human Rights was not opposed to the adoption of such a system in the fight against serious crime, although the Court highlighted the risk of undermining the fairness of proceedings, due to the possibility of false or dubious testimony being provided by "repentants" interested in the advantages offered by the system or acting out of a desire for revenge[69]. However, as long as transparency is guaranteed and the testimony of collaborators is corroborated by other evidence, case law from the Court seems to support the principle of the system[70]. The General Prosecutor acknowledged that using the procedure can pose ethical questions, but maintained that the "defence of the foundations of society" which are endangered by crime justifies the use of a sort of "*a posteriori* state of necessity", as long as a principle of transparency and legal minimum evidence is respected, preventing legal decisions from being taken solely on the basis of the repentant's testimony[71].

1.2. *Case law developments before the Law of 2018*

1.2.1. *Case law on informing as grounds for mitigation in the context of narcotics*

A form of collaboration with the legal authorities appears mainly in case law decisions in the area of drug trafficking. The Law of 9th July 1975, amending the law of 24th February 1921 on narcotics[72] established grounds for mitigation, drawing on articles 300 and 304 of the Criminal Code, with the aim not of preventing future offences but of arresting the perpetrators and participants in offences already committed. The authorities' objective in incorporating grounds for mitigation for informants was clear: "in this area where, as proved by experience, the most serious crimes are committed by members of well-organised associations (…), there was a need to find an effective way of aiding the discovery of all guilty parties"[73].

In order to constitute grounds for mitigation (extenuating circumstance or grounds for absolution), the information provided must comply with several conditions[74]:

1°) The information provided to the legal authorities must concern the *identity of perpetrators* of offences, or if this is not known, the *existence of these offences* (Law of 24th February 1921, art. 6, subparagraphs 2 and 3).

2°) The information must *not be known to the authorities*. Case law stipulates here that "the legislator's intention is for the accused to "reveal" information to the legal authorities, in other words, shed light on facts previ-

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[69] ECHR., *Cornelis c. the Netherlands*, 25 May 2004, p. 15.

[70] For an analysis of the case law quoted by the author, see M.-A. Beernaert, "La recevabilité des preuves en matière pénale dans la jurisprudence de la Cour européenne des droits de l'homme", *Revue Trimestrielle des droits de l'homme*, 2007, p. 88 and 89.

[71] Ch. De Valkeneer, "Quelques réflexions…", *op. cit*., p. 1101.

[72] Law of 24th February 1921 on trafficking of poisonous, soporific, narcotic, psychotropic, disinfectant and antiseptic substances and substances which could be used for the illicit manufacture of narcotic and psychotropic substances.

[73] *Doc*., Sén., 1970-1971, n° 290, p. 5.

[74] Ch. Guillain, *op. cit*., p. 285-288.

ously unknown to the legal authorities"[75]. It is also considered that there is no "revelation" when the information shared is already known to the authorities, due to investigations carried out by the authorities or testimony provided by other individuals[76] for example, and in this case, the accused may not invoke the advantage of grounds for mitigation[77]. It should be noted that this is particularly hazardous for the accused, who risks retaliation from the person who their information concerns, to check if the content of their deposition is already known to the authorities.

3°) Although this is not prescribed by law, case law deems that the information revealed must be *truthful and complete*, to the extent of the informant's knowledge[78]. Case law is strict on the evaluation of this criteria, and judges require informants to "reveal not only their own role, but also all information they hold on the circumstances and perpetrators of the crime"[79]. This means that the information is not considered truthful and complete if the statements made are vague and general, if they do not allow the perpetrators to be identified and prosecuted[80], if they are unreliable[81] or if selectively given information causes the police to be misled[82]. The same applies if informants do not supply the identity of all persons with whom they have come into contact[83], if they conceal their own role in drug-related offences[84], or if they refuse to say where they have hidden the drugs in their possession[85]. Although the requirement for a clear and complete declaration is understandable with regard to the "reward" granted to the informant, it can sometimes seem excessive. Thus, the criminal court did not hesitate to grant the reduction in sentence to an accused who admitted only at the court hearing that he was smuggling drugs, whereas he had previously claimed the opposite[86]. Similarly, defence lawyers have also argued that "the aforementioned article 6 does not state that the guilty party who reveals information may not, at that moment, forget anything or anyone; as in this case, this can easily happen when the information disclosed spans a certain amount of time and distance"[87], and that "it can never be verified if a person has revealed the identity of all unknown perpetrators"[88].

In legal literature, many authors cast doubt on the appropriateness and

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[75] Ghent, 31st January 1994, quoted by Cass., 26th April 1994, *Pas*., 1994, I, p. 408.
[76] Cass., 20th June 1977, *Pas*., 1977, I, p. 1070; Antwerp, 2nd December 1977, *Pas*., 1978, II, p. 46, Cass., 26th April 1994, *Pas*. 1994, I, p. 408.
[77] Cass., 7th March 1978, *Pas*., 1978, I, p. 765.
[78] Antwerp, 2nd December 1977, *Pas*., 1978, II, p. 46.
[79] Cass., 18th January 2017, n° P.16.1128., concl. av. gén. N. DE BRAUWERE (available on Juridat).
[80] Brussels, 14th October 2008, *T. Strafr*., 2009, p. 318 and note; Cass., 8th September 1987, *Pas*., 1988, I, p. 25; Cass., 8th December 1992, *Pas*., 1992, I, p. 1354.
[81] Cass., 8th February 1984, *Rev. dr. pén*., 1984, p. 598.
[82] Antwerp, 7th February 2001, *Vigiles*, 2001, p. 190 and note F. VERSPEELT, "Les exploitants de dancing et les stupéfiants".
[83] Cass., 7th March 1978, *Pas*., 1978, I, p. 766.
[84] Cass., 24th February 1998, *Pas*., 1998, I, p. 106.
[85] Corr. Liège, 13th November 1981, *J.L*., 1982, p. 317.
[86] Brussels, 16th April 1997, *R.W*., 1997-1998, p. 1506 and note W. MAHIEU.
[87] Cass., 14th September 1982, *Rev. dr. pén*., 1983, p. 385.
[88] Cass., 7th March 1978, *Pas*., 1978, I, p. 766.

effectiveness of the system. Three main criticisms are cited: 1º) The system fails to reach its objectives: the information provided generally concerns consumers, never major traffickers[89]. In practice, article 6 has not "served to curb the spread of drug trafficking and consumption in any way"[90]; 2º) The application of article 6 of the law, a special scheme in the midst of a range of provisions applying harsh sentences for a broad spectrum of behaviours, has without doubt encouraged more arbitrary police conduct"[91]; 3º) In practice, the use of informants seems extremely rare – "either judges recoil from rewarding the disclosure of information or pardoning offences which they consider too serious, or the criminals themselves are reluctant to use the informant system to improve their outcome"[92].

1.2.2. *The "Habran" affair, or the validity of evidence collected anonymously or not subject to the adversarial principle*

1.2.2.1. *A few principles of the law of evidence in Belgian criminal procedure*

Another important question raised by negotiations with collaborators or "repentants" is to what extent the information they provide can be considered as evidence. To delve further into this issue, which no doubt had an impact on the regulation on "testimony" set out in the Law of 22nd July 2018, it is necessary to revisit several principles governing the law of evidence in Belgian criminal procedure.

Under Belgian law, the burden of proof rests upon the prosecution (usually the Public Prosecutor), under the supervision of the judge. The accused is not obliged to collaborate in the submission of evidence and has the right to remain silent, and can adopt a strictly passive attitude if he/she so wishes[93]. Belgian law also includes the principle of evidence by all means and there is no hierarchy applied to the different forms of evidence[94], which means that all evidence is admissible[95], in theory. However, the non-hierarchical principle is not absolute and there are two aspects which should be noted.

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[89] R. Lallemand, "Les aspects légaux et idéologiques de la problématique des drogues. 'La drogue contre le droit moderne?'", in *Drogues et Prisons*, *Les Dossiers de la Revue de droit pénal et de criminologie*, La Charte, 1995, p. 10; Ch. Guillain, *op. cit*., p. 288-290.

[90] M. Preumont, *op. cit*., p. 514.

[91] M. Nève, note under Corr. Liège, 13th December 1989, *J.L.M.B*., 1991, p. 247. In the same vein, see E. Boutmans, "The situation in Belgium", in *e.a.* H.-J. Albrecht (ed.), *Drugs Policies in Western Europe*, Freiburg, Max Planck Institut, 1989, p. 96: "The latter clause has contributed very little to the dismantlement of major narcotic gangs, but it certainly has allowed the police to arrest lots of drug users and street pushers".

[92] M. Preumont, *op. cit*., p. 514. The preparatory work for the Law of 22nd July 2018 explains the infrequent use of grounds for mitigation differently, in part: the lack of prior negotiation between the Public Prosecutor and the repentant, insufficient guarantees for repentants that they will actually obtain the privileges granted, conditions for informing which are sometimes too strict, absence of sufficient protective measures to ensure the safety of repentants and their family (*Doc*., Ch., 2017-2018, n° 3016/1, p. 12).

[93] Cass., 9th October 1990, *Pas*., 1991, I, p. 139.

[94] As opposed to the legal proof system, in which the probative value of evidence is established by law.

[95] Cass., 30th March 2011, *J.L.M.B*., 2011, n° 31, p. 1508 and s. and note A. Masset.

Firstly, the testimony given before the trial judge under complete anonymity can only be taken into consideration as evidence in the case of offences for which it has been authorised (namely, offences mentioned under article 90-*ter* of the Code of Criminal Procedure or those committed in the context of a criminal organisation referred to in article 324-*bis* of the Criminal Code)[96]. Also, in accordance with article 189-*bis*, subparagraph 3 of the Code of Criminal Procedure, the sentencing of an individual can never be exclusively, or to a significant extent, based on testimony given under complete anonymity. This type of testimony must always be corroborated *to a significant extent* by other forms of evidence.

Secondly, judges can base their conclusions only on evidence which has been the subject of *adversarial debate* between the parties. The consequence of this rule is that evidence which the parties to the proceedings have not had the opportunity to freely refute cannot be used[97].

1.2.2.2. *The "Habran" affair*

These different principles were enshrined in Belgian and European case law to a great extent due to the "Habran" affair, which takes its name from one of the accused involved in organised crime activities (fatal robbery of an armoured car). This case involved several criminal trials and several Court of Cassation judgements[98].

During one of the criminal trials, the jury convicted Mr Habran and other accused on the basis of accusations made against him by a witness who was a member of the criminal organisation run by Mr Habran. This witness firstly had the status of indicator, and received rewards under this status, and later became a witness, for which he received financial assistance within the scope of protective measures for at-risk witnesses (Code of Criminal Procedure, art. 102-111).

At the Court of Cassation, Mr Habran and other accused questioned the validity of the testimony from the perspective of the right to a fair trial[99]. The Court of Cassation examined the action from three points of view[100].

From the angle of ensuring a fair trial, the Court considers that "it is the responsibility of the trial judge to assess how far the venality of the motives for providing testimony affect the probative value of evidence, as witnesses' reasons for testifying may raise doubts about their credibility, with-

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[96] See article 86-*quinquies* of the Code of Criminal Procedure: "les témoignages qui ont été obtenus en application des articles 86-*bis* et 86-*ter*, ne peuvent être pris en considération que comme preuves d'une infraction visée à l'article 90-*ter*, §§ 2 a 4, ou d'une infraction commise dans le cadre d'une organisation criminelle, visée à l'article 324-*bis* du Code penal".

[97] Cass., 25th September 2002, *Pas*., 2002, p. 1740; Cass., 6th November 2002, *Pas*., 2002, p. 2120.

[98] Brussels Assize Court, 28th September 2010 and 30th September 2010; Cass., 19th March 2008, 30th September 2009, and 30th March 2011.

[99] The accused argued that "testimony can only be taken into consideration, in a fair trial, if it is given by a citizen wishing to assist in the workings of the justice system and not by a person testifying out of personal interest" (Cass., 30th March 2011, *J.L.M.B*., 2011, n° 31, p. 1508 and 1509).

[100] Cass., 30th March 2011, *J.L.M.B*., 2011, n° 31, p. 1508, note A. Masset.

out making it impossible to hold a fair trial"[101]. It adds that article 6 of the European Convention on Human Rights "does not (…) prevent the judge from taking evidence from the statement made by a protected witness (…), even if the witness in question is an indicator who has decided after having provided information under this status to testify officially"[102].

From the angle of the rights of the defence, the Court considers that "official testimony by a person who has previously provided information under the status of indicator is not contrary to the general principle of law on the respect of the rights of the defence, as the effect of this is to submit the testimony to adversarial public debate between the parties"[103].

Finally, regarding the exclusion of illegally or improperly obtained evidence, the Court stipulates that "taking into account statements from a former indicator does not, in itself, undermine the general principle of law on the exclusion of illegally or improperly obtained evidence in the area of law enforcement", even if "the person who was in danger due to statements they have made or are about to make has consequently benefitted from protective measures and financial assistance prescribed by law"[104].

The case was brought before the European Court of Human Rights[105]. Mr Habran and other accused asserted that these contentious witness statements had no probative value as they had been obtained outside of the rules of law and came from "repentant" indicators whose collaboration with the legal authorities had been confidentially negotiated in exchange for benefits granted by the prosecuting authorities. They considered that the non-disclosure of discussions between the prosecuting and investigating authorities and the contentious witnesses before they gave their official statements had prevented the Criminal Court from assessing the credibility and reliability of the evidence against them. This also prevented acknowledgement of the fact that the evidence had been negotiated by the abovementioned authorities in exchange for advantages[106]. The applicants therefore deemed that there had been a violation of article 6 of the Convention (right to a fair trial).

The European Court of Human Rights began by highlighting that the "the use of statements given by witnesses in return for immunity or other advantages may cast doubt on the fairness of the proceedings", due the risk of manipulation stemming from statements which may have been made "purely in order to obtain the advantages offered in exchange, or for personal revenge"[107]. The Court continued by stating that "the applicants might legitimately have wondered whether their indictment and conviction had been based on allegations that had not been fully verified"[108].

However, the Court also pointed out that "the Convention does not preclude reliance, at the preliminary investigation stage and where the nature

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[101] *Ibid*., p. 1509.
[102] *Ibid*., p. 1509.
[103] *Ibid*., p. 1509.
[104] *Ibid*., p. 1510.
[105] ECHR., 17th January 2017, *Habran et Dalem c. Belgique*.
[106] *Ibid*., § 105.
[107] *Ibid*., § 100.
[108] *Ibid*., § 103.

of the offence may warrant it, on sources such as anonymous informants", but that the use of these sources at a later stage by the trial judge as a basis for sentencing "is acceptable only if adequate and sufficient safeguards against abuse are in place, in particular a clear and foreseeable procedure for authorising, implementing and supervising the investigative measures in question"[109]. In this case, the Court raised the points that the witness statements in question had not been given anonymously, that the applicants were aware of their identity and that their official statements were part of the evidence in the enforcement record which the defence was able to access (§ 104), that during the debates at the Criminal Court one of the witnesses who was present was given a hearing and cross-examined by the defence (§ 107), that although it was not possible to cross-examine the other witness, who was deceased, his statements were nonetheless read out to the jurors by the president (§ 108), that the statements of the two witnesses were consistent, even though they came from different sources (§ 110) and that the applicants were not prevented from contesting the reliability of the witnesses, nor the content and credibility of their statements, throughout the whole proceedings (§ 113). Finally, the Court noted that other evidence such as the ballistics and other "non-suspect" witness statements which were consistent with those of the witnesses in question were taken into account in sentencing the applicants (§ 105).

The Court concluded that the proceedings as a whole had been supported by sufficiently solid guarantees and had not undermined the right to a fair trial.

1.3. *Conclusion*

Since 1995, in view of the deadlock facing the Belgian legal system in its attempts to solve the case of the Brabant killings which had taken place around ten years earlier, there has been a slow but "unstoppable rise of repentants and/or collaborators of justice in the criminal justice system"[110]. As regards legislation, the turning point was the government's draft law, finally presented in the form of a legislative draft on 21st February 2002 by H. Coveliers and J. Herzet. This draft set out the main principles of the system, and all subsequent draft laws were very slight variations on the theme. From one text to the next, the main differences were of a terminological nature ("repentants" or "collaborators of justice") or regarded the substantive scope of the law and the issue of repentants' anonymity when providing evidence.

On a political level, it is striking to note that most of the draft laws came from Flemish-speaking MPs, going beyond political party boundaries in the North of the country. Similarly, although each proposal raised objections due to the ethical questions posed by the legal adoption of a system based on informants, the argument was quickly put to one side in the light

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[109] *Ibid*., § 101.

[110] We have borrowed this phrase from an old contribution from M.-A. Beernaert ("De l'irrésistible ascension des 'repentis' et 'collaborateurs de justice' dans le système penal", *Déviance & Société*, 2003, n° 1, p. 77-91).

of the need for efficient law enforcement on organised crime. French-speaking MPs seemed much less enthusiastic and possibly more sensitive to the ethical aspect. This cultural difference no doubt explains why despite the numerous proposals, a law on the subject was not approved until 2018. This vote was certainly facilitated by the position of the judicial authorities and the endorsement of European case law.

The drafting of this law was partially influenced by case law on informing as grounds for mitigation in the area of narcotics and the "Habran" case law regarding the admissibility of evidence taken from statements made in exchange for advantages granted to witnesses.

2. *Current legislation*

Belgium has recently incorporated into its body of legislation the possibility for an offender to collaborate with the legal authorities in exchange for a reward of penal nature[111], through the Law of 22nd July 2018. Before presenting this legislation, a few points of terminology must be explained.

We will use the term "collaborator of justice" rather than "repentant", even though the first term may cause some confusion insofar as it could potentially cover a broader range of situations in which collaboration occurs than that envisaged by the Law of 22nd July 2018. However, the term "repentant" implies "a form of regret" on the part of the collaborator, a hypothesis which in many situations seems highly dubious.

Also, to specify the type of assistance provided by the collaborator, we will refer to this collaboration as "procedural"[112]. The adjective "procedural" refers to the practicalities of the collaboration: what is expected from collaborators of justice and what they contribute "to the administration of criminal justice through assisting the authorities in their investigation and evidence-gathering work"[113]. Procedural collaboration can be governed by a law, or not, can give entitlement to a reward or a simple favour (subject to the discretion of the Public Prosecutor) and the reward in question can be granted irrevocably or temporarily[114].

A procedural collaboration can be "punitive", "preservative" or "limitative"[115]. Collaboration is deemed "punitive" when the contribution concerns an offence which is definitively in the past. It can have "preservative" aspects when it eliminates a danger linked to acts which "constitute one of the first signs of a wider criminal plan"[116]. The offences targeted here can be "either

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[111] The Law of 22nd July 2018 amending the Code of Criminal Procedure regarding promises on prosecution, sentence enforcement or detention made following testimony in the context of the fight against organised crime and terrorism (M.B., 7th August 2018) incorporated articles 216/1-216/8 into the Code of Criminal Procedure.

[112] M.-A. Beernaert, *Repentis et collaborateurs dans le système pénal*: *analyse comparée et critique*, Brussels, Bruylant, 2002, p. 22 and 23.

[113] *Ibid*., p. 23.

[114] *Ibid*., p. 398 and 399.

[115] *Ibid*., p. 395-397.

[116] R. Merle and A. Vitu, *Traité de droit criminel*, t. I, 7 éd., Paris, Cujas, 1997, p. 606, quoted by M.-A. Beernaert, *Repentis et collaborateurs…*, *op. cit*., p. 10.

a simple expression of criminal intentions, or preparatory actions for a new crime"[117]. Lastly, collaboration has a "limitative" scope when it allows prevention of new damage arising from a previously committed crime. The aim is to use collaboration to prevent damaging consequences stemming from a criminal activity[118].

Finally, procedural collaboration can be "internal" or "external". It is "internal" when the offences on which the collaborator provides information are part of the same set of offences for which the collaborator is being prosecuted or has been convicted. It is "external" when there is no such link: the collaborator makes statements regarding another case than that for which he or she is being prosecuted or has been convicted.

2.1. *The conditions for application of the system*

To be able to use procedural collaboration, an offence mentioned in article 90-*ter*, § 2-4 of the Code of Criminal Procedure (2.1.1) must have been committed. A set of principles must also be respected: the principles of adequacy and relevance (2.1.2), necessity and subsidiarity (2.1.3), proportionality (2.1.4) and in certain cases, absence of danger (2.1.5).

2.1.1. *Offences under article 90-*ter*, § 2-4 of the Code of Criminal Procedure*

Belgian law stipulates that the third party named by the informant must have committed or tried to commit a crime belonging to the list of offences in article 90-*ter*, § 2-4 of the Code of Criminal Procedure (art. 216/1). This list of offences stemmed from a very different approach from that followed in the Law of 22nd July 2018, due to the fact that this article 90-*ter*, § 2-4 originally aimed to determine offences for which phone tapping was authorised. The adaption of this list to provide guidance on the scope of the use of collaboration was justified in the preparatory work by the severity of "the crimes which most disrupt society" which the list included[119]. The list has become longer and longer over the years, which puts the "severity" criterion into perspective[120]. As we will see, using this list has led to certain difficulties (see 2.1.2 - 2.1.4 below). It should be noted that terrorist offences are part of this list (Criminal Code, art. 137-141-*ter*).

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[117] M.-A. Beernaert, *Repentis et collaborateurs…*, *op. cit*., p. 396. Certain provisions in Belgian law criminalise these types of actions in the context of terrorism (structured associations with a view to committing terrorist offences, financing terrorist groups, spreading messages inciting people to commit terrorist offences, recruitment, etc.). In this sort of preservative collaboration, "collaborators do more than simply cooperating in giving evidence, as they prevent further damages from occurring" (M.-A. Beernaert, *Repentis et collaborateurs…*, *op. cit*., p. 537).

[118] Certain terrorist offences under Belgian law fall into this category of offences (hostage taking, kidnap of minors, etc.).

[119] *Doc*., Ch., 2017-2018, n° 3016/1, p. 24.

[120] *Doc*., Ch., 2017-2018, n° 3016/4, p. 10. During the focus group organised on 23rd October 2019 at USL-B, some parties (lawyers, magistrates and professors) criticised the scope of the law as being too wide. During this same meeting, other parties (police officer and magistrate) defended the use of article 90-*ter* of the Code of Criminal Procedure. This Focus Group was conducted as part of this research and allowed us to hear the opinion and comments of magistrates, police officers and academics.

The scope of the system was even broader in the draft law, as collaboration was also possible for offences committed as part of a criminal organisation[121]. The official title of the Law of 22nd July 2018 ("combatting organised crime and terrorism") could mislead the inattentive reader as to the real scope of use of collaboration in Belgium.

2.1.2. *The principles of adequacy and relevance*

The principle of adequacy means that collaboration must be suitable in order to achieve "disclosure of the truth" (Code of Criminal Procedure, art. 216/1). Therefore, criminal law should only authorise collaboration for types of crime where this type of collaboration is effective. As collaboration is possible for all offences mentioned in article 90-*ter*, § 2-4 of the Code of Criminal Procedure, including attempted offences, the law does not seem to comply with this principle. Collaboration therefore becomes possible for telephone harassment: although we can understand why this is on the list of offences for which phone tapping can be used, it is harder to understand in what way it respects the principle of adequacy[122].

The principle of adequacy is often hard to demonstrate[123]. However, with regard to terrorism, collaboration is presented as more effective (and therefore complies better with the principle of adequacy) than in other litigation[124].

The principle of relevance relates to this same idea of the effectiveness of collaboration, but this time not with regard to the scope set out by law, but to its use by the police and legal authorities in a particular case.

2.1.3. *The principles of necessity and subsidiarity*

The principle of necessity stipulates that collaboration must be indispensable, that is to say that without the use of collaboration, it would be impossible to impart criminal justice. This principle of necessity is once again difficult to demonstrate[125]. It involves periodically checking if, for the offence concerned, criminal justice is indeed impossible without collaboration. Under this principle, it follows that the legislator must from time to time modify the scope of the law; there is nothing to say that criminal justice, which today finds itself powerless faced with a criminal phenomenon, should remain so tomorrow, thanks to new investigation methods which would mean that collaboration would no longer be "indispensable"[126].

This principle of necessity, which regards the legislative definition of the scope, in this case blends seamlessly with the principle of subsidiarity. The police and legal authorities should only use collaboration if, in the case at hand, "prosecution of the offence cannot be carried out in any other rea-

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[121] *Doc*., Ch., 2017-2018, n° 3016/1, p. 62.

[122] It seems to us that collaboration will not be particularly "effective" in demonstrating the guilt of a "harasser". (Also see *Doc*., Ch., 2017-2018, n° 3016/4, p. 10 and 80).

[123] M.-A. Beernaert, *Repentis et collaborateurs…*, *op. cit*., p. 442.

[124] *Ibid*., p. 564.

[125] *Ibid*., p. 442.

[126] *Ibid*., p. 444.

sonable way"[127] due to the insufficiency of the traditional investigation and prosecution methods[128]. This principle of subsidiarity should be evaluated in *abstracto*[129] (without the need to have tried other techniques and found them lacking) and at the time of authorisation of use of collaboration[130].

These principles of necessity and subsidiarity are formally set out under Belgian law, as collaboration is only possible if "the needs of the investigation demand this and if other investigatory measures seem insufficient (…)" (Code of Criminal Procedure art. 216/1). However, as we have just seen, using a list of offences (Code of Criminal Procedure art. 90-*ter*, § 2-4) which was originally drawn up for a different purpose (phone tapping) and their evaluation *in abstracto*, shows that consideration of these principles is highly theoretical[131]. Despite all this, it seems that it is not in the area of terrorism that the principles of necessity and subsidiarity pose the biggest problems[132].

2.1.4. *The principle of proportionality*

The criterion of proportionality is sometimes understood as demanding a balance between "the principle itself of using collaborators of justice and the type of crime being tackled (the idea being that this type of measure should be reserved for particularly serious crimes)"[133]. Using this interpretation, the aim would be to limit the use of collaboration to certain litigations (see above 2.1.1).

Here, however, the criterion of proportionality[134] will be interpreted differently: it involves the "relationship of proportionality which should exist between the crimes committed by collaborators of justice and the crimes which they are helping to solve (the idea being (…) that a collaborator who has committed more serious crimes than that which he or she is helping to investigate should not be rewarded)[135]. This criterion applies to the legislator (when determining the scope of the system) and to the police and legal authorities (when checking if this proportionality can be said to apply to the case at hand).

The Belgian legislator does not rule out collaboration in cases where the collaborator has committed a certain type of (particularly serious) of-

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[127] *Doc*., Ch., 2017-2018, n° 3016/1, p. 26.

[128] M.-A. Beernaert, *Repentis et collaborateurs…*, *op. cit*., p. 86 and 263; *Doc*., Ch., 2017-2018, n° 3016/4, p. 59.

[129] Ch. De Valkeneer, "Une nouvelle figure dans le paysage pénal belge: le repenti. Analyse de la loi du 22 juillet 2018 concernant les promesses relatives à l'action publique, à l'exécution de la peine ou à la détention consenties à la suite d'une déclaration et considérations critiques concernant le régime des repentis", *La Science pénale dans tous ses États. Liber amicorum Patrick Mandoux and Marc Preumont*, p. 380; *Doc*., Ch., 2017-2018, n° 3016/4, p. 58.

[130] M.-A. Beernaert, *Repentis et collaborateurs…*, *op. cit*., p. 283.

[131] Viewpoint of a magistrate and several lawyers during the Focus Group of 23rd October 2019.

[132] M.-A. Beernaert, *Repentis et collaborateurs…*, *op. cit*., p. 443 and 444.

[133] *Ibid*., p. 24.

[134] In places we write "external" proportionality, to avoid confusion with the principle of "internal" proportionality; see below: 2.2.1.

[135] M.-A. Beernaert, *Repentis et collaborateurs…*, *op. cit*., p. 24.

fence. However, the legislator imposes the requirement of proportionality between "the offence committed [by the collaborator]" and "the offence on which information is provided" (Code of Criminal Procedure art. 216/5 - 216/7)[136]. To clarify this question of proportionality, Ch. De Valkeneer proposes the use of the criterion of the level of penalties[137].

The preparatory work on the interpretation of this principle of proportionality makes it very clear that collaboration is not possible if the offence committed by the collaborator is "*as serious* or more serious than the crime on which information is provided with an end to discovering or investigating said crime"[138]. It seems to us that this prohibition of collaboration for crimes which are "as serious" as the crime on which information is provided risks regularly preventing the use of the collaboration system[139] and is not clearly expressed in the legal text itself.

The legislator indicates that to respect this principle of proportionality, "the level of severity of the possible consequences" resulting from the offence on which information is provided (Code of Criminal Procedure, art. 216/5 and 216/6)[140] should particularly be taken into account. The preparatory work indicates the importance of considering the nature of the consequences of the crime disclosed and how current these are: "Declarations which allow crimes to be *stopped*, (…) and allow *lives* to be *saved* and *serious injuries* to be *prevented* are particularly important"[141]. The legislator therefore recommends that the principle of proportionality should consider not only the degree of severity of the *offences committed*, but also the *interests and values* which are safeguarded or sacrificed by collaboration[142].

In the evaluation of proportionality, the Belgian legislator seems to encourage the police and judiciary authorities to stick to "values which could plausibly be compromised in the case at hand"[143]. To evaluate the degree of plausibility of the threat, it seems very useful to distinguish between the "punitive", "preservative" and "limitative" types of collaboration (see Introduction above). In the case of "preservative" and "limitative" collaboration, the threat to values seems "much more current and tangible" than in cases

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[136] During his hearing in the Chamber, Ch. De Valkeneer illustrated this principle of proportionality by stating that it should not be possible for a candidate for collaboration who has committed a rape to give testimony regarding money laundering (*Doc.*, Ch., 2017-2018, n° 3016/4, p. 59).

[137] Ch. De Valkeneer, "Une nouvelle figure…", *op. cit.*, p. 380.

[138] *Doc.*, Ch., 2017-2018, n° 3016/1, p. 28, emphasis added.

[139] Ch. De Valkeneer, "Une nouvelle figure…", *op. cit.*, p. 380.

[140] Thus, a repeat offender collaborator being prosecuted for forgery (maximum sentence 15 years) could give testimony on a robbery (maximum sentence 10 years) due to the "severity of the consequences of the offence" (*Doc.*, Ch., 2017-2018, n° 3016/1, p. 46 and 47).

[141] *Doc.*, Ch., 2017-2018, n° 3016/1, p. 27, emphasis added. "Particular attention must be paid to the severity of the consequences of the offence revealed by the repentant, *rather than to the penalty itself*" (*Doc.*, Ch., 2017-2018, n° 3016/1, p. 46, emphasis added).

[142] In terms of values, collaboration raises questions on the moral prohibition on informing (and the values of loyalty and solidarity; see below: 2.8.2.1). It can put great pressure on individuals to waive the right to silence. It can also lead to innocent parties being sentenced (if the fact that the information is not reliable goes unnoticed; see below: 2.8.2.3). Regarding the values protected owing to procedural collaboration, it seems that those related to human dignity and moral and physical safety are key.

[143] M.-A. Beernaert, *Repentis et collaborateurs…*, *op. cit.*, p. 441.

of purely "punitive" collaboration[144]. This type of threat should therefore have a greater impact on the operationalisation of the principle of proportionality: "in the case of declarations which concern an *ongoing offence* or an offence (…) *which could cause* serious physical injuries, death or significant damage, or which could prevent more serious crimes, the promise of a reward is particularly justifiable"[145].

2.1.5. *The principle of absence of danger*

When a promise of a reward concerns sentence enforcement (see below 2.2.2), there is an extra condition for the use of collaboration: the collaborator "must not represent a danger to public safety" (Code of Criminal Procedure, 216/6). This extra condition is justified by the fact that the "consequence of the promise is that the prisoner may be released"[146]. The use of the system is therefore not only dependent upon the objective degree of severity of the act (see above: 2.1.1 and 2.1.4), but also upon the "repentant's" personality and his or her presumed "dangerousness".

How can this criterion of absence of danger be operationalised? Should the criterion of reoffending be used? The preparatory work does not touch upon these issues. It should be noted that the status of reoffender does not rule out use of collaboration.

2.2. *The types of promise*

Three types of promise of reward are prescribed by the Belgian system. The "deal" can concern the conduction of prosecution (2.2.1), sentence enforcement (2.2.2) and the place of detention (2.2.3). We will subsequently address the possibility of combining one or more promises (2.2.4).

2.2.1. *Promises relating to the conduction of prosecution*

2.2.1.1. *Promising closure of the case*

The Law of 22nd July 2018 leaves intact the prerogative of the Public Prosecutor to close a case with no further action[147]. There is nothing to prevent the decision to close a case, after informal negotiation between the prosecution and the presumed offender, in exchange for information[148]. Of course, closing a case in this way provides no legal certainty for the collaborator and the promise is therefore "fragile"[149]. Furthermore, the situation of the third party concerned by the revelations is also problematic: "individuals concerned by the repentant's declarations [could] be sentenced on the basis

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[144] *Ibid*., p. 565.
[145] *Doc*., Ch., 2017-2018, n° 3016/1, p. 46.
[146] *Ibid*., p. 36.
[147] *Ibid*., p. 32, 33 and 39.
[148] This possibility has regularly been raised by the authors of previous draft laws (see above: 1).
[149] M.-A. Beernaert, *Repentis et collaborateurs…*, *op. cit*., p. 60.

(and where applicable, on the sole basis) of declarations which stem from interests hidden from the judge and the defence"[150].

2.2.1.2. *The promise of a reduced sentence: the case of terrorist offences*

If the collaborator, whether a natural or legal person, is being prosecuted by the Public Prosecutor, the latter can promise a reward consisting of a reduction of the sentence[151]. A specific – and less generous – sentence reduction system is in place for terrorist offences. We will focus on this specific system.

For serious terrorist crimes[152] (as for crimes committed with violence or threats), the reward takes the form of a promise of "a lower-level sentence with the application of sentence reduction pursuant to articles 80 and 81[153] of the Criminal Code" (Code of Criminal Procedure, art. 216/5, § 1, 1°). For example, in the case of murder, the reasoning is as follows: 1) article 393 of the Criminal Code punishes murder (outside of the context of terrorism) with 20 to 30 years of imprisonment; 2) pursuant to article 138 of the Criminal Code, if the murder is a terrorist offence, the sentence becomes life imprisonment; 3) if a terrorist collaborator benefits from article 80 of the Criminal Code, the sentence can range from three to thirty years of imprisonment.

For lower-level terrorist crimes[154] (as for lower-level crimes committed with violence or threats), the reward takes the form of a "lower-level sentence with the application of sentence reduction pursuant to article 85[155] of the Criminal Code" (Code of Criminal Procedure, art. 216/5, § 1, 2°). Lower-level terrorist crimes are thus punished by one day to five years of imprisonment.

For all terrorist crimes (serious and lower-level), a reduction of the fine and criminal confiscation measures is possible. Regarding fines, the reduction can lead to an amount "lower than the legal minimum" (Code of Criminal Procedure, art. 216/5, § 1, 4°). Regarding criminal confiscation, the reduction can concern optional confiscation and compulsory confiscation, but cannot apply to confiscation of "substances and objects which endanger public or individual safety" (Code of Criminal Procedure, art. 216/5, § 1, 4°). In this case, confiscation is not a penalty but a safety measure (for example, confiscation of weapons, explosives, narcotic substances, etc.)[156].

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[150] *Doc.*, Ch., 2017-2018, n° 3016/4, p. 16.

[151] The preparatory work states that the collaboration system is accessible to legal entities (*Doc.*, Ch., 2017-2018, n° 3016/1, p. 37) but neither this work, nor the law, mentions sentence reduction in the context of the specific penalties applicable to legal entities.

[152] Under Belgian law, custodial sentences for serious crimes range from five years to life imprisonment (Criminal Code., art. 8-11).

[153] These are the articles on admissibility of extenuating circumstances for serious crimes.

[154] Under Belgian law, custodial sentences for "lower-level offences" range from eight days minimum to five years maximum, except for serious crimes which have been reclassified as lower-level offences, for which sentences can be up to twenty years of imprisonment (Criminal Code, art. 25).

[155] This is the article on the admissibility of extenuating circumstances for lower-level offences.

[156] F. Lugentz et D. Vandermeersch, *Saisie et confiscation en matière pénale*, Bruxelles,

For serious and lower-level crimes (crimes and delicts) committed "without violence or threat", the Public Prosecutor can promise an even more attractive reward, such as a simple admission of guilt, a lighter sentence[157] than the legal minimum sentence, a sentence under electronic surveillance, a community service sentence or a probation sentence (Code of Criminal Procedure, art. 216/5, § 1, 3°). However, these options are formally prohibited for terrorist offences. The legislator also deems that perpetrators of terrorist offences "without violence or threat" (for example, it is possible to finance a terrorist activity "without violence or threat") cannot benefit from these more attractive rewards.

As we have seen (see above: 1), before the Law of 22nd July 2018, some grounds for mitigation did exist for informants in specific litigation in Belgium. The Law of 22nd July 2018 did not repeal these grounds for mitigation. The question therefore arises of the interaction between these grounds for mitigation and the system implemented by the Law of 22nd July 2018. Ch. De Valkeneer proposes using the "most favourable system for the beneficiary"[158].

2.2.1.3. *Consideration of the weighting principle in sentence reduction*

In negotiating the sentence reductions promised, the legislator imposes compliance with a weighting principle (also referred to as the "internal" principle of proportionality")[159]. This principle justifies a personalisation of the collaborator's sentence for two reasons: firstly, the behaviour of collaborating in itself reduces the severity of the offence committed or the "dangerousness" of the perpetrator, and secondly, collaboration allows punishment of behaviours which would otherwise have escaped penalty[160]. To determine how far the sentence can be reduced, the Public Prosecutor must take three criteria into account.

Firstly, the Public Prosecutor must consider the *degree of severity of the acts committed by the collaborator*: the more serious the offences are, the more sentence reduction must be limited. This criterion, which seems obvious at first glance, nevertheless raises questions. In principle, the law prescribes harsher sentences for serious offences. The criterion of degree of severity is therefore used firstly to determine, *in abstracto*, the level of the sentence (which seems obvious under modern penal rationality). Is it legitimate to use this criterion a second time to limit the reduction of a sentence in the case of collaboration? Secondly, the Public Prosecutor must take into account the *degree of severity of the offences mentioned in the informant's ac-*

Bruylant, 2015, p. 17. M. Töller, «Un régime des repentis, enfin?», *Actualités de droit pénal et de procédure pénale*, V. Franssen et A. Masset (dir.), Liège, Anthemis, 2019, p. 222.

[157] The law does not provide further details but we believe that the legislator is referring to custodial sentences.

[158] Ch. De Valkeneer, "Une nouvelle figure…", *op. cit*., p. 384; *Doc*., Ch., 2017-2018, n° 3016/1, p. 32 and 33.

[159] Here we have borrowed the concept of the "weighting principle" from M.-A. Beernaert. This author justifies her choice of terminology as follows: it is not a "strict case of proportionality (…) insofar as there is no balancing to be carried out between the different values present" (M.-A. Beernaert, *Repentis et collaborateurs…*, *op. cit*., p. 26).

[160] M.-A. Beernaert, *Repentis et collaborateurs…*, *op. cit*., p. 514 and 515.

cusations: the more serious these offences are, the greater the reduction of the sentence can be. Thirdly, the Public Prosecutor must consider the *degree of severity of the possible consequences of the offences mentioned in the accusation*: the more serious the consequences of these offences are, the greater the reduction of the sentence can be. Does the concept of "*possible* consequences" (Code of Criminal Procedure, art. 216/6) mean that only consequences which have not yet occurred should be taken into account? If this is the case, then this last criterion should only apply to limitative and preservative collaboration, in principle[161].

One may wonder if other criteria should be taken into account in the operationalisation of the weighting principle. It could be envisaged, and indeed is in the preparatory work, that if a collaborator is a reoffender this could limit the reduction of the sentence[162]. It might also be thought that the level of risk of retaliatory action should influence how far a sentence is reduced. Indeed, the risk of retaliatory action (and the courage necessary to face this) no doubt differs between a person informing on a homicide in the context of a terrorist organisation and a person informing on a homicide committed as a crime of passion. It also stands to reason that greater sentence reduction could be applied when the collaborator would probably not have been prosecuted and sentenced without their self-incrimination (lack of evidence)[163]. Finally (although this list is not exhaustive), one might consider that the circumstances responsible for the collaborator's knowledge of the useful information could influence how far their sentence is reduced: have they taken proactive (and risky) steps to obtain information to share with the legal authorities or were they simply a passive witness?

2.2.2. *Promises relating to sentence enforcement*

With regard to sentence enforcement, the Public Prosecutor can promise two things. He or she can promise to give a *favourable opinion* to a method of sentence enforcement prescribed by the Law of 17th May 2006 (Code of Criminal Procedure, art. 216/6, 1°). This favourable opinion can concern for example sentencing to limited detention[164], electronic surveillance or conditional release.

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[161] There is a paradoxical element to this reasoning – in cases where an informant reveals offences for which criminalisation has been criticised or even contested (as there are only "preparatory actions" or "expression of criminal intent" present; see above: 2.1.4), they can receive a greater sentence reduction. We consider that this paradox disappears when seen against the backdrop of the shift in approach in criminal justice towards prevention and intelligence (even though the preparatory work states that "the objective is (…) strictly judicial in nature"; *Doc.*, Ch., 2017-2018, n° 3016/1, p. 38).

[162] *Doc.*, Ch., 2017-2018, n° 3016/1, p. 49. Is this statement, which is not justified in the preparatory work, linked to the greater ease of accessing information (the easier it is, the less there is to be gained!) or more classically linked to the aim of compounding the criminal status of reoffenders (as they bear more guilt from a moral point of view)?

[163] M.-A. Beernaert, *Repentis et collaborateurs…*, *op. cit.*, p. 266.

[164] This corresponds to "a means of custodial sentence enforcement in which the prisoner is allowed to leave the prison establishment on a regular basis for a maximum of sixteen hours per day" (Law of 17th May 2006, art. 21).

Many questions surrounding this opinion of the Public Prosecutor do not seem to have been clarified by the legislator. The law includes the promise "to give *a* favourable opinion" (Code of Criminal Procedure, art. 216/6, 1°), but lists a series of arrangements. Should it be understood that the promise of a favourable opinion can only concern one arrangement and is only valid once? Let us take the example of a collaborator who requests to be sentenced to electronic surveillance measures during sentence enforcement. The Public Prosecutor gives a favourable opinion, but the Sentence Enforcement Court refuses the measure. The collaborator can resubmit the request within the time limit set by law (Law of 17th May 2006, art. 57). Is the Public Prosecutor's promise still valid? Furthermore, can an internee obtain this type of promise? It seems not, as article 216/6 of the Code of Criminal Procedure only mentions the Law of 17th May 2006 (without referring to that of 5th May 2014). Is this systematic exclusion of internees justified?

The Public Prosecutor can also promise, within the limit of their powers, to "make a *favourable decision* relating to sentence enforcement" (Code of Criminal Procedure, art. 216/6, 2°). The preparatory work illustrates this possibility in the following manner: making a "decision not to enforce the sentence or to postpone the enforcement of the sentence, subject to certain conditions"[165], "refraining from immediately enforcing the sentence"[166]. However, can "prosecutors – under the supervision of their hierarchy and the Minister of Justice – who bears political responsibility before the legislative chambers – refrain from enforcing the sentence and decide to allow sentencing to lapse"[167]? This controversial issue in legal literature elicited a negative response from M. Verdussen: there is no "principle of expediency of sentence enforcement" which can be compared to the principle of expediency of prosecution[168]. This critical position seems consistent with the Council of Europe Recommendation on the role of the Public Prosecutor in the criminal justice system: "Public Prosecutors (…) shall neither cast doubts on judicial decisions nor hinder their execution, save where exercising theirs rights of appeal or invoking some other declaratory procedure"[169]. Regardless of how legitimate this favourable decision may be, its effectiveness seems to be compromised by the fact that the Public Prosecutor is not the only party involved in sentence enforcement[170].

The three legal criteria of the weighting principle (degree of severity of offences committed by the collaborator, degree of severity of the offences

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[165] *Doc*., Ch., 2017-2018, n° 3016/1, p. 53.

[166] *Doc*., Ch., 2017-2018, n° 3016/4, p. 6.

[167] See M.-A. Beernaert, *Repentis et collaborateurs…*, *op. cit*., p. 65.

[168] M. Verdussen, *Contours et enjeux du droit constitutionnel pénal*, Brussels, Bruylant, 1995, p. 469. In the same vein, see the stance taken by Fr. Verbruggen during the hearing in the Chamber (*Doc*., Ch., 2017-2018, n° 3016/4, p. 78).

[169] Rec(2000)19, art. 19.

[170] For example, enforcement of the sentence of *electronic surveillance* is delegated to the "competent department for electronic surveillance" (which is informed of the final judgement by the court clerk) (Criminal Code, art. 37-*quater*). It is only when the electronic surveillance sentence is not served in compliance with the law that the Public Prosecutor can "decide to enforce the terms of imprisonment agreed in the court decision" (Criminal Code, art. 37*quater*, § 3).

mentioned in the informant's accusation and degree of severity of the possible consequences of the offences mentioned in the informant's accusation, see above: 2.2.1) must also be respected in promises linked to sentence enforcement. For this type of promise, the operationalisation of the weighting principle seems more limited than for promises linked to prosecution. The only variables are the number of favourable opinions, the type of favourable decision made, the presence or absence of the conditions to be respected in the case of a favourable decision, etc.

For these promises regarding sentence enforcement, it should again be noted that there are no specific provisions for collaborators who have committed terrorist offences.

2.2.3. *Promises regarding place of detention*

With regard to the place of detention, the Public Prosecutor can make two promises: a promise on the *placement* and a promise on *transfer* of the collaborator to a specific prison establishment (preferred by the collaborator). These rewards can be granted to collaborators "in pre-trial detention or serving their sentence in a prison facility"[171]. The preparatory work shows the interests of the collaborator in being placed or transferred to a specific prison establishment: to be closer to family or to seek "better conditions with more facilities available"[172]. A collaborator may also prefer not to stay in a certain prison facility alongside certain individuals in pre-trial detention or inmates.

Certain issues regarding this third type of promise seem not to have been clarified by the legislator. Can the promise of "*a* transfer" (Code of Criminal Procedure, art. 216/7, subparagraph 1) be understood more broadly and concern several transfers? It seems to us that the promise could concern several transfers, as long as the weighting principle is respected. Can an internee seek this type of promise? The answer seems to be no, as article 216/7 of the Code of Criminal Procedure only mentions the Law of 12th January 2005 (without referring to that of 5th May 2014). Is this systematic exclusion of internees justifiable?

The implementation of these promises on the place of detention also risks being made more complicated by the government's action plan against radicalisation in prisons. Under this plan, radicalised prisoners (there will undoubtedly be prisoners sentenced for terrorism offences amongst these) will be gathered in specific wings of certain prisons. What happens if a collaborator asks to be placed or transferred to a prison which does not have such a wing? Could the situation lead to the Director-General of Correctional Facilities refusing to approve the memorandum (see below: 2.4.2.2)?

The weighting principle must also apply to this third type of promise. It should be noted, however, that the third criterion of this principle regarding "the degree of severity of possible consequences" is not mentioned in the law, with no explanation provided in the preparatory work (Code of Criminal Pro-

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[171] *Doc.*, Ch., 2017-2018, n° 3016/1, p. 36.
[172] *Ibid.*, p. 55.

cedure, art. 216/7, subparagraph 1). The operationalisation of this principle seems to be very limited here; as we see it, the only variables are the number of transfers and the time period during which transfers can be requested.

For these promises on the place of detention, there are no specific points on collaborators who have committed terrorist offences.

2.2.4. *Can several promises be combined?*

What we mean by "combining several promises" is the possibility of the collaborator and their lawyer to negotiate several different types of reward, within the same memorandum. What would the Public Prosecutor's attitude be towards a lawyer negotiating a sentence reduction for their client at the stage of prosecution, as well as a favourable opinion for future conditional release and a place in a certain prison establishment? Will a bulletin from the College of General Prosecutors (Judicial Code, art. 143-*bis*, § 2) shed any light on this type of situation (which complicates the issue of which Public Prosecutor's Office is competent for the drafting of the memorandum; see below: 2.4.1)[173]? It seems that the question over combining promises is not purely theoretical, as is can arise when defence lawyers make particularly bold proposals. Furthermore, it seems that an example of a combination can be deduced from the preparatory work, where it is indicated that a promise regarding the place of detention can be made to collaborators who are "in pre-trial detention or serving their sentence in a prison"[174]. Indeed, there is no doubt that an individual in pre-trial detention is also likely to be interested in a promise concerning prosecution.

2.3. *The trade-off for promised rewards: the collaborator's obligations*

Collaborators have several obligations: to submit a statement (2.3.1), to be willing to compensate for damages caused (2.3.2), to refrain from committing new offences (2.3.3), to comply with the conditions set out in the memorandum (2.3.4) and not to obstruct criminal justice (2.3.5).

2.3.1. *Submitting a statement*

A collaborator's main obligation is of course to "make significant, revealing, truthful and complete statements concerning the role of third parties and, if applicable, their own participation" in an offence (committed or attempted) mentioned under article 90-*ter*, § 2-4 of the Code of Criminal Procedure (Code of Criminal Procedure, art. 216/7, subparagraph 1). The collaborator must "respond to each summons by the Public Prosecutor, the investigating judge and the investigative and trial bodies", in order to make the required statements (Code of Criminal Procedure, art. 216/4, § 1)[175].

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[173] During the Focus Group of 23rd October 2019, a magistrate said that a bulletin is being prepared but will be confidential.

[174] *Doc*., Ch., 2017-2018, n° 3016/1, p. 36.

[175] During the Focus Group of 23rd October 2019, a magistrate said that if testimony concerns an offence listed in article 90-*ter* of the Code of Criminal Procedure, then it can also cover "related offences" even if these are not included in the list (without which the state-

A collaborator's statements must fulfil four requirements. They must 1) concern "useful and relevant information" (significant), 2) relate to "new" information, which is "not yet known or confirmed by the Public Prosecutor" (revealing), 3) "correspond to the truth" (truthful) and, 4) contain all information which is known to the repentant" (complete)[176].

The requirement for "significant" evidence is likely to lead to legal uncertainty for collaborators, as it is not always easy to determine whether the information they possess will be evaluated as useful and relevant by the Public Prosecutor. This makes the promise fragile.

The same occurs with the requirement for "revealing" information, as the collaborator only rarely knows precisely what information the Public Prosecutor already has (it would be worrying, were this not the case…) Furthermore, if collaborators provide information without knowing whether the Public Prosecutor is already aware of it but their initiative shows a desire to move away from their criminal past, does this not merit a reward? This is, in any case, the stance taken by the Italian Constitutional Court, which has declared the condition of "necessarily revealing statements" to be "unconstitutional"[177].

Regarding the requirement of "completeness", the preparatory work seems to distinguish between internal and external collaboration. In the case of external collaboration, the statement "does not necessarily have to concern the offences for which the individual in question is being prosecuted or has been sentenced"[178]. Is there a limit here linked to the right to silence (see below: conclusion)? On the other hand, in the case of internal collaboration, the requirement of completeness demands "complete declarations with regard to the collaborator's own criminal participation in these offences"[179].

On this requirement of completeness, the preparatory work stipulates that it only concerns offences mentioned in the memorandum and not all the offences of which the collaborator is aware[180]. This limited scope of the requirement of completeness is preferable.

As the statement must be about "the participation of third parties", the law does not allow the use of the collaboration system when the collaborator is providing "non-inculpatory information" which, however, could be useful "to close a wrong line of enquiry"[181]. Collaboration is authorised to prove guilt, not innocence.

With regard to the format of the statement, the legislator rules out anonymity for the collaborator (Code of Criminal Procedure, art. 216/4, § 3).

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ments of the candidate for collaboration would not be considered honest and complete). The lawyers and certain magistrates did not share this view.

[176] *Doc*., Ch., 2017-2018, n° 3016/1, p. 24 and 38.

[177] *Doc*., Ch., 2017-2018, n° 3016/4, p. 66.

[178] *Doc*., Ch., 2017-2018, n° 3016/1, p. 39.

[179] *Ibid*., p. 39. During the Focus Group of 23rd October 2019, a magistrate emphasised that both statements on offences committed by the third party under accusation and those on offences committed by the collaborator must be complete. However, another magistrate and a professor considered that the requirement of completeness and truthfulness should be limited to the offences committed by the third party (in order to maintain the right to silence).

[180] *Ibid*., p. 86.

[181] *Doc*., Ch., 2017-2018, n° 3016/4, p. 76.

In line with case law on the admissibility of types of evidence (see above: 1.2), this transparency requirement is considered essential to ensure compliance with the rights of the defence and in particular with the adversarial principle[182] (see below: conclusion).

2.3.2. *Willingness to compensate for damages caused*

What the law precisely demands of collaborators is open to debate. Although article 216/2 of the Code of Criminal procedure mentions the "*willingness* to compensate", article 216/3 stipulates that the promise made to an individual who "*does not compensate* for damages" can be revoked (see below: 2.5.1).

The legislator does not specify which damages are concerned by this willingness to compensate. It could be imagined that it only refers to the damages linked to the offences committed by the collaborator and which are stated in the memorandum (Code of Criminal Procedure, art. 216/2, § 1).

2.3.3. *Not committing an offence (of a certain severity)*

Collaborators cannot be given a prison sentence of more than six months for offences committed after the conclusion of the memorandum (Code of Criminal Procedure, art. 216/3, 2°).

2.3.4. *Respecting the conditions set out in the memorandum*

To benefit from the promise, the collaborator commits to respecting certain conditions. There are general conditions which are systematically presented and specific conditions which vary from case to case (Code of Criminal Procedure, art. 216/2, § 1 and 216/3, § 1, 1°; see below: 2.4.2.1).

2.3.5. *Not obstructing criminal justice*

The collaborator cannot attempt to hide evidence or reach an agreement with third parties (Code of Criminal Procedure, art. 216/3, § 1, 6°).

2.4. *Conditions for using procedural collaboration and its procedural aspects*

The collaboration system gives rise to an agreement between the Public Prosecutor and the candidate for collaboration (2.4.1). This agreement is formalised in a memorandum (2.4.2) and when it concerns a promise regarding prosecution, is approved by a judge (2.4.3).

2.4.1. *An agreement between the Public Prosecutor and the candidate for collaboration*

The candidate for collaboration has no subjective right to a reward if they wish to make statements. The Public Prosecutor makes a decision

[182] *Doc.*, Ch., 2017-2018, n° 3016/4, p. 58.

based on expediency on whether negotiation should be undertaken with the candidate for collaboration[183].

It is important to be attentive to whether the potential collaborator is in fact asking for this, and to avoid so much pressure being put on individuals that doubt is cast on whether their statements are given freely (see below: conclusion).

2.4.2. *Formalisation of the agreement: drafting and approval of the memorandum*

2.4.2.1. *Content and formal requirements of the memorandum*

The memorandum is dated and must contain the following information (Code of Criminal Procedure, art. 216/2, § 1 and § 5):

– the identity of the collaborator (cannot be anonymous; see above: 2.3.1)

– the name of the collaborator's lawyer

– the Public Prosecutor[184] of the judicial district in which the accused third party's offences were committed

– the Public Prosecutor[185] of the judicial district in which the collaborator is being prosecuted or has been sentenced

– the offences for which the collaborator is being prosecuted or has been sentenced (if the latter applies, the sentence issued must also be stated)

– the offences on which the collaborator is going to make a statement

– the content of the promise made by the Public Prosecutor

– the conditions (general and specific) associated with the promise

– the conditions and methods of the statement

– the willingness to compensate for damages[186].

The law does not stipulate what is meant by the "content" of the promise, although it requires it to be "precise and detailed". One could wonder if a promise relating to prosecution should specify the level of the sentence, rather than only the sentencing range[187]. Similarly, promises on sentence enforcement should specify what method(s) of sentence enforcement is/are concerned by the favourable opinion, the number of favourable opinions which will be granted, and which favourable decision(s) can be granted

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[183] *Doc*., Ch., 2017-2018, n° 3016/1, p. 28; *Doc*., Ch., 2017-2018, n° 3016/4, p. 81.

[184] As highlighted by the College of General Prosecutors in their opinion, the term "procureur du Roi" (public prosecutor of the King) should be replaced with the term "magistrat du ministère public" (magistrate of the Public Prosecutor's Office) as "the use of repentants could be envisaged within all bodies of the Public Prosecutor's Office" (*Doc*., Ch., 2017-2018, n° 3016/1, p. 151). Furthermore, *many* magistrates of the Public Prosecutor's Office could be involved (if the collaborators reveals several offences committed by different people and in different places).

[185] *Many* magistrates of the Public Prosecutor's Office could be involved (if the collaborator has committed different offences in different places).

[186] Article 216/2, § 1, 4° of the Code of Criminal Procedure stipulates that the last six points should be explained in a more "precise and detailed" manner.

[187] Ch. De Valkeneer, "Une nouvelle figure…", *op. cit*., p. 391.

(see above: 2.2.2). Finally, promises regarding the place of detention should specify the number of transfers promised (see above: 2.2.3)[188].

The concept of "conditions associated with the promise" seems unclear. There appear to be two types of condition: general conditions which are always present and specific conditions which pertain to the case at hand. There are four general conditions[189]:

– inadmissibility of a principal sentence of more than six months imprisonment for offences committed after the conclusion of the memorandum.

– obligation to submit statements

– obligation to compensate for damages

– forbidden to knowingly make incomplete, untruthful or non-revealing statements.

Regarding the specific conditions, the legislator has not taken into account the Council of State's criticism that the concept required further clarification[190]. It is therefore not clear what is involved here. Could these conditions be, for example, a ban on carrying weapons, or a ban on living in a certain area?

Similarly, the Council of State's request for clarification of the "conditions and methods of the statement" has not been acted upon by the legislator[191]. However, the preparatory work provides some useful information: the memorandum should indicate the "date", "time" and "place" of the statement, the "method" used to give the statement, and the "persons it concerns"[192]. The memorandum must specify if the statement will be given during "a police hearing or as an appearance before the investigating or trial judge, if necessary in audio-visual format if the repentant obtains the status of protected witness"[193]. It seems to us that stating the "persons" the declaration concerns goes beyond the legal requirement. Also, one could imagine situations (however uncommon these may be) in which collaborators may make useful statements for the criminal justice proceedings, even if they are not capable of providing the name of the persons involved (for example, a statement on the place of burial of a body).

The memorandum is signed by the Public Prosecutor and the collaborator (Code of Criminal Procedure, art. 216/2, § 1). If several magistrates are concerned, the College of General Prosecutors is of the opinion that the memorandum "should be signed by the magistrates of both entities concerned, rather than only one"[194]. A bulletin should perhaps be published on

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[188] For greater precision and detail on the content of promises, it would have been useful to specify the establishment concerned for placement or transfer. However, it should not be forgotten that the third party under accusation has access to the memorandum (see below: 2.6). This information could therefore increase the likelihood of retaliatory action.

[189] For the determination of these four general conditions, article 216/2, § 1, 4º, *d*) of the Code of Criminal Procedure links back to article 216/3, § 1, 2º - 5º of the same code.

[190] *Doc*., Ch., 2017-2018, n° 3016/1, p. 40 and 87.

[191] *Ibid*., p. 92.

[192] *Ibid*., p. 43 and 44.

[193] Ch. De Valkeneer, "Une nouvelle figure…", *op. cit*., p. 392.

[194] *Doc*., Ch., 2017-2018, n° 3016/1, p. 151. It appears to us that in certain situations,

this topic (for each of the three types of promise) to determine which magistrate of the Public Prosecutor's Office in particular should negotiate the content of a promise with the candidate for collaboration and his or her lawyer, and indicate the roles of the other magistrates involved in the system.

The reasons for a promise concerning prosecution made by the Public Prosecutor must be explained (Code of Criminal Procedure, art. 216/5, § 3). Curiously, the law does not require an explanation of the reasons for promises on sentence enforcement and place of detention.

In practice, drafting a memorandum could be complicated in view of the conflicting interests of the parties concerned: the lawyer of the candidate for collaboration will want to say as little as possible before the memorandum is signed, whilst the magistrate will want to obtain as much information as possible, as quickly as possible, so as not to make "futile" promises[195]. One solution envisaged could be to ensure that statements made before the signature of the memorandum are protected by the principles of good faith and confidentiality between the lawyer and the magistrate. This would mean that these statements would not be used by the magistrate if the memorandum was not successfully drafted (confidentiality clause)[196].

2.4.2.2. *Approval of the memorandum*

The memorandum must receive the prior agreement of the General Prosecutor (Code of Criminal Procedure, art. 216/2, § 2, 1°). If there are several competent General Prosecutors, a decision is taken "by consensus" (Code of Criminal Procedure, art. 216/2, § 3), which means that they must all approve the memorandum for the promise to be valid[197]. If the promise was made by the Federal Prosecutor, no General Prosecutor has competency and no agreement is necessary[198].

The memorandum must receive a prior opinion of the Federal Prosecutor (Code of Criminal Procedure, art. 216/2, § 2, 3°). The Federal Prosecutor has a register of all memoranda signed in the country (Code of Criminal Procedure, art. 216/2, § 6), and is therefore certainly the party most able to "encourage uniformity in the implementation of legislation"[199]. The Federal Prosecutor is also able to "prevent repentants from obtaining several promises in different districts in exchange for their testimony on certain of-

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more than two magistrates could be involved (if the collaborator has committed several offences and informs on several third parties who have committed several offences themselves).

[195] Viewpoints of participants in the Focus Group of 23rd October 2019.

[196] Viewpoints of the lawyers and magistrates of the Focus Group of 23rd October 2019. However, a magistrate considered that if the memorandum was not signed, magistrates could use the information gathered.

[197] The College of General Prosecutors considers that in the case of external collaboration, the negative opinions will mainly come from the "General Prosecutor of the jurisdiction in which the promise will be implemented" (*Doc.*, Ch., 2017-2018, n° 3016/4, p. 52). The requirement for consensus avoids the promise being implemented by a Public Prosecutor who is opposed to it, which would have been problematic for criminal policy in the jurisdiction concerned.

[198] Ch. De Valkeneer, "Une nouvelle figure…", *op. cit.*, p. 389.

[199] *Ibid.*, p. 389; *Doc.*, Ch., 2017-2018, n° 3016/1, p. 29.

fences"[200]. It should be noted that under this hypothesis, the statements would not be classed as revealing (see above 2.3.1).

A prior opinion from the Witness Protection Commission is also necessary (Code of Criminal Procedure, art. 216/2, § 2, 2°). This commission examines the scale and feasibility of protective measures which could be provided for certain collaborators. A negative opinion from this commission could compromise the agreement, as the risk of retaliatory action would be too high[201].

If the collaborator is under investigation or if his/her statements are submitted as part of an investigation, a prior opinion from the investigating judge is required (Code of Criminal Procedure, art. 216/2, § 2, 4°). This opinion concerns the "progress of the investigation" on determining "the expediency or need for the use of the repentant as part of the investigation"[202]. It is therefore to be expected that the investigating judge will decide on the capacity of the candidate for collaboration to produce significant and revealing statements. However, it seems "difficult to ask an investigating judge, who is independent and impartial, to give an opinion on the relevance of granting the status of repentant to a witness as part of an ongoing case, when this judge cannot speculate on the guilt or innocence of either the repentant or any other suspects (…) on whom a statement could be made[203].

Regarding promises on the place of detention, a "prior agreement of the Director-General of Correctional Facilities" is necessary (Code of Criminal Procedure, art. 216/6, subparagraph 1). It is this Director-General who has authority over the placement and transfer of prisoners (Law of 12th January 2005, art. 18). These types of promise "could have an impact on prison functioning"[204], but they cannot "undermine the authority of the prison governor over discipline, order and security within the prison" (Code of Criminal Procedure, art. 216/7, subparagraph 1). If, due to a disciplinary, order or security problem, the promise cannot be implemented, "the prison governor informs the Public Prosecutor of this"[205], but it is not known what the Public Prosecutor can do about such information. This makes the promise fragile. In addition, we have seen that the government's plan to combat radicalisation in prisons could make certain placements or transfers impossible (see above: 2.2.3).

To be valid, the memorandum must be agreed and signed in the presence of the collaborator's lawyer. The collaborator can confer confidentially with his/her lawyer at any point, without the Public Prosecutor being present (Code of Criminal Procedure, art. 216/2, § 4).

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[200] *Doc*., Ch., 2017-2018, n° 3016/1, p. 29.
[201] Ch. De Valkeneer, "Une nouvelle figure…", *op. cit*., p. 389 and 390.
[202] *Doc*., Ch., 2017-2018, n° 3016/4, p. 23 and 36. This opinion from an investigating judge would be useful if the weighting principle were to allow for a greater reduction of the sentence in cases where, without the collaborator's self-incrimination, he or she would probably not have been prosecuted or convicted due to a lack of evidence.
[203] *Doc*., Ch., 2017-2018, n° 3016/4, p. 12.
[204] *Doc*., Ch., 2017-2018, n° 3016/1, p. 56.
[205] *Ibid*., p. 56.

The memorandum is drawn up in three copies, signed by the Public Prosecutor and the collaborator. One is given to the collaborator, a second is placed in the enforcement record on the offence committed by the collaborator and the third is kept by the Public Prosecutor (Code of Criminal Procedure, art. 216/2, § 5).

2.4.3. *Approval of the agreement*

2.4.3.1. *Scope*

The requirement of approval of the agreement only concern promises on prosecution[206]. Because the legislator gives authority to the Public Prosecutor to end prosecution, judicial review is necessary[207].

Regarding promises on sentence enforcement, the absence of approval makes sense when the Public Prosecutor has given a "favourable opinion" (as the final decision to grant the modality of execution of the custodial sentence will be taken by the Sentence Enforcement Court). However, this could pose a problem when the Public Prosecutor has made a "favourable decision" (as in this case, no legal body will be able to check if the principle of proportionality and the weighting principle are respected).

As for promises on detention, these must be accepted by the Director-General of Correctional Facilities. However, this individual is not a jurisdictional body and his decision will be linked to other criteria than compliance with the principle of proportionality and the weighting principle (which will therefore not be checked in any way).

2.4.3.2. *The competent courts*

Approval is the responsibility of the court "at which the prosecution of the repentant takes place"[208]. This can be the Police Court, Criminal Court, Court of Appeal, Assize Court or investigating courts[209].

The law does not stipulate the Assize Court's composition (with or without jury) for this approval. As the memorandum contains aspects linked to the penalty, it seems preferable to have a jury present[210]. Regarding the investigating courts, when these are acting as the trial court, they can decide on an internment or a suspension of sentencing. The legislator has not stip-

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[206] During the Focus Group of 23rd October 2019, a magistrate stated that if the Public Prosecutor realises that the conditions set out in the memorandum are not respected, he or she will not request approval of the memorandum. This viewpoint was criticised by other magistrates, lawyers and professors, as in this case the prosecution would be both judge and jury.

[207] The preparatory work refers to the Constitutional Court decision on penal transaction to justify the need for judicial review (*Doc.*, Ch., 2017-2018, n° 3016/1, p. 35; C.C., 2nd June 2016, n° 83/2016, cons. B.11. and B.12.4.).

[208] Ch. De Valkeneer, "Une nouvelle figure…", *op. cit.*, p. 393. The Law of 22nd July is modelled on the approval procedure for penal transaction, penal mediation and plea bargaining.

[209] In practice, it seems that the Council Chamber will be called upon to approve the majority of agreements (viewpoint of several magistrates during the Focus Group of 23rd October 2019).

[210] Ch. De Valkeneer, "Une nouvelle figure…", *op. cit.*, p. 393; *Doc.*, Ch., 2017-2018, n° 3016/4, p. 83.

ulated that a internee can obtain a promise[211] (see above: 2.2). Regarding suspension of sentencing, the law states that the question of approval is to be dealt with during resolution of proceedings (Code of Criminal Procedure, 216/5, § 3). Waiting until this stage of proceedings risk having a dissuasive effect on the collaborator, "who may be reluctant to provide their testimony"[212]. In the case of approval by a investigating court, this court sends the case to the competent court for an alternative sanction to be applied (Code of Criminal Procedure, art. 216/5, § 3).

2.4.3.3. *The purpose of the evaluation*

The competent tribunal, court or investigating court assesses whether (Code of Criminal Procedure, art. 216/5, § 3):

– the principle of proportionality and the weighting principle are respected

– the legal conditions are fulfilled

– the collaborator has freely and knowingly accepted the memorandum

– the offences correspond to their correct legal classification

– the offences for which the collaborator is being prosecuted and the offences mentioned in the informant's accusation correspond to reality

– no reasons for ending prosecution are present

– the willingness to compensate for damages is present.

The law does not clarify if this covers the concept of "legal conditions". The preparatory work suggests that the tribunal, court or investigating court does not have to check whether the principles of relevance and subsidiarity are respected[213]. It seems to us that this concept of "legal conditions" concerns, amongst other things, ensuring that the offence revealed by the informant is indeed mentioned in article 90-*ter*, § 2-4 of the Code of Criminal Procedure and checking whether there are any prior opinions and agreements, whether a lawyer is present, whether the required signatures are present, etc.

2.4.3.4. *The proceedings*

The tribunal, court or investigating court gives a hearing to the collaborator or their lawyer on the memorandum and the offences which the prosecution concerns (Code of Criminal Procedure, art. 216/5, § 4, subparagraph 1). If necessary, the victim or their lawyer is also given a hearing on the offences and the compensation to be provided for damages. The victim can bring civil proceedings before the criminal courts and in this case, the collaborator is given a hearing in the context of these civil proceedings (Code of Criminal Procedure, art. 216/5, § 4, subparagraph 2).

2.4.3.5. *The decision*

The tribunal, court or investigating court decides whether to approve or

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[211] With regard to promises on prosecution, it is difficult to envisage a "lower level" than an indeterminate sanction.

[212] Ch. De Valkeneer, "Une nouvelle figure…", *op. cit.*, p. 394.

[213] *Doc.*, Ch., 2017-2018, n° 3016/1, p. 35 and 50.

reject the promise, providing reasons for this decision and with no penal appeal possible (Code of Criminal Procedure, art. 216/5, § 3).

If the promise is approved, the tribunal or court[214] decides on the sentence which could be applied if one of the reasons for revocation set out under article 216/3 of the Code of Criminal Procedure arises (see below 2.5.1). The Council of State has criticised the fact that appeal is not possible, as "at the time of signing the memorandum, the individual concerned does not yet know the level of the substitute sanction"[215]. This means that there is no "waiver of the right to appeal, voluntarily and in full knowledge of the facts" on the part of the collaborator[216]. In response to this comment from the Council of State, the preparatory work states that "all means permitted by law are available against a substitute penalty"[217]. Unfortunately, the law itself is less clear. In practice, it seems that the collaborator will appear before the trial judge before the other co-defendants[218].

If approval is not granted, the legislator sets out two hypotheses. Either a new memorandum can be drawn up and be submitted to a differently constituted chamber for approval, or no new memorandum is drawn up and the offences committed by the collaborator can be assigned to a differently constituted chamber. In the second hypothesis, the memorandum and all documents, materials and communications linked to this procedure are excluded from discussions. They cannot "be used against [the collaborator] in any other criminal, civil, administrative, arbitral or other proceedings, and cannot be used as evidence, even as an out-of-court confession" (Code of Criminal Procedure, art. 216/5, § 3). As M.-A. Beernaert highlighted during her hearing at the Chamber, the law should have stipulated that in this hypothesis, all evidence is unusable not only against the collaborator but against the third party whom the accusations concern[219]. The law is not sufficiently clear on the fate of this third party when "the case against [the collaborator] is assigned to a differently constituted chamber" (Code of Criminal Procedure, art. 216/5, § 3). When this third party is a co-perpetrator or accomplice, the Minister of Justice states "that both the repentant rejected by the judge and the co-perpetrators must appear before the same court"[220].

2.5. *Revoking the promise*

The grounds for revoking the promise (2.5.1), the competent authorities to make the decision on revocation (2.5.2) and the consequences of this (2.5.3) are addressed here:

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[214] If the promise has been approved by the investigating court, this court refers the case to the competent tribunal or court (Code of Criminal Procedure, art. 216/5, § 3, subparagraph 2). If applicable, the tribunal or court rules on civil interests (Code of Criminal Procedure, art. 216/5, § 4).

[215] *Doc.*, Ch., 2017-2018, n° 3016/1, p. 85.

[216] *Ibid.*, p. 85.

[217] *Doc.*, Ch., 2017-2018, n° 3016/1, p. 51.

[218] Viewpoint of a magistrate, criticised by a lawyer during the Focus Group of 23rd October 2019.

[219] *Doc.*, Ch., 2017-2018, n° 3016/4, p. 83.

[220] *Ibid.*, p. 29 and 43.

2.5.1. *Grounds for revoking the promise*

Revocation of the promise is never compulsory, and is only possible if the collaborator (Code of Criminal Procedure, art. 216/3)[221]:

– does not respect the conditions (general and specific; see above 2.4.2.1) which had been accepted in the memorandum.

– is sentenced to a principal penalty of more than six months' imprisonment under a ruling or judgement which has acquired the force of res judicata for offences committed after the date of conclusion of the memorandum.

– does not make statements as stipulated in the memorandum.

– does not compensate for damages.

– has knowingly made incomplete, untruthful or non-revealing statements on the offences concerned (by the memorandum).

– has tried to hide evidence or make an arrangement with third parties.

The law is ambiguous on the grounds for revocation with regard to compensation for damages: it stipulates that only "the willingness to compensate for damages" should be mentioned in the memorandum (Code of Criminal Procedure, art. 216/2, § 1, 4°, *f*) but lists failure to compensate for damages as grounds for revocation (Code of Criminal Procedure, art. 216/3, 4°). This raises questions on the severity of the sanction prescribed in article 216/3 of the Code of Criminal Procedure: this revocation seems a disproportionate sanction, as it has the potential to prioritise the financial situation of the victim and the State over the freedom and security of the collaborator. Similarly, the College of General Prosecutors considers that revocation should only stem from "a deliberate intention not to provide compensation, [as] the absence of compensation could result from circumstances outside the convict's control (illness, social situation, etc.)"[222].

The fifth grounds for revocation regards the quality of the declarations "on the offences concerned". In the memorandum two types of offences are stated: the offences committed by the collaborator (Code of Criminal Procedure, art. 216/2, § 1, 4°, *a*) and the offences committed by the third party concerned by the informant's statements (Code of Criminal Procedure, art. 216/2, § 1, 4°, *b*). It seems to us that it should only be possible to revoke the promise when the problem with the statement concerns the offences committed by the third party (as the statement on these offences is the key aspect of this system). Also, making "non-significant" statements is not stated as a possible cause for revocation, whilst making incomplete, untruthful or non-revealing statements is. The preparatory work seems to indicate that it is not easy to determine whether a non-significant statement has been provided intentionally and maliciously[223]. It seems to us that the same reasoning could apply to non-revealing declarations.

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[221] According to the preparatory work, the promise is always accompanied by a "resolutive condition" (*Doc.*, Ch., 2017-2018, n° 3016/1, p. 33).

[222] *Doc.*, Ch., 2017-2018, n° 3016/4, p. 53. If the absence of compensation is due to one of these circumstances, it could be envisaged that the Special Fund for aid to victims of intentional violence could intervene (*Doc.*, Ch., 2017-2018, n° 3016/4, p. 77).

[223] *Doc.*, Ch., 2017-2018, n° 3016/1, p. 91.

2.5.2. *The competent authorities for revocation*

For promises concerning prosecution, the Public Prosecutor asks the tribunal or court to note this non-compliance with the conditions, take a decision on whether the promise should be revoked and decide on the enforcement of the substitude sanction (Code of Criminal Procedure, art. 216/5, § 5)[224]. To do this, the body which approved the promise gives the collaborator[225], their lawyer and the Public Prosecutor (as well as the victim if conditions in their interests have been imposed[226]) a hearing. This revocation can take place within a period equal to the duration of the substitude sanction[227]. This period is a minimum of five years if the collaborator has not made statements as stipulated or has not provided compensation for damages (Code of Criminal Procedure, art. 216/5, § 5).

For promises regarding sentence enforcement and the place of detention, the law does not state which party has the authority to revoke a promise. The preparatory work seems to provide a simple answer to this question: "The Public Prosecutor *notes* that the conditions have not been respected and is *no longer bound* by his/her promises"[228]. It seems curious that the Public Prosecutor is responsible for both negotiating the promise and potentially revoking it. Should there not be a transfer of authority for revocation to the Sentence Enforcement Judge? For these two types of promise, the law does not stipulate the time period within which a revocation can take place.

2.5.3. *Consequences of the revocation*

If the promise on prosecution is revoked, the tribunal or the court "independently delivers a fully explained ruling on the enforcement" of the sanction planned for the eventuality of the collaborator not respecting the contents of the memorandum (Code of Criminal Procedure, art. 216/5, § 5)[229]. This raises a question: when the tribunal or court rules on the enforcement of the sanction in question, should it automatically correspond to the level decided on at the approval stage? Or can (should?) this sanction be reduced, taking into account the sentence already served by the collaborator, or even the efforts made by the collaborator to respect the conditions imposed (the latter is taken into account by the Sentence Enforcement Court when determining the proportion of the custodial sentence that the individual must serve after revocation of conditional release)? We believe that re-

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[224] *Ibid*., p. 52.

[225] Is it appropriate that if the promise was made by an investigating court, this same court will conduct the hearings of the parties but that the decision on revocation will be taken by other court or tribunal? Should the hearings of the parties not have taken place in this court or tribunal?

[226] It would be preferable to conduct a hearing of the victim only if the conditions imposed in his or her interests have been violated.

[227] We imagine that this period begins on the date of signature of the memorandum.

[228] *Doc*., Ch., 2017-2018, n° 3016/1, p. 44, emphasis added.

[229] If the approval was given by a Court of Assize, this "court, without a jury, rules on the application (providing reasons for this)" of the alternative sanction (Code of Criminal Procedure, art. 346/1).

ducing the sentence in this way is possible, as the law does not require the court or tribunal to impose a set penalty, but to rule on the enforcement of this penalty.

The consequences of revoking promises on sentence enforcement and place of detention are not mentioned in the law.

According to certain hypotheses (see below 2.7), the protective measures implemented for collaborators and members of their family can be withdrawn. It seems to us that revoking a promise should not automatically be accompanied by withdrawal of these protective measures. In the case that the decision only concerns the collaborator, it can, it seems, be entirely driven by a punitive approach, however if the decision does not only concern the collaborator (as his or her family may be affected) a combination of punitive and protective approaches seems necessary.

2.6. *Conditions for use of statements*

A collaborator's statements "can only be taken into account as evidence if they are decisively corroborated by other evidence" (Code of Criminal Procedure, art. 216/4, § 2). As this corroborating evidence must be "decisive", this means that "the judge cannot largely or mostly"[230] base their decision on the collaborator's statement. The "other evidence" can be obtained prior to, or thanks to, the collaborator's statement[231].

The preparatory work stipulates that the statement must be "corroborated (…) by a *different type* of evidence"[232]. As we see it, this means that the requirement of corroboration is not respected if the "other evidence" takes the form of a statement made by another collaborator. It is regrettable that the law does not specify this.

The lower probative value of the statement is justified by the fact that the collaborator's statements could be influenced by the prospect of a promise, or a desire for revenge.

A copy of the memorandum is included in all enforcement records in which the collaborator's statement is used (Code of Criminal Procedure, art. 216/2, § 5). Also, the minutes of each of the collaborator's hearings must mention the memorandum (Code of Criminal Procedure, art. 216/4, § 2). In this way, the trial judge is "informed of the fact that this statement has not been made in a disinterested manner, [which allows the judge to] determine its reliability"[233]. Including the memorandum in the enforcement record of the third party concerned by the informant's accusations "allows adversarial debate between the parties concerned"[234].

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[230] *Doc*., Ch., 2017-2018, n° 3016/1, p. 46.

[231] *Ibid*., p. 45.

[232] *Ibid*., p. 45; *Doc*., Ch., 2017-2018, n° 3016/4, p. 23. In the same vein, see Ch. De Valkeneer, "Quelques réflexions à propos de la prescription de l'action publique et des 'repentis' ou collaborateurs de justice", *Rev. dr. pén. crim*., 2014, p. 1102.

[233] *Doc*., Ch., 2017-2018, n° 3016/1, p. 31 and 42.

[234] *Ibid*., p. 31. During the Focus Group of 23rd October 2019, certain lawyers stated that the fact that the contents of the memorandum is accessible to the third party under accusation will reduce the number of candidates for collaboration. On the same occasion, a

2.7. *Protective measures for collaborators*

Protective measures for at-risk witnesses can be accessed by collaborators (2.7.1). These measures are of several types (2.7.2). They can also be withdrawn (2.7.3).

2.7.1. *Accessibility of protective measures*

Before the Law of 22nd July 2018, the Belgian protection system for at-risk witnesses (Code of Criminal Procedure, art. 102 - 111) was not applicable to witnesses making "statements regarding cases in which they are being prosecuted"[235]. The Law of 22nd July 2018 did not amend the definition of at-risk witness set out in article 102 of the Code of Criminal Procedure to clearly include collaborators in the protection system. However, the preparatory work unambiguously show that collaborators and their families can use this protection system[236].

2.7.2. *Types of protective measures*

Protective measures can consist of (Code of Criminal Procedure, art. 104):

– ordinary protective measures (data protection in the civil registry, preventative technical equipment, psychological assistance, organisation of police patrols, recording of incoming and outgoing calls, secret telephone number, protected vehicle licence plate, close physical protection, relocation for 45 days maximum, placement in a protected section of the prison, etc.)

– special protective measures[237] (relocation for more than 45 days, new identity, temporary protective identity)

– financial assistance measures

– measures to preserve the collaborator's social and administrative rights[238]

– measures obliging all persons who, by virtue of their position, have knowledge of or assist in the protective measures, to maintain confidentiality

– preventative surveillance measures.

These preventative surveillance measures are the major innovation of the Law of 22nd July 2018 on witness protection. Article 104, § 5 of the Code of Criminal Procedure does not specify what these preventative surveillance measures cover. The preparatory work is clearer on this matter. The "physi-

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magistrate said that the memorandum would be filed as soon as it is signed (without waiting for approval).

[235] Ch. De Valkeneer, "Une nouvelle figure…", *op. cit*., p. 399.

[236] *Doc*., Ch., 2017-2018, n° 3016/1, p. 40 and 56-61. The extension of protective measures to the collaborator's lawyer was defended by Fr. Verbruggen during the hearing in the Chamber (*Doc*., Ch., 2017-2018, n° 3016/4, p. 77).

[237] These special measures are possible when the statements concern an offence under article 90-*ter*, § 2-4 of the Code of Criminal Procedure or an offence committed in the context of a criminal organisation. They can therefore be applied to collaborators.

[238] These measures are justifiable as "it can currently be observed (…) that when a witness receives a new identity, innumerable administrative problems arise with regard to payment of salaries (…), pensions, benefits" (*Doc*., Ch., 2017-2018, n° 3016/1, p. 57).

cal and virtual world" of the collaborator and their family will be monitored through "discreet interception of mail", monitoring of "information technology (…) (standard telephone communications, VoIP, email traffic, social media, internet use, etc.)", monitoring of "means of transport", monitoring of "finances" and monitoring of "the new living environment of the at-risk witness"[239].

It is stipulated that this "heightened surveillance" is implemented *"for the sole purpose* of guaranteeing security"[240]. This phrase is rather cryptic: for whose security? The preparatory work provides many examples of potential beneficiaries of these surveillance measures: the collaborator and his or her family (protection of physical and psychological safety), police agents and prison staff (protection of physical safety)[241], the protection system itself (protection of integrity) and the State (cost containment)[242]. Of course, one could also wonder if these surveillance measures have other aims than the security of these different parties, insofar as they allow collection of indicators of any new criminal behaviour on the part of the collaborator. The preparatory work hardly mentions this point. Instead, it justifies the interest of these new measures by the need to monitor the inadvertent but problematic conduct of the children of the collaborator who may share details of their new lives via social media. The conduct of children is highlighted here to justify intense preventative surveillance of their parents. The intensity of this surveillance is such that the legislator has stated that the collaborator should be informed in writing of the possibility of these preventative surveillance measures (Code of Criminal Procedure, art. 104, § 5). These preventative measures are decided by the Federal Prosecutor. The legislator does not provide reasons for this exception to the competence of the Witness Protection Commission.

2.7.3. *Withdrawal of protective measures*

Article 108 of the Code of Criminal Procedure sets out situations where these different protective measures may be withdrawn. This occurs when:

– the person is "no longer at risk"[243]

– the person is "suspected of having committed an offence or crime after protective measures were granted"

– after protective measures have been granted, the person is declared guilty (or benefits from a penal transaction or mediation) of an offence which may lead to a custodial sentence of one year, or a higher penalty.

– the person's actions have in some way compromised the protection measures granted

– the person is not respecting the conditions of the memorandum[244].

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[239] *Doc*., Ch., 2017-2018, n° 3016/1, p. 58; *Doc*., Ch., 2017-2018, n° 3016/4, p. 25 and 95.

[240] *Doc*., Ch., 2017-2018, n° 3016/1, p. 58, emphasis added.

[241] The meaning of this systemic and managerial protection is not explained by the preparatory work.

[242] *Doc*., Ch., 2017-2018, n° 3016/1, p. 58; *Doc*., Ch., 2017-2018, n° 3016/4, p. 25.

[243] Under this hypothesis, the withdrawal of protective measures is compulsory.

[244] This is the specific memorandum for at-risk witnesses prescribed by article 107 of the Code of Criminal Procedure. It is therefore different from the memorandum prescribed

The Witness Protection Commission rules on the issue of withdrawal by majority vote, providing reasons for this and with due attention to the principles of subsidiarity and proportionality. There is no appeal from the decision (Code of Criminal Procedure, art. 109, § 7). It would perhaps be worthwhile (to better distinguish between the protective and punitive approaches) to stipulate that withdrawal of measures granted to the collaborator does not automatically entail withdrawal of the measures granted to their family. This possibility, which would no doubt be difficult to implement, is currently impossible (Code of Criminal Procedure, art. 110).

2.8. *Monitoring and evaluation of the collaboration system*

The legislator has prescribed a monitoring and evaluation mechanism for this system which is often criticised due to considerations of morality and reliability[245]. To this end, the Minister of Justice must submit an annual report to the Chamber of Representatives (Code of Criminal Procedure, art. 216/8). The report must indicate the number of investigations, the number of individuals concerned[246] and the results obtained within the collaboration system. The Minister of Justice has mentioned another piece of information which should be included in this report: the offences committed by the persons concerned[247]. This information, which is not stipulated by the law, could be helpful.

2.9. *The Law of 22nd July 2018 scrutinised by the Constitutional Court*

Two appeals were lodged by two of the accused in a judicial enquiry in which repentants were used (the "Footgate" case which is still ongoing, see below), at the Constitutional Court, with the aim of repealing certain provisions of the Law of 22nd July 2018[248].

One of the applicants made eight arguments and the other made four in support of their appeal, mainly from the angle of violation of articles 10 and 11 of the Constitution (principle of equal treatment and non-discrimination), read in conjunction with the principle of legality, the principle of legal certainty and article 6 of the European Convention on Human Rights. The complaints concerned the use of the system for repentants in the context of prosecution, and more specifically the respective roles of the Public Prosecutor and the investigating judge, the scope of the system for repentants, compliance with the adversarial principle, presumption of innocence,

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by article 216/1 of the Code of Criminal Procedure which we addressed previously (see above 2.4).

[245] M.L. Cesoni (dir.), *Les nouvelles méthodes de lutte contre la criminalité*: *la normalisation de l'exception*, Brussels, Bruylant, 2007.

[246] The concept of "individuals concerned" is not satisfactory: should only collaborators be taken into account or also third parties under accusation? If these two types of individual are concerned by the statistics, should they not be presented as two separate variables? Without distinguishing between the two, the statistics may be unusable.

[247] *Doc.*, Ch., 2001-2002, n° 1483/4, p. 7.

[248] *M.B.*, 12th March 2019, p. 25925.

promises on sentences, revocation of promises, referral after revocation, the right to consult enforcement records, confidentiality of evidence and judicial review (cons. B.2.5).

On 6th February 2020, the Constitutional Court issued a decision rejecting the appeal, subject to the interpretation of two provisions of the law[249].

Firstly, the Court pointed out that the expediency of using the system for repentants, when all legal conditions are fulfilled, is a matter for the Public Prosecutor alone to decide. However, it underlined that the Public Prosecutor must respect the principle of equal treatment and non-discrimination and cannot arbitrarily decide on the individuals who could be considered for system for repentants (cons. B.7.3). Although the preparatory work shows that guaranteeing compliance with the condition of subsidiarity is not under the authority of the investigating and trial courts, "the prohibition of arbitrary action is part of the guarantees of the Rule of Law" (cons. B.7.3). According to the Court, it is the responsibility of the "competent investigating or trial court to check whether the use of the system for repentants is necessary to determine the truth and whether equality of treatment for all persons involved in the investigation has been respected" (cons. B.7.3). To this extent, the Court considers that the law provides enough guarantees for effective judicial review to be carried out on the memorandum (cons. B.8).

Secondly, although the Law of 22nd July 2018 does not stipulate a time limit for adding a certified copy of the memorandum to the enforcement record, the Court pointed out that firstly, it could reasonably be considered that a copy of the memorandum should be immediately included in the enforcement record (cons. B.14.2) and secondly, that failure to do so, or doing so late, could be sanctioned for violation of the right to a fair trial, identified by the competent investigating or trial court (cons. B.14.5).

The Court added that it considers that there is no violation of the right to a fair trial due to discrimination, as the individuals concerned by the repentant's statements reserve the possibility of challenging the reliability, content and credibility of these statements before the competent investigating or trial court. The judge can, however, deem the statement to be unreliable and unusable in the assessment of evidence (cons. B.23.3).

Finally, given that repentants must submit their declarations between the signature and approval of the memorandum, the Court emphasised that the competent investigating or trial court should not approve the memorandum if it observes that the repentant has not yet submitted statements or that the statements made are not linked to the promise (cons. B.32.2).

The Court emphasises the legislator's inconsistency as regards the scope of the law; on the one hand, despite the title of the law, the offences listed do not fall within the strict definition of serious and organised crime (see above: 2.1.1) and, on the other hand, some offences, such as computer forgery, appear on the list in article 90-*ter*, § 2-4 of the Code of Criminal Procedure, while others, such as forgery in writing, do not (cons. B.11.3).

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[249] Constitutional Court, 16th February 2020, n° 16/2020, *Nieuw Juridisch Weekblad*, 2020, n° 423, p. 454 et note S. Careel, «Spijtoptantenregeling: incoherent, maar grondwetsconform».

2.10. *Conclusion*

We will close this overview of the Law of 22nd July 2018 by assessing this Belgian law from the angle of four criteria for legitimacy which are regularly raised as a criticism of this type of system for collaboration with justice: the morality of the system, whether it respects the right to silence, whether it is reliable, and whether it guarantees equality of treatment and non-discrimination.

Morality

A first criticism of collaboration is linked to its morally dubious nature. Informing could be considered morally reprehensible due to 1) underlying ulterior motives of the collaborator (for example, greed or revenge), 2) the fact that it can be misleading, and 3) violation of a duty of loyalty or solidarity (betrayal of the third party on whom information is provided)[250].

Despite its immorality, collaboration is authorised under Belgian law if this is the only method which will uphold values judged more important than those it undermines. The principles of expediency, necessity and proportionality, which are formally stated in the law (see above: 2.1), once again arise here. To authorise or refuse collaboration, the nature of the threat to the values which collaboration aims to protect must be taken into consideration (is it a current and palpable threat?)[251]. It is therefore easier to override the immorality of collaboration for "preservative" and "limitative" types of collaboration than for "punitive" collaboration (see above: 2.1.4). It seems to us that the difference between these three types of collaboration is not sufficiently considered in the law to envisage that it could influence the work of the police and legal authorities.

The Belgian legislator has chosen to authorise collaboration for an extensive list of offences, namely those stipulated in article 90-*ter*, § 2-4 of the Code of Criminal Procedure. This list was not created specifically for the collaboration system, but is taken from a list of situations in which phone tapping is authorised (see above: 2.1.1). These characteristics – a broad and non-specific list – show that the main influence of the scope of collaboration is not reflection on its immoral nature and its potential excesses with regard to preserving the values judged most important. Rather, these characteristics show that the priorities have more to do with simplicity and efficiency.

Pressure to collaborate

When a law authorises collaboration, offenders are subject to a form of pressure to collaborate due to the difference in treatment of those who collaborate and those who do not. Indeed, when an offender is told that if he/she collaborates the sentence will be three years' imprisonment, but if not he/she may be sentenced to nine years' imprisonment, this inevitably puts pressure on the offender, who may feel that the "six extra years" are not to

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[250] M.-A. Beernaert, *Repentis et collaborateurs…*, *op. cit.*, p. 432.
[251] *Ibid.*, p. 565.

punish their illegal conduct but their refusal to collaborate[252]. There is an element of truth to this; "as admitted by magistrates (…), the fact that the accused denies the charges "gives a bad impression" and can lead them to impose a heavier sentence"[253]. Although this tendency is hard to detect or objectify, there is a risk that it could become more pronounced when collaboration is authorised by law[254].

Although a certain amount of pressure is inevitable, it is not systematically unlawful. When the person likely to collaborate has the status of witness, there is no real "right to silence for witnesses" in Belgium. However, it may be in the person's interests not to speak out in terms of respecting solidarity and fear of retaliation. Belgian law takes these interests into account to a certain extent in article 30 of the Code of Criminal Procedure, which states that all individuals must disclose offences and crimes of which they have knowledge, without prescribing punishment for those who do not comply with this obligation.

When the person likely to collaborate risks self-incrimination, he or she is in this case protected by a true right to silence. For the pressure exerted on the person to be legal, their decision to waive this right must be free, informed and accompanied by guarantees[255].

Waiving the right to silence is certainly not done freely when a law prescribes a specific penalty to force recalcitrant candidates to do so. On this subject, we consider it fortunate that Belgian law does not prescribe a specific penalty for refusal to cooperate on the part of the accused. Belgian law therefore complies with ECHR case law on this matter[256]. It also seems appropriate that the Belgian legislator has not introduced penalties for collaborators who withdraw from the system and decide not to make a statement in the end. Under these circumstances, the revocation of the promise and application of the alternative sanction seems to suffice.

Waiving the right to silence can only be done in an informed manner if the collaborator knows exactly what he or she will obtain as a result of collaboration. Systems where the advantages bestowed on the collaborator are irrevocable and certain should therefore be preferred.

The decisions of the Belgian Public Prosecutor can in certain contexts be revoked, as they must receive the approval of the General Prosecutors and in some cases, the approval of a judge or the Director-General of Correctional Facilities (see above: 2.4.2). In addition to this, when the memorandum on a promise regarding prosecution is signed, the collaborator is missing an important piece of information: the level of the substitute sanction. Finally, it must be ensured that the advantages obtained by a collaborator cannot be reduced to nothing by proceedings conducted abroad[257]. To benefit from the principle of *ne bis in idem*, final judgement must have been

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[252] *Ibid*., p. 454, 457 and 461.

[253] K. Beyens, *Straffen als sociale praktijk*, Brussels, VUB Press, 2000, p. 390, quoted by M.-A. Beernaert, *Repentis et collaborateurs…*, *op. cit*., p. 459.

[254] M.-A. Beernaert, *Repentis et collaborateurs…*, *op. cit*., p. 459.

[255] *Ibid*., p. 464-466.

[256] See ECHR, Brusco c. France ruling of 14th October 2010.

[257] M.-A. Beernaert, *Repentis et collaborateurs…*, *op. cit*., p. 465, 466 and 570.

passed on the collaborator in Belgium[258]. It seems to us that the requirement of approval by a judge provides reassurance with regard to the risk of prosecution abroad.

The result promised by the Belgian Public Prosecutor is sometimes uncertain. When a promise is made on sentence enforcement, the collaborator will receive only a favourable "opinion" which does not predetermine the final decision (made by the Sentence Enforcement Court). Alternatively, a favourable "decision" may be granted; however the Public Prosecutor is not the only party involved in this and its implementation may be affected by the prior role played by other parties (see above 2.2.2). When a promise on the place of detention is made, the prison governor may decide not to implement the promise (even after statements have been made by the collaborator),if he/she considered that this would disrupt discipline, order or security within the prison (see above 2.4.2.2).

Waiving the right to silence must be accompanied by certain guarantees. Due to this, in legal literature it is stated that the collaborator must be assisted by a lawyer[259]. Fortunately, Belgian law provides this assistance (see above 2.4.2.2). Furthermore, the collaborator should not be "sentenced solely on the basis of their admission"[260]. Belgian law requires corroboration in order to punish the third party on whom information is provided, but not to punish the collaborator. It seems to us that this specific requirement for corroboration is particularly useful when the collaborator deliberately makes false statements, due to pressure from criminal circles. In the other cases, the collaborator's statements will allow the investigators to find other evidence. Finally, the Belgian legislator stipulates that collaborators should be able to benefit from protective measures to prevent retaliatory action. The legislator was particularly attentive to this question, including the opinion of the Witness Protection Committee very early on in proceedings (see above: 2.4.2.2).

Reliability

There are several reasons to be wary of the reliability of statements made by collaborators. A good witness, according to F. Gorphé, is someone who "has no material or moral interests in the proceedings"[261]. Collaborators do not correspond to this definition. Furthermore, even if they do not consciously attempt to make untruthful statements, they could be influenced by "what they think (…) they are expected to say"[262]. It seems questionable to believe that the candidates for collaboration will not lie as it is not in their interests to do so (under the threat of having their sentence reduction rescinded, or protection measures withdrawn, etc.), as this implies that the collaborator considers it impossible to trick the legal authorities[263]. Be this as it may, problems concerning the reliability of statements could be mitigated by including a set of guarantees in the system such as those set out below.

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[258] *Ibid*., p. 465.
[259] *Ibid*., p. 466 and 570.
[260] *Ibid*., p. 467, 505 and 572.
[261] F. Gorphé, *La critique du témoignage*, 2e ed., Paris, Dalloz, 1927, p. 192, quoted by M.-A. Beernaert, *Repentis et collaborateurs…*, *op. cit*., p. 471.
[262] M.-A. Beernaert, *Repentis et collaborateurs…*, *op. cit*., p. 472.

A *guarantee of transparency* would mean that the judge (responsible for the case of the third party on whom information is provided) and the defence (of the third party) would be informed of the witness' status as a collaborator, and of the content of the agreement and the conditions under which the testimony was obtained. Belgian law stipulates that the judge and the defence should be aware of the fact that the individual is a collaborator. These two parties also have knowledge of the content of the agreement, as the memorandum is included in the enforcement record of the third party (see above: 2.6). This transparency could have adverse effects in terms of security for the collaborator (for example if the memorandum states the prison establishment promised) or for his/her lawyer. There are questions over the added value for the rights of the defence of knowing exactly what the promise entails (if only that it allows a lawyer to learn, for future reference, the room for manoeuvre in their negotiations with the Public Prosecutor[264]). To ensure the transparency of the conditions under which testimony was obtained, M.-A. Beernaert proposes, although she can see the problems with this procedure, that "the first declarations of a collaborator (…) should always be recorded in audio-visual format", in order to ensure that the collaborator "has not been subject to undue pressure or had to answer leading questions"[265]. Belgian law does not address this point.

A guarantee of the adversarial principle seems to be provided by Belgian law. It appears that the third party on whom information is provided and his/her lawyer are able to contest the reliability of the collaborator's statements, as they have access to the memorandum, but particularly because the law forbids any form of anonymity (see above 2.3.1). If the collaborator's need for protection is particularly high, a "remote hearing through an audio-visual connection"[266] seems to be a balanced solution.

The principle of *equality of arms* could be interpreted as guaranteeing the defence the power to contest the reliability of the collaborator's statements by providing the same opportunities as to the Public Prosecutor. In practical terms, this means that the defence of the third party on whom information is provided should be able to "grant immunity to any potential defence witnesses"[267] This idea, which would no doubt be difficult to implement, is not addressed in Belgian law.

A *guarantee of corroboration* seems essential to evaluate the reliability of statements. This guarantee of corroboration is required by ECHR case law and stipulates that a third party cannot be sentenced purely on the basis of testimony given against him or her by a collaborator of justice (see above 1.2). Belgian law provides this guarantee, and even requires statements to be decisively corroborated by other evidence of a different type (see above 2.6).

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[263] *Ibid*., p. 474.

[264] For the third party under accusation, it seems that this information on the exact content of the promise would only strengthen the desire for revenge, without any significant positive effects in terms of the rights of the defence.

[265] M.-A. Beernaert, *Repentis et collaborateurs…*, *op. cit*., p. 482 and 483.

[266] *Ibid*., p. 494.

[267] *Ibid*., p. 497.

This guarantee seems necessary, although it limits the principle of certitude beyond reasonable doubt.

A *guarantee of specific statement of reasons* could reduce the risk of miscarriage of justice[268]. This would oblige the judge to "specify the reasons why he or she deems it appropriate to give credence to the statements of a collaborator"[269]. This statement of reasons is not prescribed by Belgian law.

Equality of treatment and non-discrimination

On one hand, the collaboration system must respect "external"[270]. equality of treatment. This first requirement concerns the scope of the collaboration system; authorisation of collaboration for certain types of crime but not others must be justified. We consider it important – and this is the case in Belgium – that this establishment of boundaries be undertaken by the legislator. The Belgian legislator has chosen to take the severity of offences as a criterion, using the strong expression of the offences "which most disrupt society". We have already mentioned the questionable nature of the operationalisation of this criterion, due to the fact that the legislator has used the list of offences from article 90-*ter*, § 2-4 of the Code of Criminal Procedure to do so (see above 2.1.1). However, more than this criticism, it is the criterion of severity of offences which is controversial. On this topic, M.-A. Beernaert makes a convincing case for the following argument: collaboration should only be possible for litigation "which poses particular difficulties for the legal authorities"[271]. If the legislator limits the scope only to offences which the criminal justice system would be powerless to process without collaboration, this will no doubt increase compliance with the principles of adequacy and necessity. Limiting the scope in this way would also provide greater equality of treatment, as it would reduce the initial inequality between offenders who could become accused third parties (and would only receive a light punishment as the justice system is powerless to deal with them) and those who cannot become accused third parties (and who are more often punished, as the justice system has the power to do so). This criterion would require periodic evaluation, as changes to tools (technology) and practices (both on the part of the legal authorities and of the offenders) could require amendments to be made to the list of criminal litigation in which collaboration is necessary.

On the other hand, the collaboration system must respect "internal"[272] equality of treatment. This second requirement imposes justification of the fact that different potential collaborators do not all have the same opportunity to collaborate in a useful manner. Only the quickest candidates (as only these can make statements classed as revealing) can collaborate in a useful manner. It seems to us that the criterion of speed should not be interpreted too strictly: a second candidate could also be taken into account for collabo-

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[268] *Ibid*., p. 502.
[269] *Ibid*., p. 502.
[270] *Ibid*., p. 542.
[271] *Ibid*., p. 546.
[272] *Ibid*., p. 541 and 548.

ration and sign a memorandum as long as the first candidate has not yet made their statements (set out in the first memorandum). This approach would be even more justifiable if offenders were given the "right to choose whether to collaborate and the corresponding right to obtain certain benefits in exchange for collaboration"[273]. This idea sheds light on the potential inequality between offenders when the Public Prosecutor has a margin of discretion in the choice on whether or not to accept a potential collaboration. This inequality exists in Belgium.

3. *Current case law*

As the Law of 22nd July 2018 entered into force only recently, no case law has been published yet and we do not know of any ongoing cases which may have used the collaboration system in terrorist cases.

However, the collaboration system appears to be in action in (ongoing) cases concerning drug trafficking, murder, and organised crime offences[274]. Moreover, the Law of 22nd July 2018 was applied for the first time in the highly mediatised ongoing "Footgate" case. Following a vast enquiry into corruption in the world of Belgian football, an investigation was launched into participation in a criminal organisation, money laundering and private corruption. Nineteen individuals were accused, and nine of these were placed in detention. One of the main suspects, whose identity was not kept secret (Dejan Veljkovic) was released under an agreement with the Federal Prosecutor. This suspect can also lay claim to the title of the first "collaborator" in Belgium. The other accused were also subsequently released during the investigation. Two of the accused have lodged an appeal with the Constitutional Court, which issued a decision on 6th February 2020 (see above 2.9).

4. *Compliance of Belgian law with article 16 of Directive 541/2017/EU*

The compatibility of Belgian law with article 16 of (EU) directive 2017/541[275] is called into question regarding promises on prosecution (4.1), on sentence enforcement and on the place of detention (4.2).

4.1. *Regarding promises on prosecution*

Article 16 of the directive envisages both internal collaboration ("to identify or prosecute *other perpetrators of the crime*")[276] and external collaboration ("to prevent *other offences* mentioned in articles 3 - 12 and 14 from being committed)[277].

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[273] *Ibid*., p. 552.

[274] This information was provided by a magistrate during the Focus Group of 23rd October 2019.

[275] (EU) Directive 2017/541 of 15th March 2017 on the fight against terrorism, replacing Framework Decision 2002/475/JAI of the Council and amending decision 2005/671/JAI of the Council.

[276] Emphasis added.

[277] Emphasis added.

The directive only authorises the use of extenuating circumstances for external collaboration if the collaborator and the third party accused by the collaborator are both involved in terrorist activities (as the "other offences listed in articles 3 - 12 and 14" are all linked to terrorist activity). Belgian law allows collaboration in one case which is not listed in article 16 of the directive: a promise on prosecution can be made in the case that the collaborator is involved in terrorist activities and the third party accused by the collaborator is involved in activities not linked to terrorism, as long as the principles of relevance, subsidiarity, proportionality and the weighting principle are respected. We consider that the following example illustrates a situation in which Belgian law authorises an extenuating circumstance whilst article 16 of the directive does not: a case where the collaborator has received terrorist training and the third party has committed a murder (not linked to terrorist activities).

4.2. *Regarding promises on sentence enforcement and place of detention*

The only type of reward prescribed by the directive is sentence reduction. The question is therefore whether promises on sentence enforcement and place of detention are compatible with the directive, and particularly with article 15 which calls for "effective, proportionate and dissuasive criminal penalties".

Promises on the place of detention do not pose major difficulties. A change of place of detention does not compromise the effectiveness, proportionality and dissuasiveness of a criminal penalty.

Regarding promises on sentence enforcement, we have seen that Belgian law prescribes either a favourable opinion on a means of enforcement of the sentence stipulated under the Law of 17th May 2006, or a favourable decision on sentence enforcement (see above 2.2.2). The first type of advantage does not seem problematic to us. It is only an opinion, and more fundamentally, the European Union has shown on many occasions[278] that it promotes alternative means of custodial sentence enforcement and therefore does not consider that these undermine the requirements of effectiveness, proportionality and dissuasion of criminal penalties. The second type of advantage, however, appears potentially problematic if, as the preparatory work indicates, the favourable decision consists of "not proceeding with sentence enforcement or delaying sentence enforcement, providing the conditions are respected"[279]. In this case, the effectiveness, proportionality and dissuasiveness of the criminal penalty are compromised.

General conclusion

Belgium has only had a true "law on repentants" since the entry into force of the law of 22nd July 2018. Before this law, a penal reward for col-

[278] See for example framework decisions 2008/909/JAI, 2008/947/JAI and 2009/829/JAI.
[279] *Doc.*, Ch., 2017-2018, n° 3016/1, p. 53.

laboration was only prescribed for some specific offences (including drug offences), through the grounds for mitigation mechanism, which allowed sentences to be reduced or dropped. This grounds for mitigation mechanism is hardly used in practice, for the reasons explained in this report.

The Law of 22nd July 2018 is not the first time the Belgian legislator has tried to introduce a broader mechanism to reward collaborators of justice. Since the 90s, many draft laws were submitted. To justify their proposals, the proponents (mainly from the North of the country) pointed to the gaps in the Belgian system which were highlighted by the sadly famous "Brabant killings" (1982 - 1985) and more generally, to the needs of the parties involved in the criminal justice system in order to fight organised crime and terrorism.

The legislator in 2018 did not limit the scope of the collaboration mechanism to these types of litigation. The scope of offences upon which informants can provide information is indeed very wide, as all offences under article 90-*ter* of the Code of Criminal Procedure are included. Two principles in particular are meant to limit the scope: firstly, the principle of subsidiarity only authorises the use of collaboration if the needs of the investigation justify this and if other forms of investigation appear insufficient. Secondly, the principle of proportionality does not authorise collaboration if the offence committed by the informant is more serious than the crime informed upon. This scope raises questions on the compatibility of Belgian law with article 16 of directive 541/2017/EU. Belgian law authorises sentence reduction when the collaborator is involved in terrorist activities and the third party accused by the collaborator is involved in non-terrorist offences, whilst the directive seems to rule out the use of extenuating circumstances in this case.

The law of 22nd July allows the Prosecutor to promise three types of benefit. Firstly, the collaborator can obtain a reduced sentence. This sentence reduction must be approved by a judge. How far it is reduced depends on the severity of the offences committed by the collaborator, the severity of the offences informed upon, and the severity of the possible consequences of the offences informed upon. It should be noted that the legislator has prescribed less generous rules for "terrorist" collaborators. Secondly, the collaborator can obtain a favourable opinion or decision with regard to sentence enforcement. People working in the field have strongly criticised this part of the law. The law should be amended to make this type of reward truly attractive to candidates for collaboration. Thirdly, collaborators can be placed or transferred to serve their custodial sentence in a prison of their choice.

To benefit from these advantages, collaborators must comply with certain obligations. The main obligation is of course to make the statements which they have committed to give, and which cannot be anonymous under any circumstances. Collaborators must also pay compensation for the damages linked to their own offence and refrain from committing any new offence of a certain level of severity. If the collaborator does not respect one of the obligations, the agreement will be revoked and, if the promise was in relation to sentence enforcement, the substitute sanction will be applied.

The declarations made by collaborators can of course have serious consequences on the life of the third party accused by the collaborator, and that

of the collaborator him or herself (and family). For the third party, it is stipulated that the collaborator's statements cannot be considered as evidence unless they are decisively corroborated by other evidence. To guarantee the rights of the defence of the third party, his or her lawyer will be informed that the witness for the prosecution is a collaborator (who cannot be granted anonymity) and will be able to contest the reliability of the testimony. To avoid retaliatory action, the collaborator and his/her family can be provided with protective measures, if deemed necessary.

Because the Law of 22nd July 2018 (validated by the Constitutional Court in its judgment of 6 February 2020) is so recent, there is not yet any case law linked to terrorist offences. Those involved in this field, when asked, also stated that no collaboration mechanism is currently envisaged for any "terrorism" case.

CHAPTER 3

CROATIA

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1. *Historical background of rewarding legislation*

1.1. *Socio-political reasons*

Before the 1990s Croatia was one of six republics of the Socialist Federative Republic of Yugoslavia, which due to its one-party political system, socialism and state governed market was not part of the European western democracies. The Republic of Croatia became an independent state in 1991 after the collapse of the socialist political and economic system and the breakup of Yugoslavia. The quest for independence was accompanied by a war, which lasted from 1991-1995. Already during the war, a complex and turbulent transitional reform of the Croatian criminal justice system started and this process continued until 2000 (the so-called first transitional reform). Due to a significantly new international, constitutional and legal framework, the criminal justice system had to be transformed in order to protect basic democratic values and individual rights in line with European standards of protection of fundamental rights and freedoms of citizens and the defence rights. The first transitional reform of Croatian criminal justice system (1991-2000.) aimed to strike the balance between protection of human rights and the need for effective criminal justice system including creating effective solutions to combat new forms of crime, especially organized

crime[1] as well as terrorism, which was not in the focus during the socialist period. The major legislative reform in that regard happened only six years after independence, in 1997, when a new Criminal Code (CC/97)[2] and a new Criminal Procedure Act[3] (CPA/97) were enacted. The Criminal Code has introduced for the first time several rewarding measures for terrorist offences and the Criminal Procedural Act has introduced the right to fair trial and its procedural guaranties in line with European Convention of Human Rights and the Croatian Constitution.

Second transitional reform of Croatian criminal justice system began with the accession process of the Republic of Croatia to the European Union, which started on 29 October 2001. On that date Croatia signed the Stabilization and Association Agreement with the European Union and committed to fulfil political, economic, legal and administrative criteria from Copenhagen and Madrid. The process of adopting the EU *acquis communautaire* and developing administrative and judicial structures for effective implementation of Chapter 23: Judiciary and fundamental rights and Chapter 24: Justice, freedom and security lasted almost 12 years[4] Fight against corruption and the establishment of an independent and effective criminal justice system were the most important conditions and the last one to be fulfilled for accession of Croatia to full membership of the European Union[5].

During the negotiations, several forms of rewarding measures have been introduced into Croatian criminal procedure: the crown witness was introduced with the Act on Anti-Corruption and Organized Crime Prevention Office in 2001[6] and the judgment at the request of parties in an investigation was introduced in 2002 (Article 190.a CPA/1997) but only for offences punished up to 10 years of imprisonment, thus excluding severe offences such as organised crime or terrorism. Similar processes took place in the field of substantive criminal law. In the course of this timeframe, the Criminal Code was amended on several occasions, significantly reshaping rewarding measures and terrorist offences in line with the acquis.

Following its accession to the European Union in 2013, the process of harmonization of national legislation with the developing EU law continued

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[1] See Davor Krapac, *Zakon o kaznenom postupku i drugi izvori hrvatskog kaznenog postupovnog prava: redakcijski pročišćeni tekst, objašnjenja i poveznice, stvarno kazalo*, *Narodne novine*, Zagreb, 2002, pp. 9-10.

[2] Criminal Code, Official Gazette 110/97, 27/98, 50/00, 129/00, 51/01, 111/03, 190/03, 105/04, 84/05, 71/06, 110/07, 152/08, 57/11, 143/12.

[3] Criminal Procedure Act, Official Gazette 110/1997, 27/98, 58/99, 112/99, 58/02, 143/02, 62/03, 178/04, 115/06.

[4] Republic of Croatia submitted official application for full membership to EU in February 2003, and in 2004 the European Council gave Croatia the official candidate status. However, the opening of the accession negotiations was delayed until Chief Hague Prosecutor Carla del Ponte declared Croatia's co-operation with the International Criminal Tribunal for the former Yugoslavia was complete in October 2005. (see more in: Zlata Đurđević, *Pregovori o pridruživanju EU za 24. poglavlje "Pravda, sloboda i sigurnost"*, Pravo azila, 1 (2006), 1, p. 3).

[5] Berislav Pavišić, *Novi hrvatski Zakon o kaznenom postupku, Hrvatski ljetopis za kazneno pravo i praksu*, 2(2008), p. 512.

[6] Act on Anti-Corruption and Organized Crime Prevention Office, Official Gazette 88/01, 12/02, 33/05, 76/07.

in the Republic of Croatia including the harmonisation with the Directive (EU) 2017/541 of the European Parliament and the Council of 15 March 2017 on combating terrorism (Counter-Terrorism Directive)[7].

1.2. *Legislative evolution*

For a better understanding of the legislative evolution of rewarding measures in Croatian law, this chapter shall be divided into two parts explaining the evolution of Croatian criminal substantive legislation and then the Croatian criminal procedural legislation.

1.2.1. *Evolution of rewarding measures in Croatian substantive criminal law*

Mitigation of punishment as such is not a novelty in Croatian legal system and neither is remission of punishment. The 1977 Criminal Code of the Socialist Federal Republic of Yugoslavia was taken over and adopted only with minor adjustments by an Act of the Croatian Parliament as the Basic Criminal Code of the Republic of Croatia (hereinafter BCCRC) in 1991[8]. Mitigation of punishment and remission of punishment were governed by Articles 38 to 41 of the BCCRC and in 1997 the first Criminal Code of the Republic of Croatia essentially retained the same provisions from the BCCRC (see more about classical mitigation and remission of punishment *infra*, 2.2.2).

Whereas the possibility of classical mitigation of punishment as well as of remission of punishment, hence, existed in Croatian legislation even before Croatia became independent, rewarding measures applicable specifically to terrorism were introduced for the first time by the 1997 Criminal Code and its subsequent amendments[9].

The 1997 Criminal Code introduced a rewarding measure applicable to the offence Anti-State terrorism (Article 141 CC/1997) – remission of punishment for those who organized a group of people with a purpose of committing an act of anti-state terrorism (Article 152 (3) CC/1997), and in case of a mere membership in the group, remission of punishment was even mandatory if a member uncovered the group prior to having committed an act of terrorism (Article 152 (4) CC/1997). It may be assumed that the reasons behind the introduction of this rewarding measure were pragmatic and utilitarian, i.e. reflected in the desire to motivate terrorists to come forward, prevent further terrorist activities and facilitate investigations; yet, these criminal policy considerations have not been explicitly mentioned either in

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[7] Directive (EU) 2017/541 of the European Parliament and the Council of 15 March 2017 on combating terrorism (Counter-Terrorism Directive) and replacing Council Framework Decision 2002/475/JHA on combating terrorism and amending Council Decision 2005/671/JHA (OJ L 88/6, 31.3.2017).

[8] Official Gazette 53/91, 39/92 and 91/92, 31/93, 35/93, 108/95, 16/96, 28/96, Novoselec, P., *Opći dio kaznenog prava*, Osijek, 2016, p. 32.

[9] Similar provision existed even before in the BCCRC with respect to some other offences against the security of the Republic of Croatia. See Article 115(3) and (4) of the BCCRC.

the academic literature or in the explanatory memorandum supplementary to the new law[10].

In 2004, the same possibility of remission of punishment was extended to those who associated for the purpose of committing acts of international terrorism and related terrorist offences (Article 187 CC/97)[11]. By doing that, Croatian legislator essentially, to an extent, implemented the requirements set by Article 6 of the Framework decision of 13 June 2002 on combating terrorism, which provided for the possibility of reduction of punishment with respect to all terrorist offences, regardless of whether anti-state or international.

Provision defining the offence Association for the Purpose of Committing Criminal Offenses Against the Values Protected by International Law (Article 187 CC/97) provided for a more lenient punishment for a perpetrator who organized a group of people or in some other way joined three or more persons in common action for the purpose of committing any of the listed (international) terrorist offences[12], if by uncovering the group s/he prevented the perpetration of these criminal offences (Article 187(3) CC/97). Whereas the organizers of such groups were ordinarily to be punished by imprisonment from three to fifteen years just for organizing a group, punishment for organizers who prevented the commission of the offence was significantly less severe – from six months to three years of imprisonment, with the further possibility of remission of punishment in its entirety (Article 187(3) CC/97). Furthermore, remission of punishment was automatic and mandatory for a member of the group who uncovered the group prior to having committed any of the listed criminal offences (Article 187(4) CC/97).

With the 2008 Amendments to the CC/97[13], the distinct offence of anti-state, i.e. anti-Croatian terrorism, was abolished and incorporated in offence Terrorism (Article 169) that was previously entitled "International Terrorism". The 2008 Amendments introduced two new offenses related to terrorism – Public Incitement to Terrorism (Article 169a) and Recruitment and Training for Terrorism (Article 169*b*) that were also subject to Article 187 regime, allowing for mitigation and remission of punishment.

In 2011 the entirely new Criminal Code of the Republic of Croatia (CC/11) was enacted and it entered into force in 2013. It further harmonized Croatian criminal legislation with the acquis, also in the field of terrorism[14]. Legislative policy discussions and the dominant academic narrative during this time frame focused almost exclusively on the harmonization require-

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[10] See Željko Horvatić, *Novo hrvatsko kazneno pravo*, Zagreb, 1997, p.

[11] Technically this was done through the amendments of Article 187 which was until 2004 applicable only to Genocide, Aggressive War and War Crimes. International Terrorism was incriminated by Article 169 CC/97 and related terrorist offences were the following: Endangering the Safety of Internationally Protected Persons (Article 170 CC/97), Taking of Hostages (Article 171 CC/97), Misuse of Nuclear Materials (Article 172 CC/97), Hijacking an Aircraft or a Ship (Article 179 CC/97) and Endangering the Safety of International Air Traffic and Maritime Navigation (Article 181. CC/97).

[12] For a full list of offences, see footnote 11 *supra*.

[13] Amendments to the CC/97 from 2008 (Official Gazette 152/08).

[14] Criminal Code, Official Gazette 125/11, 144/12, 56/15, 61/15, 101/17, 118/18, 126/19.

ments instead of analysing in depth criminal policy considerations behind the specific measures[15].

The 2011 Criminal Code defines offences related to terrorist activities in the following articles: Terrorism (Article 97), Financing of Terrorism (Article 98), Public Incitement to Terrorism (Article 99), Recruitment for Terrorism (Article 100), Training for Terrorism (Article 101) and Terrorist Association (Article 102).

The main provision regulating rewarding measures applicable specifically to terrorism is Article 102 that defines the offence Terrorist Association[16,17]. It provides that an organizer or a leader of a terrorist association[18] the aim of which is to commit a criminal offence referred to in Articles 97 through 101 "or any other criminal offence intended to cause death or serious bodily injury to a civilian or to any other person not taking an active part in an armed conflict, when the purpose of such an act is to intimidate a population or to compel a government or an international organisation to perform or to abstain from performing any act" may have his/her punishment remitted if s/he uncovers a terrorist association in a timely manner to prevent the perpetration of a criminal offence (Article 102(3) CC). The remission of punishment applies under the same conditions to members of a terrorist association or other persons who commit an act with knowledge that such an act contributes to the achievement of a terrorist association's goal. Finally, remission of punishment is possible with respect to a member of a terrorist association, who uncovers the association prior to committing a terrorist offence as its member or on its behalf. Article 102 of the Criminal Code thus abolished the distinction in the legal consequences for the orga-

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[15] Comp. e.g. Kristian Turkalj, *Usklađivanje hrvatskog pravnog sustava s pravnom stečevinom EU na području borbe protiv međunarodnog terorizma*, in Davor Derenčinović (ed.), *Novi obzori suvremenog terorizma i antiterorizma Hrvatsko motrište*, Zagreb, 2007, pp. 79-108, and Ksenija Turković, *et al*., *Komenar Kaznenog zakona*, Zagreb, 2013, pp. 152.

[16] Criminal Code, Article 102.

(1) Whoever organises or runs a criminal association the aim of which is to commit a criminal offence referred to in Articles 97 through 101, Article 137, Article 216, paragraphs 1 through 3, Article 219, Articles 223 through 224, Articles 352 through 355 of this Act or any other criminal offence intended to cause death or serious bodily injury to a civilian or to any other person not taking an active part in an armed conflict, when the purpose of such an act is to intimidate a population or to compel a government or an international organisation to perform or to abstain from performing any act, shall be sentenced to imprisonment for a term of between three and fifteen years.

(2) Whoever becomes a member of the criminal association referred to in paragraph 1 of this Article or commits an act with knowledge that such act contributes to the achievement of the terrorist association's goal, shall be sentenced to imprisonment from one to eight years.

(3) The perpetrator of a criminal offence referred to in paragraph 1 or 2 of this Article who, by uncovering a terrorist association on time, prevents the perpetration of a criminal offence referred to in paragraph 1 of this Article or a member of a terrorist association who uncovers the association prior to committing, as its member or on its behalf, a criminal offence referred to in paragraph 1 of this Article may have his or her punishment remitted.

[17] This provision replaced and slightly amended the content of Article 187 of the former CC/97.

[18] According to Article 328(4) a criminal association shall be made up of three or more persons acting in concert with the aim of committing one or more criminal offences that are punishable with imprisonment for a term longer than three years and shall not include an association randomly formed for the immediate commission of one criminal offence.

nizers, i.e. leaders and mere members of the terrorist association who renounced their terrorist activity. With respect to the latter, the remission of punishment is no longer mandatory.

In 2018 the 2011 Criminal Code was amended to comply with the Directive 541/2017. Since the provisions from the Directive 541/2017 were largely taken over from the Framework Decision 2002/475/JHA on combating terrorism and its 2008 amendment[19], Croatian substantive criminal legislation was already to a large extent harmonized with the Directive. Therefore, only one new criminal offense related to terrorist offences was introduced – Travelling for the Purpose of Terrorism (Article 101.a CC/19) and several existing offences were slightly amended. Although this was not explicitly stated in the explanatory report attached to the amendments, implicitly it can be concluded that the legislator considered Article 102 – an article that regulates rewarding measures for terrorists – in full compliance with the Directive[20].

In the end, it is important to emphasize that in addition to rewarding measures applicable under Article 102, general provisions on mitigation and remission of punishment remain applicable under the general conditions stipulated in Articles 48-50 of the Criminal Code, as will be explained *infra*, 2.2.2.

1.2.2. *Evolution of rewarding measures in Croatian criminal procedural law*

Review of legislative evolution of Croatian criminal procedural law may start with a reference to criminal procedure of former Yugoslavia, more precisely with the Criminal Procedure Act of 1976 which entered into force on 1 July 1977. After the independence, in 1991 Croatian Parliament co-opted this law, with some amendments, and it was in force until the adoption of the new CPA in 1997. The adoption of the CPA of 1997 mark the completion of the first phase of transitional changes in the Croatian criminal procedure. Therefore, the first Croatian Criminal Procedure Act, the one from 1997, was actually founded on the provisions of Yugoslav CPA of 1976[21].

The original text of the Criminal Procedure Act of 1997 did not contain the most of the rewarding measures existing today in Croatian criminal procedural law. They were introduced by the amendments to the CPA/1997 and with the adoption of new special legislation – Act on Anti-Corruption and Organized Crime Prevention Office in 2001.

However, the CPA/97 had an important provision that served as a basis for development of the forthcoming institute of Crown Witness. It authorised the State Attorney General to dismiss a crime report or to drop the indictment against a person who was a member of criminal organization under the following conditions: firstly, if this was "of importance for the discovery of offenses and of the members of a criminal organization", and

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[19] Council Framework Decision 2008/919/JHA of 28 November 2008 amending Framework Decision 2002/475/JHA on combating terrorism (OJ L 330, 9.12.2008, p. 21-23).

[20] See *www.sabor.hr/sites/default/files/uploads/sabor/2019-01-18/081205/PZE_78.pdf*.

[21] See more Berislav Pavišić, *Novi hrvatski Zakon o kaznenom postupku, Hrvatski ljetopis za kazneno pravo i praksu*, vol. 15 No. 2, 2008, Zagreb, pp. 511-512.

secondly, if this was "in proportion with the gravity of the offenses committed and with the importance of that person's testimony" (Article 176 CPA/97). In accordance with that provision, the Act on Anti-Corruption and Organized Crime Prevention Office from 2001 introduced a new form of consensual procedure – Crown witness. The status of a crown witness was granted to a suspect or defendant, by the court, upon the request of the State Attorney General. The crown witness as a form of agreement between parties could be used only in cases of organized crime and corruption. Ever since it was introduced into Croatian law, it has rarely been used in practice, as will be explained *infra* (1.3.*c*) and 2.2.1 B)*b*))[22].

Legislative intervention that introduced another form of consensual procedure – a judgment at the request of parties in an investigation was achieved by the 2002 amendments of the Criminal Procedure Act of 1997. The use of this initial Croatian version of plea-bargaining (Article 190.*a* CPA/97), was limited to criminal offenses punishable by imprisonment from five to ten years. The parties could negotiate only the type and the measure of the punishment, but not the type and form (criminal law qualification) of an offence. In the judgment based on the agreement, it was possible to impose a prison sentence up to one third of the upper limit prescribed by law, while the parties were supposed to indicate explicitly the type and measure of the punishment. The investigating judge could either agree with the proposed type and measure of the punishment, or disagree, in which case the judicial panel decided. In case the judicial panel rejected the proposed agreement, the parties had the right to appeal.

In 2008, the new Criminal Procedure Act introduced a new model of prosecutorial investigation into Croatian criminal proceedings, replacing the traditional model of judicial investigation. "Judgment at the request of parties in an investigation" was replaced with a "judgment based on agreement of the parties". The main difference between the two Croatian versions of plea-bargaining was that the later version allowed bargaining for all criminal offences[23].

Another form of consensual procedure, "partial procedural immunity of a witness" or "witness immunity" was also introduced into Croatian criminal procedure with the new Criminal Procedure Act of 2008 (Article 286 CPA). Yet, just a few years later, the Constitutional Court of the Republic of Croatia declared unconstitutional the legislative provisions regulating this institute. More concretely, according to the CPA/08, the State Attorney had broad powers when granting witness immunity to any person whose testimony would be important in proving a serious criminal offence of another person, for which a sentence of imprisonment of ten years or more was prescribed by law. The Constitutional Court explained the important procedural

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[22] Elizabeta Ivičević Karas, *Trial Waiver Systems in Croatia. Towards a rights-based approach to trial waiver systems*, page 3-4, 6-7, report available at: *https://fairtrials.org/sites/default/files/publication_pdf/20190513_ Trial_Waivers_Croatia_Final.pdf*.

[23] Elizabeta Ivičević Karas, *Trial Waiver Systems in Croatia. Towards a rights-based approach to trial waiver systems*, page 3-4, 6-7, report available at: *https://fairtrials.org/sites/default/files/publication_pdf/ 20190513_Trial_Waivers_Croatia_Final.pdf*.

difference between the position of witnesses granted with the immunity on one side, and the Crown witness on the other side[24]. Following the Constitutional Court decision, Article 286 was brought into line with the Constitution by 2013 amendments to the CPA. The legislative amendment implied strengthening the principle of proportionality and therewith narrowing the margin of discretion of the state attorney when granting the witness immunity. Still, the legislation does not provide for judicial supervision of the state attorney's decision to grant the immunity to the witness[25] (see more *infra*, 2.2.1.B)*b*)).

1.3. *Case law evolution*

Case law evolution until present days will be presented through four mechanisms of consensual justice: *a*) judgement at the request of parties in an investigation *b*) judgment based on agreement of the parties, *c*) crown witness, *d*) witness immunity.

a) Judgment at the request of parties in an investigation:

During the first several years, a judgement at the request of parties in an investigation, existed in the CPA from 2002 to 2008, was barely used in practice, but its use increased since 2006 when the legislator amended the Criminal Code and reduced the possibilities to mitigate the sentence and pronounce suspended sentences, and therefore motivated the defendants to engage into negotiations with the state attorney[26].

b) Judgment based on agreement of the parties:

So far, there have been a few studies on case law of the judgments based on agreement of the parties. The research conducted at Zagreb County Court in 2013, that covered the period from 1 September 2011 to 31 May 2013, showed that the judgment based on agreement of the parties was rendered in cases of various criminal offences, including criminal offences related to drug-abuse, corruption, robberies, abuse of office and official authority etc., but also in cases of murder, attempted murder, rape and attempted rape[27]. Another research at the same court, covering the period 2013 to 2015, showed that the number (absolute and relative) of judgments based on agreement of the parties significantly increased every year, though it did not contain any detail on the type criminal offences[28]. Yet, it showed

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[24] USRH U-I-448/2009 of 19 July 2012, points 143 - 146.3, Official Gazette 91/12. See *ibid*.

[25] Elizabeta Ivičević Karas, *Trial Waiver Systems in Croatia. Towards a rights-based approach to trial waiver systems*, page 3-4, 6-7, report available at: *https://fairtrials.org/sites/default/files/publication_pdf/ 20190513_Trial_Waivers_Croatia_Final.pdf*.

[26] Krapac, Davor, *Presuda na zahtjev stranaka u stadiju istrage u hrvatskom kaznenom postupku*, in *Decennium Moztanicense* (ed. Berislav Pavišić), Rijeka, 2008, pp. 144-145.

[27] See Elizabeta Ivičević Karas; Dorotea, Puljić, *Presuda na temelju sporazuma stranaka u hrvatskom kaznenom procesnom pravu i praksi Županijskog suda u Zagrebu*, *Hrvatski ljetopis za kazneno pravo i praksu* 2(2013), pp. 829-830.

[28] See Ivan Turudić, Tanja Pavelin Borzić, Ivana Bujas, *Sporazum stranaka u kaznenom postupku - trgovina pravdom ili?*, *Pravni vjesnik* 1(2016), pp. 147-148.

that all the agreements proposed by the parties, 100% of them, were accepted by the Zagreb County Court[29]. This confirms the assumption that the court has a rather passive role and judges do not check the agreements in detail[30].

On the other side, there are two recent cases where the indictment panel of Zagreb County court rejected the statement on the agreement of parties[31], and then the Supreme Court of the Republic of Croatia, denied the County court the authority to question the agreement regarding the choice of the type and the measure of the agreed punishment[32]. This decision of the Supreme Court actually narrows down the authority of the court to question whether the punishment that the parties agreed upon is not only within the legislative framework, but also whether it is appropriate and fair.

c) Crown witness:

One of only two cases in the Republic of Croatia where the institute of Crown witness was used in Croatian judicial practice was the so-called Pukanić case that relates to a case of murder of the co-owner of the political weekly Nacional, Ivo Pukanić, and his aide, Niko Franjić. Pukanić and Franjić were killed in the explosion of a bomb planted next to Pukanić's car in the car park outside the Nacional offices in central Zagreb on October 23, 2008. The six defendants, Robert and Luka Matanić, Amir Mafalani, Željko Milovanovic, Bojan Gudurić and Slobodan Đurović, were indicted by the Office for the Prevention of Corruption and Organised Crime (USKOK) and convicted of offences murder for gain, a crime against public security and a conspiracy to commit crime[33]. It is very difficult to collect any data on the use of crown witnesses, due to its strictly confidential nature.

d) Witness immunity:

Given the fact that testimony of person to whom is granted witness immunity is confidential, there are no available information and cases to demonstrate the functioning of this institute in practice.

2. *Current rewarding legislation (where existing)*

The rewarding measures will be grouped depending on the stage of the criminal proceedings in which they are used: the pre-sentencing stage, sentencing stage and post-sentencing stage. The measures will be analysed in two sections: legislation and results of the focus group. The focus group

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[29] *Ibid*., p. 148.

[30] Zvonimir Tomičić, *Novokmet, Ante, Nagodbe stranaka u kaznenom postupku - dostignuća i perspektive*, *Pravni vjesnik*, 3-4(2012), p. 182.

[31] Zagreb County Court, decision K-Us-45/15 of 17 May 2016, and decision K-Us-45/15 of 12 March 2018.

[32] Supreme Court of the Republic of Croatia, judgment in case Kzz 38/16-3, of 21 September 2017. See also judgment in case Kzz 17/2018-8, of 8 and 9 May 2018. See Elizabeta Ivičević Karas, *Trial Waiver Systems in Croatia*, p. 10.

[33] Radio.net, 10 February 2010, Zagreb - *https://www.tportal.hr/vijesti/clanak/trial-in-pukanic-case-opens-at-zagreb-county-court-20100204*.

worked on the basis of the structured interview with up to three questions related to each rewarding measure existing in Croatian legislation. Therefore, this section includes the analysis of the current rewarding legislation but also experience from the practitioners about their use in judicial practice.

2.1. *Applicability conditions*

Explained further under the types of rewarding measures.

2.2. *Types of rewarding measures*

There are few types of rewarding measures in current Croatian criminal law. These include: the judgement based on agreement of the parties, the Crown witness, the Witness immunity, abolishment or reduction of the sentence and mitigation of punishment by the court.

2.2.1. *Rewarding measures that exclude or mitigate the penalty, initiated at the pre-sentencing stage*

A) The judgment based on agreement of the parties,

a) Legislation[34]

As said before, the judgment based on agreement of the parties is applicable to all criminal offences, notwithstanding the gravity or the type. The

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[34] CPA, Article 360.

(1) The parties may negotiate on the conditions of pleading guilty and agreeing on a penalty and the other measures referred to in Article 360, paragraph 4, item 3, of this Act. During negotiations the defendant shall have a defence counsel.

(2) The panel may postpone the session for no more than fifteen days in order that the parties may complete negotiations.

(3) If prior to the opening of or during the session of the indictment panel the State Attorney and the defendant and his defence counsel signed a statement on the rendering of a judgment on the basis of an agreement of the parties, they shall submit the statement to the panel immediately upon the opening of the session.

(4) The statement referred to in paragraph 3 of this Article shall contain the following:

1) a description of the criminal offence that is the subject of the charge;

2) the defendant's guilty plea to the criminal offence in question;

3) the agreement on the type and measure of penalty, judicial admonition, suspended sentence, partial suspended sentence, special obligations, protective supervision, seizure of objects, and the costs of proceedings;

4) the defendant's statement of position on the civil claim filed within the framework of criminal proceedings;

5) the statement by the defendant on his acceptance of the State Attorney's proposal for the imposition of a safety measure and the confiscation of the pecuniary advantage obtained by the commission of the criminal offence;

6) the signatures of the parties and the defence counsel. «(5) After the statement referred to in paragraph 3 of this Article has been signed, the State Attorney shall notify the victim or the injured person thereof.

6. Adjudication on the Basis of an Agreement Between the Parties

(5) After the statement referred to in paragraph 3 of this Article has been signed, the State Attorney shall notify the victim or the injured person thereof.

(6) If the criminal offence in question is a criminal offence against life and limb or against sexual freedom which is punishable by more than five years' imprisonment, the State

negotiation between the parties is taking place in pre-trial stages of criminal proceedings such as during inquiries, investigation or indictment stage. This judgement can only be rendered before the indictment panel or at the preparatory hearing for the trial stage. It can never be rendered in the stage of investigation, or once the trial has started.

The bargaining procedure is regulated in detail by the Instructions of the State Attorney General[35] (which is internal document and is binding for all of the state attorneys), and the Criminal Procedure Act only regulates the procedure before the court, once the parties reach the agreement. The parties (state attorney and the defendant) may only bargain on the conditions of pleading guilty with regard to the severity of punishment or other criminal law measure (Article 360 (1) CPA). In cases of criminal offences against life and limb and criminal offences against sexual liberty, punishable with more than five years imprisonment, the state attorney must previously obtain the consent of the victim (Article 360(6) CPA). The minutes of negotiations between parties is secret and that means that the content of the negotiation and the motivation of the parties for concluding agreement is not revealed even to the judicial panel that will deliver the judgment based on it.

However, after receiving the written agreement submitted by the parties, the court must first decide on the indictment (Article 361(1) CPA) meaning will and may decide to accept the parties' request only once it has confirmed the indictment (Article (2) CPA).

The court can refuse to bring a judgement based on the agreement of the parties only if the agreed punishment does not comply with the rules on measuring the punishment, or of it is otherwise unlawful (Article 361 (3) CPA). In the case the statement (the agreement) is accepted, the court shall pronounce the punishment or measure as determined in the written agreement (Article 361 (3) CPA).

Attorney must obtain the consent of the victim for the reaching of an agreement. If the victim is deceased or unable to give his consent, consent shall be sought from the persons referred to in Article 55, paragraph 6, of the present Act.

CPA, Article 361

(1) Upon receipt of the written statement on adjudication on the basis of the agreement reached between the parties, referred to in Article 360, paragraph 3, of the present Act, the panel shall first determine and state for the record whether the parties agree with the contents of the statement and then decide on the indictment's confirmation (Article 354, paragraph 1, Article 355 and Article 356).

(2) If it confirms the indictment, the panel shall decide on the acceptance of the statement on adjudication on the basis of the agreement reached between the parties, referred to in Article 360, paragraph 3, of the present Act and shall sentence the accused to a penalty or other measure referred to in Article 360, paragraph 4, of the present Act.

(3) The panel shall not accept the statement on adjudication on the basis of the agreement reached between the parties, referred to in Article 360, paragraph 3, of the present Act if in view of the circumstances its acceptance is not in accordance with the determination of penalty provided for by law or the agreement is otherwise not in accordance with the law. By an order against which no appeal shall be possible the panel shall reject the statement on adjudication on the basis of the agreement reached between the parties.

(4) After the issuance of the order referred to in paragraph 3 of this Article, the indictment shall be delivered together with the case file to the president of the panel for the purpose of scheduling the trial.

[35] Instructions of the State Attorney General, on the proceedings during bargaining with the suspect/defendant on terms of pleading guilty and the punishment, O-2/09, of 17 February 2010, *http://www.dorh.hr/PresudaPoSporazumu* (accessed on 10 October 2019).

The sentence mitigation agreed upon by an agreement between the state attorney and the defendant (on which a judgment based on the agreement of the parties is based) must be within the limits prescribed by the Criminal Code in the Article 49 (Punishment Mitigation Limits)[36].

b) Focus group results

Focus group results pointed at some deficiencies of the judgment based on the agreement of the parties as a rewarding measure. Focus group participants found the regulation of the judgment based on the agreement of the parties inadequate. According to their experiences, there are different reasons motivating prosecutors to enter into the agreement, which include improving the cost-effectiveness of the proceedings, discovering new facts and evidence, and obtaining the testimony necessary to conduct another criminal proceeding against another defendant. The motive of getting a testimony is not provided by law for this measure as it is legally prescribed for crown witness. It is only stipulated in the Instruction of the Chief State Attorney.

Judges and prosecutors indicated that, in practice, the agreement is almost never concluded with the aim of improving the cost-effectiveness of the proceedings. In addition, the judges stated that, in case the goal of the agreement is to obtain evidence against other perpetrator and for another criminal offence, the problem is that there is no guarantee that the defendant who reached the agreement will actually participate in another proceeding as a witness and fulfil his/her part of the bargain once the criminal proceedings against him/her are completed and a more lenient sentence is pronounced according to the concluded agreement. Some participants, particularly judges, pointed out that, according to their opinion, the defendant's plea should be judicially fixed as soon as the agreement itself is concluded in order to preserve it for later proceedings and only after the plea is fixed the court should decide on the request of parties.

Unlike the judges, state attorneys, on the other side, stated that the perpetrators with whom they entered into an agreement upon which a judgment was subsequently passed, trusted the institutions and fulfilled their obligations. At the same time, they warned that the formalities for entering into an agreement with perpetrator are innumerable. This is often demotivating state attorneys to engage into negotiations, and they find that it is easier for them to just regularly accuse the perpetrator within the classic criminal procedure.

In addition, the state attorneys pointed out that the agreement (on which the judgment will later be based) between the state attorney and the accused is particularly useful in cases of crimes involving multiple perpetrators or co-perpetrators. Such procedures are, as a rule, very difficult to conduct and complete, so concluding a settlement with several co-defendants is a significant relief to the State Attorney's Office.

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[36] See more in: Elizabeta Ivičević Karas, *Trial Waiver Systems in Croatia. Towards a rights-based approach to trial waiver systems*, page 3-4, 6-7, report available at: *https://fairtrials.org/sites/default/files/publication_pdf/20190513_Trial_Waivers_Croatia_Final.pdf*.

Finally, all participants agreed that it would be difficult to discuss about the possibility of applying the institute of a judgment based on the agreement of the parties to terrorist offenses, since so far there were no such proceedings in the Republic of Croatia.

B) Crown witness

a) Legislation

Crown witness institute is used to obtain evidence needed for the prosecution of a restricted number of the gravest criminal offences. The State Attorney General requires granting a suspect/defendant a status of a crown witness and the court assigns it. It was introduced already in 2001 by the Act on Anti-Corruption and Organized Crime Prevention Office[37].

Although the institute of crown witness, on the one hand, provides considerable protection for the penitent and is a form of rewarding measure, in the case of terrorist offenses, the possibility of applying this institute is almost completely excluded. Article 39 of the Act on Anti-Corruption and Organized Crime Prevention Office states that the crown witness cannot be the perpetrator (circumstances for granting crown witness status) for some of the most serious offences such as: an act of terrorism referred to in Article 97 (3,4) CC, financing off terrorism referred to in Article 98 (1), CC and a terrorist association referred to in Article 102 (1) CC.

Even though it cannot be applied to all offences related to terrorism, the institute of the crown witness still must be mentioned as a form of mitigation and rewarding measures since it is an important tool for obtaining witness testimony as a key evidence in prosecution of grave criminal offences[38].

b) Focus group results

Focus group discussion pointed at the main deficiencies of this institute. Participants agreed that the crown witness, although well-conceived in theory and regulated in detail in legislation, does not work as intended in practice. According to participants' experiences, in Croatia, the status of crown witness was granted in only two cases so far. In both cases there were some negative consequences for the witnesses, primarily due to the influence of the public.

Participants as well pointed that the possibility of assigning the status of a crown witness to perpetrators is excluded for almost all terrorist offenses, therefore it is disputable whether it can be at all considered an adequate rewarding measure in terrorism cases.

Still, participants emphasized that the institute is necessary on the one hand, because the testimony of internal communication between members of a criminal association can only be obtained through the crown witness. On the other hand, there are also disadvantages, such as a high degree of recidivism among such persons in most countries of the world.

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[37] Act on Anti-Corruption and Organized Crime Prevention Office, Official Gazette 76/09, 116/10, 145/10, 57/11, 136/12, 148/13, 70/17.

[38] *Ibid.*

Important advantage of this institute is its strict form, determined by the law and regulated in detail, as well as a strong judicial control during the assignment itself. Still, the focus group participants suggested that the crown witness should be regulated even in more detail. Namely, a person who obtains such status and is willing to cooperate with the authorities should be particularly well protected and separated from the environment in which s/he is located, and the state authorities have to completely prevent the leakage of information related to his/her private life to the public. This would prevent populist condemnation by society, but also protect the person from the criminal milieu of which s/he was a member.

The participants also gave their opinion on why the Crown Witness institute is not used in practice. The granting of this status is intended for persons who have been members of a criminal organisation, or are in contact with large and serious criminal organizations. According to the prosecutors, there are several such organisations in Croatia. The members of these organisations are so loyal that they are unwilling to cooperate with the authorities. These individuals, even when they face a large prison sentence for the crime committed, prefer to remain silent rather than cooperative and, as a rule, are fully loyal to their criminal milieu.

Finally, when asked if, according to their experiences, the judgment based on agreement of the parties had actually replaced and reduced the use of the crown witness in practice (having in mind that the main function of the crown witness is to provide a witness testimony in criminal proceedings against another defendant, also a member of criminal organization), the focus group participants had many comments. First, it should be borne in mind that the interest of the defendant to admit the crime in order to receive more lenient punishment (which is the basis for the agreement), and the interest to contribute as a witness in another proceeding, are rather different interests and should be clearly distinguished. The participants believe that a judgment based on the agreement of the parties in practice actually serves as a replacement of the crown witness, because it is much easier to use. Still, they warned that this is not a good solution. Ultimately, with the crown witness institute a perpetrator is completely abolished for the crimes committed, while in case of agreement of the parties, the perpetrator is sentenced, but with a more lenient punishment. Some participants suggested that solution could be in creation of a new consensual form that would actually combine elements of both above mentioned institutes.

C) Witness immunity

a) Legislation (Article 286 CPA)[39]

Witness immunity is another form of consensual procedure that applies to a witness who refused to answer particular question in order not to ex-

[39] CPA, Article 286.
(1) A witness shall not be required to answer particular questions if it is probable that in doing so he would expose himself or his close relative to criminal prosecution, grave disgrace or considerable material damage. The body conducting the proceedings shall instruct the witness thereof.

pose himself/herself, or a close relative, to criminal prosecution. Then the state attorney may grant him/her witness immunity, meaning that s/he will drop charges against him/her if the statement of the witness is important for proving a grave criminal offence listed in a catalogue[40] (Article 286 (2) CPA.

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(2) If a witness refuses to answer the questions referred to in paragraph 1 of this Article because in doing so he would expose himself or his close relative to criminal prosecution, the State Attorney may declare that he will not institute criminal prosecution if the answer to a question and the testimony of the witness are important for proving the commission of a criminal offence by another person, namely the following criminal offences set forth in the Criminal Code:

1) war crime (Article 91, paragraph 2), terrorism (Article 97, paragraphs 1, 2 and 3), financing of terrorism (Article 98), training for terrorism (Article 101), terrorist association (Article 102), slavery (Article 105), trafficking in human beings (Article 106), trafficking in human body parts and human embryos (Article 107), unlawful deprivation of liberty (Article 136, paragraph 4), kidnapping (Article 137, paragraph 3), sexual abuse of a child under the age of fifteen (Article 158), child pandering (Article 162, paragraphs 1 and 3), exploitation of children for pornography (Article 163), serious criminal offence of child sexual abuse and exploitation (Article 166), money laundering (Article 265, paragraph 4), abuse of position and authority (Article 291, paragraph 2) if the offence was committed by an official person, taking a bribe (Article 293) if the offence was committed by an official person, trading in influence (Article 295) if the offence was committed by an official person, criminal association (Article 328, paragraph 1), committing a criminal offence as a member of a criminal association (Article 329, paragraph 1, items 3 through 6), murder of an internationally protected person (Article 352), kidnapping of an internationally protected person (Article 353);

2) criminal offences against the Republic of Croatia (Title XXXII) and against the Armed Forces of the Republic of Croatia (Title XXXIV) punishable by imprisonment for a term of at least five years;

3) criminal offences punishable by long-term imprisonment.

(3) The answer and testimony of the witness must be related to the circumstances of the case and be credible, in which case the State Attorney shall bring a motion for the adjournment of the action in order that the statement within the meaning of paragraph 4 of this Article can be given. The State Attorney shall have the witness declare in writing that he as a witness in the criminal proceedings will testify truthfully and will not keep to himself anything which he knows about the criminal offence about which he is giving testimony and the perpetrator. Already at the time of giving the declaration the witness shall have a counsel chosen from among attorneys-at-law so that his rights and interests can be protected.

(4) The declaration referred to in paragraph 5 of this Article may be made by the State Attorney if the State Attorney obtained the declaration of the witness referred to in paragraph 3 of this Article and the answers to certain questions are important for proving the commission of a criminal offence by another person as referred to in paragraph 2 of this Article and if it is probable that by answering a question the witness would expose himself or a close relative of his to criminal prosecution for a criminal offence punishable by a sentence that is less severe than the sentence laid down for the criminal offence about which he is giving testimony. The declaration on the non-initiation of criminal prosecution cannot be made if the criminal office in question is punishable by imprisonment for a term of at least ten years.

(5) The declaration of the State Attorney on the non-initiation of criminal prosecution must be made in writing and be certified by the seal and signature of the senior State Attorney. The declaration must include the factual and statutory description of the criminal offence and the legal designation of the criminal offence for which prosecution will not be initiated. The State Attorney shall hand over the declaration to the witness. The witness and the person referred to in paragraph 2 of this Article cannot be criminally prosecuted for the criminal offence that is the subject-matter of the declaration but can be prosecuted for the criminal offence of giving false testimony.

(6) If the answer to the question referred to in paragraph 2 is incomplete, unrelated to the circumstances of the case and uncorroborated by other evidence, the State Attorney shall not make the declaration referred to in paragraph 4 and the answer given to the question which the witness initially refused to answer for the reasons laid down in paragraph 2 of this Article shall be struck out from the minutes. The struck-out answer shall be sealed into a special envelope which shall be kept separately from the case file.

[40] Elizabeta Ivičević Karas, *Trial Waiver Systems in Croatia*, p. 7.

The catalogue includes terrorist offences such as terrorism (Article 97 (1, 2 and 3) CC), financing of terrorism (Article 98 CC), training for terrorism (Article 101 CC), terrorist association (Article 102 CC)). In addition, the punishment prescribed for the criminal offence that would be forgiven with the witness immunity must be lower than the one the witness testimony would refer to (Article 286 (4) CPA), and must not amount to ten years or more[41]. Again, due to the nature of the agreement, there are no publicly available official data on the number of such agreements.

b) Focus group results

Focus group participants indicated that the institute of procedural immunity of witnesses – witness immunity, is applied much more in practice than the institute of crown witness, and the most usually it is applied in corruption cases. According to opinion of several participants, granting procedural immunity to a witness should not be limited to minor criminal offenses. Participants also pointed at some negative experiences with the implementation of this institute. The main problem is the length of the procedures. Namely, in order to obtain witness immunity, a person must state that s/he will testify in criminal proceedings as a witness and that s/he will not withhold any relevant information. From the moment that statement is made and from the moment the State Attorney gives a statement that s/he will not prosecute, to the moment when the witness in the proceedings is due to appear before the court, years may pass. During this period, there can be various changes in the person of the witness, as well as in his/her surroundings, so it often happens that such persons declare before the court that they no longer remember particular circumstances, or they do not want to testify at all.

But the main deficiency of this institute, according to some opinions of the focus group participants, is the lack of the precise legislative form for granting the status of witness immunity (especially comparing with the crown witness), and particularly the lack of judicial review when granting immunity. All participants agreed that an additional legislative regulation is needed. Finally, participants pointed that, according to the legislation in force, the granting of procedural immunity of a witness would not be applicable to the perpetrators of terrorist offenses as a rewarding measure, since most of terrorist offenses are not relatively minor criminal offences, but just the opposite – the most serious criminal offences which are excluded from application of this form of consensual procedure.

2.2.2. *Rewarding measures that exclude or mitigate the penalty, initiated at the sentencing stage*

In addition to the rewarding measures just explained (see *supra* 2.2.1), which may under the conditions set in Article 102 of the Criminal Code result in mitigation or even exclusion of penalty at the sentencing stage, under Croatian Criminal Code, mitigation and remission of punishment if certain

[41] Elizabeta Ivičević Karas, *Trial Waiver Systems*..., p. 7.

conditions are met, can be applied to all criminal offenses, including terrorism. Although their purpose is slightly different and in Croatian academic literature mitigation and remission are usually discussed as measures enabling individualization of punishment, they can also serve the purpose of general rewarding measures applicable to all offences.

A) Mitigation of punishment (Article 48 CC)[42]

In Croatian criminal justice system punishment may be mitigated on three grounds. One of them is mitigation of punishment as a result of the agreement between the State Attorney and the defendant (Article 48(3) CC) (see *supra* 2.2.1.). Punishment may also be mitigated based on: *a*) explicit legal authority given to the court to mitigate the sentence (Article 48(1) CC) or *b*) the court's assessment that in a case at hand particularly mitigating circumstances on the perpetrator's side justify mitigation provided that the purpose of punishment may be achieved by a less severe punishment (Article 48(2) CC).

a) Explicit legal authority for mitigation (Article 48(1) CC)

With respect to the former, the Criminal Code explicitly prescribes that the court may mitigate the punishment in connection with these provisions: omission to act (Article 20(3) CC), excess of the limits of the necessary self-defence (Article 21(3) CC), substantially diminished responsibility (Article 26 CC), avoidable mistake of law (Article 32(2) CC), attempt (Article 34 (2) CC) and aiding and abetting (Article 38 CC), regardless of which crime is committed and who is the perpetrator. The court can also mitigate a punishment in certain situations related to specific offenses; for example, if a member of a criminal association who committed, incited or assisted another to commit a criminal offence as a member of a criminal association, substantially contributes to the discovery of a criminal association, his/her punishment may not be remitted, but can be mitigated according to explicit authority of Article 329(3) CC.

b) Particularly mitigating circumstances (Article 48(2) CC)

In the latter case, the court may consider any circumstance as a ground for mitigation if that circumstance is 'particularly' mitigating and base the decision on the overall assessment of the committed crime and the perpetrator. Art. 48(2)of CC lists, as example, several specially mitigating circumstances – reconciliation of perpetrator with the victim, compensation in full

[42] Mitigation of Punishment, Criminal Code, Article 48.

(1) If expressly so provided by law, the court may impose a less severe punishment than the one prescribed for a particular criminal offence.

(2) The court may impose a less severe punishment than the one prescribed for a particular criminal offence also in cases where special mitigating circumstances exist, in particular if the perpetrator has reconciled with the victim, if he or she has fully or in greater part compensated for the damage caused to the victim by the criminal offence or if he or she has made serious efforts to compensate for the said damage, provided the purpose of punishment can also be achieved by such a less severe punishment.

(3) The court may impose a less severe punishment than the one prescribed for a particular criminal offence also when the state attorney and the defendant have agreed on this.

or in greater part by the perpetrator for the damage caused to the victim by the criminal offence or serious efforts by the perpetrator to compensate for the said damage[43]. The limits of mitigation of sentence are prescribed in Article 49 of the Criminal Code[44] and depend on the severity of the committed criminal offence.

B) Remission of punishment (Article 50 CC)

In certain cases, the law provides not just for mitigation, but also for remission of punishment. Remission of punishment is regulated by Article 50 of the Criminal Code. The court may remit the punishment of a perpetrator where:

1. such authority is based upon an express statutory provision e.g. withdrawal from attempted crime (Article 35 CC) and entirely unsuitable attempt (Article 34(3) CC) in general part and in context of particular offences, e.g. Article 102 CC);

2. the consequences of a criminal offence committed by negligence have aggrieved him/her so severely that his/her punishment is unnecessary for achieving the purpose of punishment;

3. the perpetrator has sought to avert or reduce the consequences of a criminal offence committed by negligence and has compensated for the damage caused by it;

4. the perpetrator of a criminal offence for which only a fine or a sentence of imprisonment of up to one year is prescribed has reconciled with the victim and compensated for the damage.

It is important to mention that when the court is authorized to remit the punishment of a perpetrator, it may also reduce the punishment regardless of the limits set in Article 49 CC.

In the context of terrorism only Article 50(1)(1) of the Criminal Code is applicable. Theoretically, the court could remit the punishment in a case of a terrorist who due to gross ignorance attempted to commit a criminal offence by unsuitable means or towards an unsuitable object (Article 34(3) CC)[45].

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[43] Petar Novoselec, *Opći dio Kaznenog prava*, *Peto izdanje*, Osijek, 2016, pp. 425-427.

[44] Punishment Mitigation Limits, Article 49 of the CC/11.

(1) The court may reduce a punishment pursuant to Article 48, paragraphs 1 and 2, of this Code up to the following limits:

1. if a ten-year term of imprisonment is prescribed as the minimum range for a criminal offence, the punishment may be reduced to three years,

2. if a five-year term of imprisonment is prescribed as the minimum measure for a criminal offence, the punishment may be reduced to two years,

3. if a three-year sentence of imprisonment is prescribed as the minimum measure for a criminal offence, the punishment may be reduced to one year,

4. if a one-year sentence of imprisonment is prescribed as the minimum measure for a criminal offence, the punishment may be reduced to six months,

5. if a six-month sentence of imprisonment is prescribed as the minimum measure for a criminal offence, the punishment may be reduced to three months.

(2) In the case referred to in Article 48, paragraph 3, of this Code, the punishment may be reduced up to half of the minimum punishment obtained by reduction pursuant to the provisions of paragraph 1 of this Article, but cannot be any shorter than three-months imprisonment.

[45] Such would be an attempt shoot down a plane, by shooting from a pistol, e.g. Novoselec, Petar, *Opći dio Kaznenog prava*, Osijek, 2016, p. 292.

More realistic scenarios are those of withdrawal. According to Article 35(1) CC, a perpetrator who of his/her own volition gives up the further execution of a criminal offence being aware that under all the circumstances s/he may have completed the act or who, after completion of such an act, prevents the occurrence of the consequences may receive remittance of the punishment. Particularly interesting is the new provision on the so-called non-causal withdrawal (Article 35(2) CC). Punishment may be remitted even if a perpetrator is unsuccessful in preventing the offence, which remains uncompleted for reasons independent of his/her will. In fact, an often given example in literature is that of a perpetrator who installs a bomb, but notifies the police, not knowing that the police already dismantled the bomb[46].

Focus group results were to a great extent conditioned by the lack of judicial practice in terrorism cases. Regarding the mitigation of punishment by the court for the perpetrator of a terrorist offense, as well as the optional release of a member of a terrorist association who discloses the association or prevents the commission of a terrorist act (Article 102 CC), focus group participants stated that they could not contribute to the discussion given that they have never run across such cases in practice. They also pointed at the fact that such perpetrators may have no reasons to expose themselves to the risk of retaliation by the criminal organization itself, or to potential additional condemnation by the public without any certainty that this would lead to remission of punishment or at least to obligatory mitigation. According to prevailing view of the focus group participants, the perpetrators are always motivated by desire to avoid prosecution and/or to obtain a milder sentence. In doing so, the degree of the perpetrator's willingness to cooperate is closely linked to the certainty of benefit (mitigation).

2.2.3. *Rewarding measures that exclude or mitigate the penalty, initiated at the post-sentencing stage*

A) Abolishment or reduction of the sentence[47]

There are also normative possibilities to remit or mitigate the penalty or release on parole a convicted person in exchange of his/her testimony.

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[46] Turković, *et al*., *Komentar Kaznenog zakona*, Zagreb, 2013, p. 54; Same example can also be found in Novoselec, Petar, *Opći dio Kaznenog prava*, Osijek, 2016, p. 300.

[47] Act on Anti-Corruption and Organized Crime Prevention Office, Article 37.

(1) Upon the reasoned proposal of the Director, the Attorney General may submit to the court referred to in Article 31, paragraph 1 of this Act, a decision on the examination as a witness of a person convicted as a member of a criminal organization or criminal association, together with a request for the renewal of the criminal proceedings for revision of that final judgment regarding the decision on sentence (Article 43 paragraph 5 of this Act and Article 497 paragraph 2 of the Criminal Procedure Code), if its evidence is important for the detection and proving of criminal offenses committed within the framework of a criminal organization or criminal associations or perpetrators of these offenses, or for detecting and preventing the commission of criminal offenses by members of a criminal organization or criminal association.

(2) The statements referred to in Article 38, paragraphs 2 and 3 of this Act shall be attached to the requests. The sentenced person makes this statement before the competent execution judge in the presence of defense counsel.

(3) Instead of the request referred to in paragraph 1 of this Article, the Attorney Gen-

Upon a reasoned proposal of the Head of the Anti-Corruption and Organized Crime Prevention Office, the State Attorney General may submit the court a request to issue a decision to examine as a witness a person who has been convicted as a member of a criminal organisation or a criminal association with the final judgement, along with a request to reopen the criminal proceeding so as to amend the final judgement in terms of the decision on the penalty (Article 37(1) and Article 43(5) of the Act on Anti-Corruption and Organized Crime Prevention Office and Article 497(2) CPA), if that person's testimony is relevant for disclosing and proving criminal offences committed within a criminal organisation or a criminal association, or perpetrators of those criminal offences, or for disclosing and preventing commission of criminal offences by members of a criminal organisation or a criminal association. The convicted person shall give his/her testimony before the competent judge of execution of sentences, in the presence of a defence counsel (Article 37(2) of the Act on Anti-Corruption and Organized Crime Prevention Office).

The State Attorney General may also submit a proposal to the court competent for releasing on parole, to release the person on parole beyond the time limits that are prescribed by a special legislation (Article 37(3) of the Act on Anti-Corruption and Organized Crime Prevention Office)

Focus group participants could not discuss this institute much because, according to their experiences, it has never been used in practice. According to their opinions, one of the reasons why it has never been used in practice, is the lack of final judgments related to organized crime offenses, committed within the major criminal organizations. However, the participants agreed that the institute as such is acceptable.

2.3. *Counterpart of rewarding measures: the obligations of the repentant*

a) Judgment based on agreement of the parties:

Although the Criminal Procedural Act regulates the judgment based on the agreement of the parties and therefore the agreement itself, it does not contain provisions on the defendant's obligations to which s/he obliges by signing the agreement. Only the internal Guidelines on Negotiating and Agreeing with the Defendant on Plea and Sanction[48] issued by the State Attorney General provide guidance on this issue.

According to that Guidelines, the defendant must comply with some of the essential elements of the agreement which were decisive for the acceptance of the agreement. When testifying as a witness in criminal proceedings against a specific perpetrator for the specific crime, the testimony has to be in accordance with a statement given to the state attorney or to the police, which is attached to the agreement[49].

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eral may submit to the court competent for the conditional release of prisoners a motion for parole outside the time limits for repeating the motion prescribed by a special law.

[48] Instructions of the State Attorney General, on the proceedings during bargaining with the suspect/defendant on terms of pleading guilty and the punishment, O-2/09, of 17 February 2010, *http://www.dorh.hr/PresudaPoSporazumu*.

[49] *Ibid*., p. 8 and additions 2-4, p. 16-22.

Focus group results show that provisions cited out in Guidelines, do not provide sufficient guaranties and do not function as intended in practice. As it was already stressed (*supra* 2.2.1.A)*b*)), judges pointed that, in case the goal of the agreement is to obtain evidence against other perpetrator and for another criminal offence, the problem is that there is no guarantee that the defendant who reached the agreement will actually testify in another proceeding as a witness and fulfil his/her part of the bargain once the criminal proceedings against him/her are completed and a more lenient sentence is pronounced according to the concluded agreement. Contrary to the opinions of the judges, prosecutors stated that the perpetrators with whom they entered into an agreement upon which a judgment was subsequently passed, trusted the institutions and fulfilled their obligations.

b) Crown witness

In order to obtain a status of a crown witness, a person must state that s/he will answer the questions in the capacity of a witness, although it is likely that s/he will therewith expose him/herself or a close person to severe shame, substantial property loss or criminal prosecution. In addition, in order to become a crown witness, a person must sign a written statement resuming the obligation to: speak the truth and not withhold any information known to him/her regarding particular criminal offences placed in the jurisdiction of the Office, or any other such offence; speak the truth and not withhold any information known to him/her about the pecuniary or any other gain or benefit, objects, acquired assets or other circumstances related to the particular criminal offences under jurisdiction of the office; and finally state that s/he is not familiar with any other relevant circumstance (Article 38(1) of the Act on Anti-Corruption and Organized Crime Prevention Office).

c) Witness immunity:

Witness has to give a factual and credible testimony, tell the truth, not withhold any information known to him/her about the criminal offence of which s/he is testifying and the perpetrator of that offence (Article 286(3) CPA).

2.4. *Revocation of rewarding measures*

2.4.1. *Grounds for revocation*

a) Judgment based on agreement of the parties

i) Withdrawal of the party

The parties (the defendant and the state attorney) may waive their statements, regarding the agreement on which the judgment would be based, until the judgment is delivered (Article 362(1) CPA). Yet, Instructions of the State Attorney General narrow down the possibility for the state attorney to withdraw from the agreement. A state attorney may withdraw from the proposal of the agreement until the verdict is rendered only if the defendant fails to comply with some of the essential elements of the agree-

ment which were decisive for the acceptance of the agreement (not presenting the defence in accordance with the statement given to the state attorney or the police and which is attached to the agreement, not testifying as a witness in criminal proceedings against a specific perpetrator for the commission of a specific crime, in accordance with a statement given to the state attorney or to the police and which is attached to the agreement, and in other cases for which there are special reasons and which must be reported to the superior state attorney)[50]. However, in most cases the judgment based on agreement of the parties is rendered before the giving testimony at the trial in another criminal proceedings.

ii) Courts' rejection of the parties' statement (Article 361(3) CPA)

The court may reject the parties' statement if "given the circumstances, its acceptance is not in accordance with measuring the sentence as prescribed by law or the agreement is otherwise not lawful". The problem with the interpretation of this provision in practice was discussed *supra* 1.3.*b*).

b) Crown witness

The status of Crown witness will be revoked in several cases, according to Article 46 of the Act on Anti-Corruption and Organized Crime Prevention Office[51]. The person will lose the status of a crown witness if s/he gives a false testimony, or does not mention all the facts that s/he is legally obliged to say when s/he entered into an agreement with the State Attorney General. Another ground for revocation is commission of a new criminal offence, placed under jurisdiction of the Anti-Corruption and Organized Crime Prevention Office, or another grave criminal offence listed in the catalogue, if this crime is committed prior to the final termination of the criminal proceedings. Lastly, if person with the status of Crown witness becomes a member of a criminal organisation or a criminal association and, within its framework, commits a criminal offence placed under jurisdiction of the office, the status of a crown witness will also be revoked.

c) Witness immunity

If the answers that witness gives to the questions aren't factual, supported by other evidence or are otherwise incomplete, the state attorney can revoke the witness immunity (Article 286(6) CPA).

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[50] Instructions of the State Attorney General, on the proceedings during bargaining with the suspect/defendant on terms of pleading guilty and the punishment, O-2/09, of 17 February 2010, *http://www.dorh.hr/PresudaPoSporazumu* (accessed on 9 March 2019), page 12.

[51] Act on Anti-Corruption and Organized Crime Prevention Office, Article 46.

The provisions of Article 45 of this Law shall not apply and the Attorney General shall continue criminal prosecution or initiate criminal proceedings:

1. if the Crown witness has not stated all the facts and circumstances referred to in Article 38, paragraph 2 of this Law or made a false statement,

2. if a Crown witness commits a new criminal offense referred to in Articles 21 and 39 of this Law before the final termination of criminal proceedings,

3. if, within two years of the decision referred to in Article 42 of this Act, the Crown witness has become a member of a criminal organization or criminal association and, within its limits, has committed the criminal offense referred to in Article 21 of this Law.

2.4.2. *Consequences*

a) Judgment based on agreement of the parties:

If the parties withdraw from the agreement, the statement on the agreement as well as all the other data relating to it, must be excluded from the case file and stored with the judge of the investigation (Article 362 CPA). They cannot be viewed or used as evidence.

b) Crown witness:

If one of before mentioned reasons for revocation from Article 46 of Act on Anti-Corruption and Organized Crime Prevention Office occurs (*supra* 2.4.1.*b*)), the state attorney shall resume or initiate the prosecution.

c) Witness immunity:

If the answer to the question posed to the witness (to which s/he initially denied the answer) is not complete, circumstantial and supported by other evidence, the state attorney will not provide a statement on non-prosecution, while the concrete answer will be excluded from the record. The excluded answer will be sealed and kept outside the case file (Article 286(6) CPA). The state attorney may initiate the prosecution, including the prosecution for giving false testimony[52].

2.5. *Conditions for the application of the measures (procedural aspects)*

a) Judgment based on agreement of the parties:

In cases of criminal offenses for which criminal proceedings are instituted *ex officio*, the State Attorney has the power and duty to negotiate an agreement with the defendant on the plea, punishment and other measures (Article 38(2)7) CPA). The parties may negotiate on terms of plea and on the punishment and other measures (agreement on the type and measure of the punishment, judicial admonition, suspended sentence, partial suspended sentence, special obligations, protective supervision, seizure of objects and costs of proceedings). The defendant must have a defence attorney during the negotiations. The statement on which the verdict will be based must be submitted to the indictment panel before the beginning of the session, or immediately after its opening. That statement has to be signed by the state attorney, the defendant and his/her defence attorney (Article 360(3) CPA).

The content of the parties' statement for reaching the judgment based on the agreement of the parties is strictly prescribed by law (Article 360(4) CPA). The statement must include:

1) a description of the criminal offense, which is the subject of the charge,

2) the statement of the defendant on the guilty plea,

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[52] Davor Krapac, *Kazneno procesno pravo Prva knjiga: Institucije*, *Narodne novine*, Zagreb, 2015, p. 108.

3) agreement on the type and measure of the punishment, judicial admonition, suspended sentence, partial suspended sentence, special obligations, protective supervision, seizure of objects and costs of proceedings;

4) the statement of the defendant on the submitted request for indemnification,

5) statement of the defendant on the acceptance of the proposal of the State Attorney for imposing a security measure and confiscation of the pecuniary gain acquired through a criminal offence,

6) signature of parties and defence attorney.

After signing the statement, the state attorney informs the victim or the injured party of it. In the case of criminal offenses against life and limb and criminal offences against sexual freedom, for which a punishment of imprisonment of more than five years is prescribed by law, the state attorney must obtain the consent of the victim before reaching the agreement (Article 360(6) of CPA).

As it was already pointed, the CPA does not regulate the procedure of negotiation between the state attorney and the defendant, but only the procedure before the court (*supra* 2.2.1.A)a)). Relevant provisions were contained in special legislation, as well as in the Instructions of the Attorney general. In the Article 75 of the State Attorney's Office Act of 2009[53], which is no longer in force, it was determined that "the State Attorney General shall provide instructions for the agreement on the sanctions with the defendant. The instructions shall prescribe the manner of organizing the negotiations, the written form and content of the agreement consisting of a statement for the adoption of a judgment on the basis of an agreement reached between the parties, and the manner for calculating the reduced sentence that should be applied in the specific case. The instructions may lay down cases in which the state attorney may not reach agreement on passing the judgment based on agreement between the parties". Although the State Attorney's Act of 2009 is no longer in force since it was replaced with the State Attorney's Act of September 2018[54] that do not contain this provision, the Guidelines on Negotiating and Agreeing with the Defendant on Plea and Sanction issued under the mentioned Article 75 within the Instructions of the Attorney General, are still in force[55].

Hence, according to previous special legislation, the State Attorney General needed to give directions for plea bargaining, in order to avoid any potential arbitrariness. Therefore, according to the Instructions of the Attorney general, the reduction of the punishment may be within the limits permitted by law, but the purpose of the punishment and the benefit that prosecutor's office is gaining by entering into an agreement with repentant should be considered. Particular attention is given to the agreement leading to the disclosure of other crimes and other perpetrators or proving guilt of

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[53] Official Gazette, 76/09, 153/09.

[54] Official Gazette, 67/2018.

[55] The new State Attorney's Act from 2018, which is in force since 1 September 2018, does not regulate plea bargaining.

other perpetrators. There must be proportionality between the reduction of the sanction to which the state attorney agrees and other offenses that will be prosecuted on the basis of the repentant statements. In the case of entering into an agreement with the co-accused (co-suspect/co-defendant), the state attorney must take into account all the circumstances of the criminal offence that defendant committed, the subjective circumstances on the part of the defendant and especially the criminal offences and perpetrators s/he would be able to prove on the basis of the repentant's statements[56].

After receiving a written agreement, the court will first determine that the parties actually agree on the contents of the statement and put it in the record, and then decide on the confirmation of the indictment. The Indictment must be confirmed before the indictment panel accepts the agreement of the parties and brings a judgment based on that agreement (Article 361 CPA).

b) Crown witness:

The requirements for granting a status of crown witness are set out in the Article 36 paragraph 1 Act on Anti-Corruption and Organized Crime Prevention Office[57]. Firstly, the suspect/defendant must be a member of a criminal organization or association. Secondly, there must be circumstances allowing mitigation or remission of punishment. Lastly, granting the status of crown witness must be proportionate to the gravity of the offence and must be significant for proving, revealing and preventing other criminal offences committed within the criminal organization. As was already emphasised the law explicitly excludes the possibility of granting the status of a crown witness to a perpetrator of the gravest criminal offences, listed in the catalogue (Article 39 of the Act on Anti-Corruption and Organized Crime Prevention Office). According to the legislature, the gravity of the perpetrator's criminal activity would be *ex lege* disproportionate to the importance of his/her testimony[58].

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[56] Instructions of the State Attorney General, on the proceedings during bargaining with the suspect/defendant on terms of pleading guilty and the punishment, O-2/09, of 17 February 2010, *http://www.dorh.hr/PresudaPoSporazumu* (accessed on 9 March 2019), page 10-11.

[57] Act on Anti-Corruption and Organized Crime Prevention Office, Article 36.

(1) The Attorney General may require the court referred to in Article 31, paragraph 1 of this Act to issue a decision on examination as a witness of a person who has become a member of a criminal organization or criminal association:

1. against who a criminal complaint has been filed or criminal proceedings is conducted for a criminal offense referred to in Article 21 of this Act committed within the framework of a criminal organization or criminal association and if there are circumstances on the basis of which in accordance with the Criminal Code a sentence of a member of criminal organization or criminal association may be remitted or under which the sentence can be mitigated,

2. if the testimony of that person is proportionate to the gravity of the offence committed and to the importance of that person's testimony for detecting and proving criminal offenses committed within the framework of the criminal organization or criminal association or their perpetrators, or for detecting and preventing criminal acts of the criminal organization or criminal association.

[58] Davor Krapac, Kazneno procesno pravo Prva knjiga: Institucije, Narodne novine, Zagreb, 2015, p. 497.

The Attorney General decides to initiate proceedings for granting procedural immunity to a member of a criminal organization or criminal association in accordance with the law (Article 38(4) CPA). Provisions of the Criminal Procedure Act apply to interrogation of crown witnesses. Measures for the protection of crown witnesses and persons close to him/her outside of the criminal proceedings are taken pursuant to special regulations (see *infra*, 2.7.*b*)).

c) Witness immunity:

Article 286 of the Criminal Procedure Act sets out the procedural formalities for granting witness immunity to certain persons. The state attorney may make a statement that s/he will not prosecute a witness who refused to answer a specific question, in order not to expose him/herself or a close relative to criminal prosecution, severe shame or significant material damage, if the answer is important for proving another person's criminal offence listed in the catalogue (Article 286(2) CPA). The punishment prescribed for the criminal offence for which the witness would not be prosecuted must be less than that prescribed for the offense in respect of which s/he is testifying, and must not be punishable with imprisonment of ten years or more (Article 286(4) CPA).

The state attorney should first obtain a written statement from the witness saying that s/he will tell the truth and that s/he will not withhold any information about the crime s/he is testifying of and the perpetrator (Article 286(3) CPA). After obtaining the statement from the witness, the state attorney will prepare and submit to the witness his/her statement on non-prosecution (Article 286(4) CPA).

The statement of the state attorney on non-prosecution must be written, sealed and signed by the superior state attorney ((Article 286(5) CPA) and it must precise the criminal offense in relation to which the State Attorney General will not prosecute.

2.6. *Conditions for the use of the declarations obtained (probative value of declarations)*

In Croatian law, there are no specific rules on probative value of declarations made by crown witnesses, or persons with witness immunity, or witnesses previously sentenced within the judgment based on agreements of the parties. This means that the principle of free judicial assessment of evidence applies. Yet, the CPA explicitly prescribes that the conviction may not be founded exclusively on the testimony of a person granted with the witness immunity, or on the testimony of endangered witness who was questioned under special measures of procedural protection (Article 298 CPA)[59] (see *infra*, 2.7.). It should be noted that, in rule, the crown witness would likely be questioned as an endangered witness.

[59] Article 298 CPA: A judgment of conviction cannot be founded solely on a witness testimony obtained under Article 286, paragraphs 2 through 4 of the present Act or on the testimony of an endangered witness.

2.7. *Measures for the protection of the repentant*

a) The judgment based on agreement of the parties:

Until now we were mentioning only the procedural guarantees of the defendant's rights. The most important guarantees are defence council and the judicial control. The presence of a defence counsel is mandatory while bargaining on a plea with the state attorney from the beginning of the negotiations (Article 360(1) CPA). The judicial control is ensured through the provision that the court must establish that both of the parties agreed with the content of the statement (Article 360(1) CPA) and to decide that the indictment is founded on evidence and that there are no impediments for prosecution before it accepts the agreement (Article 361(1) CPA).

Beside defence rights guarantees, there are also measures of protection of endangered witnesses that can also be agreed upon. Special protection measures that may be agreed upon by the parties while bargaining may be procedural or extra-procedural measures.

The procedural protection is regulated in the CPA and it includes providing protection to the endangered witness. This protection consists of a specific way of examining the witness and his/her participating in the proceedings. There is also an obligation to act with special care regarding the protection of witnesses (Article 294(2) CPA). The CPA regulates the special way of questioning and participation of the endangered witness in the proceedings (Article 294(3) CPA). It may include the use of pseudonym (Article 295 and 296 CPA), as well as the witness examination through the audio-video conference with the changed character and voice of the witness (Article 297 CPA).

The extra-procedural, or the out-of-court protection (non-procedural measures and protection) of the witness and his/her close relatives is regulated in the special law (Article 294(4) CPA) – the Witness Protection Act[60]. Measures for the protection of a witness and persons close to him/her outside the proceedings are set out in Article 17 of Witness Protection Act as follows: physical and technical protection, transfer, measures of concealment of identity and property, and change of identity.

b) Crown witness and a convict whose sentence is to be abolished or reduced:

When granting the suspect or defendant the status of a crown witness, the panel of judges shall order that all the records and official notes on that person's earlier statements, given in the capacity of a suspect or defendant, if there are any, be separated from the court records. Such statements, as well as other evidence they lead to, may not be used as evidence in the criminal proceedings (Article 42(2) Act on Anti-Corruption and Organized Crime Prevention Office).

Regarding the measures of procedural protection, the panel of judges shall order exclusion of the public from the part of the main hearing in the

[60] Official Gazette, 163/03, 18/11, 73/17.

criminal proceedings against members of a criminal organization or a criminal association, when the crown witness is interrogated (Article 44 Act on Anti-Corruption and Organized Crime Prevention Office). Other procedural protection measures are applied according to the CPA (see *supra* 2.7.*a*)), while the non-procedural protection is applied according to Witness Protection Act (see *supra* 2.7.*a*)).

c) Witness immunity

A person who is granted a witness immunity, and is questioned as a witness in criminal proceedings, is provided with the same procedural and extra-procedural protection under the same conditions as any other witness to the procedure, according to the CPA and the Witness Protection Act (see *supra* 2.7.*a*)). In addition, the lawyer must be present while the witness is giving his/her statement in order to protect his rights and interests (Article 286(3) CPA).

2.8. *Evaluation and control of the measure*

a) Judgment based on the agreement of parties:

As stated before, one of the main deficiencies of this measure is that there is no guarantee that a person convicted by a judgment based on agreement of the parties will actually fulfil his/her part of the settlement and contribute with his/her testimony in other criminal proceedings to prove other crimes and perpetrators (see *supra* 2.2.1.A)*b*)).

b) Crown witness:

Unlike the judgment based on agreement of the parties, the mechanism of granting the status of a crown witness does include guarantees that the crown witness will fulfil his/her part of the settlement. Namely, the status of a crown witness shall be revoked and the state attorney will continue the prosecution (see *supra* 2.3.*b*), 2.4.1.*b*), 2.4.2.*b*)).

c) Witness immunity

The control over the measure is provided through the power of the state attorney to revoke the witness immunity, if the answers that witness gives to the questions aren't factual, supported by other evidence or are otherwise incomplete (Article 286(6) CPA) (see *supra* 2.3.*c*), 2.4.1.*c*), 2.4.2.*b*)).

3. *Current relevant case law (where existing)*

The only terrorist crime committed in the Republic of Croatia was the case of bombing in town Rijeka in 1995. On October 20, 1995, an Islamic terrorist organization attempted to destroy a police station by driving a car with a bomb into the wall of the building. Twenty-seven employees in the police station and two bystanders on the street were injured, although the only person killed was the attacker.

The criminal proceedings were not conducted due to the death of the perpetrator, and it is therefore impossible to discuss the measures applied in the particular case as they were not even taken. However, we will continue with brief review and explanation of the circumstances of the case.

In the last days of the Bosnian War in 1995, the Croatian Defense Council (HVO), a Bosnian Croat military force, captured Talaat Fouad Qasim when he attempted to enter Bosnia and Herzegovina. Qasim, an important member of al-Gama'a al-Islamiyya, was soon transferred to Egypt with the active help of Croatia. Because Croatia had de facto controlled the Croatian Defence Council, the military force which had captured Talaat Fouad Qasim and due to its active role in the operation, a decision was made to commit a terrorist attack in Croatia.

At 11:21 a.m. Central European Time, a Fiat 131 Mirafiori entered the parking lot of the Primorje-Gorski Kotar County police headquarters. Due to the 90-degree turn needed to enter the lot, the vehicle firstly moved slowly but then started to accelerate towards the wall at the end of the parking lot. Due to the low security measures, this incident was not noticed before the attack itself took place. After 15–20 meters, passing 8-10 available parking spaces in the small lot, the Fiat crashed into the stairs leading to the police station and exploded. The time of explosion was recorded as 11:22 a.m. local time (10:22 UTC). Subsequently, a police investigation found out that the car was loaded with 70 kg (150 lb) of highly explosive TNT. The police also found a part of a Canadian passport inside the remains of the attacker's car. The next day, representatives of the al-Gama'a al-Islamiyya terrorist organization from Egypt claimed responsibility for the attack, requesting extradition of Qasim.

Due to an error made by the attackers, the bombing did not cause fatalities, aside from the suicide bomber himself. The police headquarters was located on a higher ground than the parking lot itself and there were stairs before the entrance in the building. Due to the smaller size of the parking lot, the Fiat 131 had neither the space and velocity, nor the horsepower, to climb the stairs and destroy the police station wall. As a result, the police station failed to collapse and only 29 injuries were recorded (including two unaware bystanders). The bomb also carved a large crater in the ground, battering nearby buildings and destroying vehicles.

With the help of the CIA, officials examined the video footage of the attack. American and Croatian investigative sources came to the conclusion that Hassan al-Sharif Mahmud Saad had organized this attack. Saad had come to live in Bosnia only that year; previously, he had been living in Italy. Soon after the attack, Bosnian officials discovered that Saad was planning a new terrorist attack, against NATO forces, which was to happen in December 1995. A few days after that attack failed, he was killed in central Bosnia in a firefight with Croatian Defense Council forces[61].

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[61] See more – *https://www.vecernji.hr/vijesti/u-zatvoru-u-egiptu-umro-voda-jaamat-al-islamiye-koja-je-izvela-teroristicki-napad-1995-u-rijeci-1018512*, *https://narod.hr/kultura/20-listopada-1995-rijeka-islamski-teroristicki-napad-automobilom-bombom*, *https://hr.wikipedia.org/wiki/Teroristi%C4%8Dki_napad_u_Rijeci*.

4. *Conformity of the current rewarding legislation to Article 16 of the Directive 541/2017/EU (where existing)*

Although Croatian criminal legislation, through the transposition and implementation of secondary sources of the European Union law so far – Council Framework Decisions of 13.6. 2002 on combating terrorism 2002/475 / JHA and Council Framework Decision 2008/919 / JHA of 28.11.2008 had already been largely in line with the provisions of the Directive (EU) 2017/541, it was nevertheless necessary to make certain amendments to the Croatian Criminal Code – both with respect to the offense of terrorism referred to in Article 97 of the Criminal Code and the criminal offenses related to terrorism referred to in Article 98-103 of the Criminal Code. This led to the fourth amendment of the Criminal Code of 2011[62]. whose explicit purpose was primarily to further align national criminal legislation with the Directive[63].

Yet, the provision allowing for rewarding measures in cases of terrorism (Article 102) was not altered, implying that the legislator considered the existing provisions to be in full conformity with Article 16 of the Directive. Article 102, however, does not explicitly cover all the possibilities for mitigation introduced in Article 16 of the Directive. First of all, it is foremost applicable to members of terrorist associations (both those who organize or run it, and mere members). In 2013 the provision was broadened to include the outsiders who knowingly contribute to achievement of a terrorist association's goals; yet the provision is not broad enough to cover the so-called lone wolf terrorists, although they can also take action such as preventing and mitigating the effects of the terrorist offence (Art. 16(*b*)(*i*)) of the Directive). Furthermore, explicit possibility of remission of punishment is excluded under Article 102 if the member had already committed a terrorist criminal offence[64]. Article 102 furthermore does not give any special credit to perpetrators who do not prevent terrorist offences or uncover a terrorist association, but "merely" mitigate the effects of the offence or find evidence (Art. 16(*b*)(*i*) and (*iii*) of the Directive). In all of these scenarios general provisions on mitigation of punishment and remission, including that on withdrawal, remain applicable, as explained above[65]. This however, can be seen as insufficient, as demonstrated by the focus group results.

Even though the focus group participants estimate that, in theory, Croatian legislation is in line with the Directive 2017/541, i.e. that the Directive has been implemented as required.

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[62] Amendments of the Criminal Code of 2011, Official Gazette 118/18.

[63] See the explanatory memorandum available at *https://esavjetovanja.gov.hr/ECon/MainScreen?entityId=7635* [20.1.2020.].

[64] Yet, it must be emphasized that the Directive does not require remission of punishment at all, and it suffices that the punishment may be mitigated. In Croatia this can be done both on the basis of general provision on mitigation (particularly mitigating circumstances in Art. 48 (2) CC/11) and on the basis of explicit provision of Art. 329(3) CC/11, which allows for mitigation in cases of repentant members of any criminal association, including terrorist association.

[65] There is nothing to prevent the judge from seeing such action as an extenuating circumstance or voluntary abandonment.

At the same time, they concluded that in practice the institutes of mitigation of punishment for the perpetrator currently existing in the legislature of Republic of Croatia, with exception of the rewarding measure specific for terrorism in Art. 102 of Criminal code, would not be adequate or applicable to perpetrators of terrorist offenses. Indeed, currently the law does not envisage some forms of rewarding measures, such as the crown witness and the witness immunity, for the most serious crimes, including terrorism. Some focus group participants warned that the entire focus group discussion was based solely on past experiences with "ordinary" criminal offenses, which are not directly transferable to far more atrocious terrorist offenses. Some focus group participants pointed that terrorism is an ideologically motivated crime. On the other side, the organized crime is basically motivated by the desire to obtain some kind of benefit, mostly the pecuniary gain. Even though granting the status of a crown witness may work in practice with regard to organized crime, it might not be so with regard to terrorism offences. Terrorists usually pursue their goals even in the face of obstacles and regardless of the costs involved. They are mostly not afraid of imprisonment or complete isolation, or an absolute condemnation of society. By accomplishing their goals, they often fulfil their life purpose. Consequently, their cooperation with state authorities cannot be realistically expected, at least not to the same extent and with the same motivation one would expect from the perpetrators of other offences, even very serious ones. Due to all that was mentioned above, the focus group participants questioned the practical applicability of existing general regarding measures to terrorist offenses.

Although participants were not familiar with any case of prosecution of terrorist offenses in Croatia, employees of the Security Intelligence Agency of the Republic of Croatia (SIA) and police officers warned about many activities connected to terrorism taking place on Croatian territory. Those acts are usually undertaken for the purpose of recruiting new members to the terrorist association or committing a crime of publicly provoking others to commit a terrorist offence. Participants from the Security Intelligence Agency warned that even in the absence of a classis terrorist attack in Croatia, one should bear in mind that a number of (typically young) people have been recruiting and publicly encouraging other people to commit a terrorist offence. These participants also emphasized the need for prevention. It is necessary to intervene and prevent further consequences as soon as the minimal danger or the first step towards committing terrorist offenses occurs. In addition, with the right approach young people can relatively easily get back on course.

Participants further emphasized that there is a major problem within the legal system itself. Although, criminal offenses of recruitment and public provocation to commit a terrorist offence exist in theory and are listed in the Criminal Code, the practice is such that those crimes are difficult to prove and charge. The reasons for this are numerous, and among other things the problem is lack of education. There is also a need to educate the prosecuting structure (under State Attorney's Office) how to deal with crimes connected to terrorism.

Participants suggested that a new form of rewarding measure, suitable for terrorist offenses, must be created in order to successfully combat potential terrorist threats and attacks in in the future. Potential solutions should also be sought by looking into the comparative legal system.

In conclusion, in order to combat terrorism by trying to get a perpetrator to cooperate, a new mechanism, appropriate for this category of crimes (terrorism), should be created in Croatian legal system. This new provision should secure a degree of certainty that mitigation/protection will indeed be provided to the penitent, while at the same time ensure that penitent's testimony has probative force in all subsequent proceedings.

CHAPTER 4

FRANCE

JULIE ALIX, NICOLAS DERASSE, JEAN-YVES MARECHAL, CLÉMENCE QUENTIN

1. *Historical background of rewarding legislation (where existing)*

1.1. *Socio-political reasons*

Although highlighted today by the problem of terrorism, the status of "repentant" has not been ignored in our previous legislation. But, the references that concerned it, such as the comments it has elicited from the doctrine, remain few. It is almost futile to try to find references to this notion, or to what may be related to it, in the writings of the criminal lawyers of the Ancien Régime. Indeed, few authors follow the path, still poorly marked, traced by Cesare Beccaria on the subject. In his Traité *Des délits et des peines* (ed. 1766, p. 102 ff.), the Italian Marquis mentions, in Title XIV of the book (*Des crimes commencés et des complices*), judicial decisions offering "im-

punity to the accomplice of a great crime, who betrays his companions". Such practices, which he considers to be denunciation, give him more criticism than reasons for satisfaction. In this way, "the Society," he said, "authorizes betrayal, even hated by villains among themselves. It therefore contributes to introducing "crimes of cowardice, which are more harmful to a nation than crimes of courage". When it "uses" such means, justice "discovers its uncertainty, and the law shows its weakness, imploring the help of the very person who offends it".

However, Beccaria does not want to keep the silent about the benefits of the approach. He insists on the prevention of "major crimes" and the observation of a practice that seems to "reassure the people who fill themselves with fear, when they see crimes committed, without knowing the perpetrators". He remains in his role as a reformer when he calls for the adoption of a "general law that promises impunity to any accomplice who discovers a crime", much more "preferable" to a particular declaration in a particular case, because it prevents the union of the bad guys, inspiring each of them to fear exposing themselves alone to danger". Moreover, such a text, if adopted, "would not give boldness to villains who see that there are cases where they are needed". Finally, "such a law, he concludes, must combine impunity with the banishment of the legislator" (*ibid.*).

At that time, Italy, through Beccaria was already setting the tone for a practice. Although it raised a certain number of reservations, it has helped gain the support of the population. As J.-F. Gayraud noted (*La dénonciation*, Paris, 1995, p. 264), the fact of questioning "the interest of granting impunity to criminals in terms that are still relevant" makes Beccaria's remarks very precursory, with a "desired objective" that is "always to disintegrate criminal organizations".

In 18th century France, criminal doctrine focuses more on the mechanism of active repentance ("To raise the problem of active repentance is to ask whether an offender who has spontaneously repaired or contributed to repairing the consequences of the offence he has committed can benefit from acquittal or a reduction in penalty", P. Savey-Casard, "Le repentir actif en droit pénal français", *Revue de science criminelle et de droit pénal comparé*, 1972, No. 3, p. 515) and the means offered by the justice system to the accomplice to reduce the penalty that may be imposed against him in the context of a criminal action. If they are not legally established, these means are not dismissed by the authors, who keep in mind this type of situation of which they may have been aware but for which the sources of the law seem incomplete.

The illustration can be provided here by lawyer Claude-Joseph de Ferrière in one of his passages on the "Crime" section in his *Dictionnaire de droit et de pratique* (ed. 1769, vol. 1, p. 406). If this jurisconsult specifies first of all that "he who has concerted to commit a crime, and who can commit it, by a real remorse of conscience has withdrawn from his undertaking", he also evokes the interest shown in the question of "repentance" by the following words: "As if someone who has conceived the plan with others to assassinate a Private Individual, through true and effective repentance, discov-

ers everything that is going on against him, declares his accomplices, gives him the means to arrest them and secure his life, he cannot be followed as a consequence of the will he had to commit an assassination. Indeed, projects that are not followed by any effective action are not within the competence of human justice. Since the society is not interested in wishes that are not followed up, the Society does not punish them.

In the Age of Enlightenment, comments remain too infrequent and nourished to encourage the deputies of the French Revolution to legislate on the subject. In any case, the period does not seem to be the right time for this approach. Indeed, both the principle of the legality of offences and penalties recognized in articles 7 and 8 of the Declaration of the Rights of Man and of the Citizen of 26 August 1789 and the sanction of complicity, punished by death in the Criminal Code of 1791, not to mention the lack of consideration of mitigating circumstances in the latter text, cannot lead to any value being given to "repentance".

However, this is not the case under the Consulate and Empire regimes. The organized plots against the Emperor undoubtedly contributed to greater attention being paid to those who, through the information they could provide, made it possible to thwart crime plans or have the perpetrators arrested if they had actually committed the crime. This is therefore an important first step with the 1810 Penal Code.

1.2. *Legislative evolution*

In France, the first legislative provisions concerning the status of the "repentant" seem to find a place, in the current state of our research, in the Criminal Code of 1810. The articles concerned can be considered, as Paul Savey-Casard (*op. cit.*, p. 518) noted, as "legal exceptions" to "the rule of ineffectiveness of active repentance". Here, Parliament is interested in"cases where the offender's subsequent conduct in relation to the offence he or she committed is taken into consideration". The latter, "for example, […] collaborated in the repression of the crime".

This scenario is already present in article 108 of this Code, which clearly reflects the context of the plot, which is very clearly perceived during the Napoleonic period. This article provides that "Exemptions from punishment shall be granted to perpetrators of conspiracies or other crimes against the internal or external security of the State who, before any execution or attempt to execute such conspiracies or crimes, and before any prosecution is initiated, shall have first informed the authorities mentioned in Article 103 (namely the Government, the administrative or judicial police authorities) of such conspiracies or crimes and their perpetrators or accomplices, or which, even since the commencement of the proceedings, have resulted in the arrest of such perpetrators or accomplices". The legislator already provides here for the two scenarios that may arise, i.e. when a co-author or accomplice decides to inform the constituted authorities, whether this occurs either before the preparation of a plot or after the execution of this crime, by providing sufficient evidence to arrest those who committed this crime. In either case,

article 108, paragraph 2, states that"The perpetrators who have given such knowledge or made such arrests may nevertheless be sentenced to remain for life or in time under the special supervision of the high police".

The same measures may be applied, as provided for in article 138 of the 1810 Penal Code, against persons guilty of the crimes referred to in articles 132 and 133" – i. e. the crime of counterfeiting – again with an exemption from penalties which may be decided in the cases described above, but also with the implementation of a "special surveillance of the high police" (security measure), whether perpetual or in time. The status of the "repentant" is further strengthened by article 144, according to which the provisions just described are also "applicable to the crimes mentioned in article 139", which refers to "those who have counterfeited the State seal or made use of the counterfeit seal; those who have counterfeited or falsified, either one or more national stamps, or the State hammers used for forest marks, or the stamp or stamps used to mark gold and silver materials, or who have made use of falsified or counterfeit papers, effects, stamps, hammers or stamps […]".

Article 285 of the 1810 Code also confirms, but to a lesser extent, the interest of the Napoleonic legislator in denunciation. The reference here concerns "offences committed through writings, images or engravings, distributed without the name of the author, printer or engraver". The text states that "if the printed text contains some provocations to crimes or offences, criers, billboards, vendors and distributors will be punished as accomplices of the provocateurs, unless they have made known those from whom they hold the text containing the provocation". Paragraph 2 of this article provides that "in the event of disclosure, they shall be liable only to imprisonment for a term of six days to three months […]". Unlike the previous articles, the qualification of the facts leads to a mitigation and not to an exemption from punishment. As Paul Savey-Casard (*op. cit.*, p. 518) notes, "this encouragement to denounce is surprising. The drafters of the Code used it for purely practical purposes. They saw it as a way to more easily seize the main culprits and prevent offences that are highly dangerous to public order.

During the 19th century, legislation on the status of the "repentant" seemed to remain relatively static, at least until the time of the anarchist attacks. In this context, a first law of 2 April 1892 amended article 435 of the Criminal Code. It now provides that persons guilty of "wilfully destroying in whole or in part or attempting to destroy by mine or any explosive substance buildings, dwellings, dikes, roadways, ships, boats, vehicles of all kinds, stores or construction sites or their outbuildings, bridges, public or private roads and generally all movable or immovable objects of any kind whatsoever", "shall be exempt from punishment if, before the consumption of these crimes and before any prosecution, they have informed and revealed the perpetrators to the constituted authorities, or if, even after the prosecution has begun, they have provided for the arrest of the other perpetrators. They may nevertheless be subject, for life or in time, to the residence ban established by article 19 of the law of 27 May 1885.

A second law dated 18 December 1893 – which is one of the famous rogue laws adopted to repress the anarchist movement in France – amends

article 266 of the Criminal Code. Paragraph 3 of this article concerns "the persons who have committed the crime referred to in this article (more specifically art. 265: "any association formed, whatever the duration or number of its members, any agreement established for the purpose of preparing or committing crimes against persons or property […]")". These persons "shall be exempt from punishment if, before any prosecution, they have disclosed to the constituted authorities the agreement reached or made known the existence of the association".

In terms of legislation, the 20th century seems to have been mainly marked by the texts adopted during the 1980s and 1990s. Since the late 1970s, France has been confronted with a proliferation of terrorist attacks that continued over the following decades. In this sensitive context, the law of 2 February 1981 "strengthening security and protecting the freedom of persons" replaces articles 265 to 267 of the Criminal Code with articles 265 to 268 of the same Code. The latter article provides that "shall be exempt from the penalties provided for in articles 265, 266 and 267 – in substance, participation "in an association formed or an agreement established for the purpose of preparation in the form of one or more material facts, one or more crimes against persons or property", participation "in an association formed or an agreement established for the purpose of preparation in the form of one or more material facts, of one or more of the following offences: 1° Pimping […]; 2° Aggravated theft […]; 3° Destruction or aggravated deterioration […].; (4) Extortion […]", complicity in the offences defined above when the person "has voluntarily provided, knowing that they were to be used for the action, means intended to commit the crime or crimes for which the association was formed or the agreement established – the person who, having committed one of the acts defined by these articles, has, before any prosecution, disclosed the association or agreement to the constituted authorities and has allowed the identification of the persons in question". As Bernard Bouloc points out, "this excuse requires that the denunciation allow the identification, but not the arrest of the perpetrators. It is not, however, reserved for the first whistleblower, but only concerns the offence of criminal association without having any influence on the crimes or offences that were the consequence of the criminal association" ("The problem of the repentant. La tradition française relativement au statut des repentis", *Revue de science criminelle*, 1986, p. 780).

A few years later, the law of 9 September 1986 "on the fight against terrorism and attacks on State security" was added to the system already in place. Article 6 of this text introduces the following provisions into articles 463-1 and 463-2 of the Criminal Code: Article 463-1, paragraph 1, provides that "Any person who has attempted to commit as an perpetrator or accomplice one of the offences listed in the eleventh paragraph of article 44, when in relation to an individual or collective enterprise whose purpose is to seriously disturb public order by intimidation or terror, shall be exempt from punishment if, having notified the administrative or judicial authority, it has prevented the offence from occurring and identified, where appropriate, the other perpetrators". Similarly, paragraph 2 provides that "Any person who,

as an perpetrator or accomplice, has committed one of the offences listed in the eleventh paragraph of article 44, when in relation to an individual or collective enterprise whose purpose is to seriously disturb public order by intimidation or terror, shall be exempt from punishment if, having notified the administrative or judicial authority, it has prevented the offence from causing death and permanent disability and has made it possible to identify, where appropriate, other offenders". As for article 463-2, it provides that "Except in the cases provided for in article 463-1, the maximum penalty incurred by any person, author or accomplice to one of the offences listed in the eleventh paragraph of article 44, when it was in relation with an individual or collective enterprise whose purpose is to seriously disturb public order by intimidation or terror, who has, before any prosecution, permitted or facilitated the identification of the other perpetrators or, after the initiation of the prosecution, permitted or facilitated their arrest, shall be reduced by half or, where the penalty prescribed by law is life imprisonment, to twenty years". This law confirms the implementation of an exemption from punishment but also a reduction of punishment for those who will work to "repent".

On the eve of the adoption of the New Penal Code, which came into force on 1 March 1994, the mechanism of repentance has already found its place in French legislation. As J.-F. Gayraud (*op. cit.*, p. 267 *et seq.*) noted, however, the French system differs from neighbouring models. Indeed, "Unlike the status of repentance established in certain foreign laws, which takes into account the confession made by an offender for release during the investigation phase, or certain laws which allow the investigating courts to assess the existence of mitigating circumstances for disqualification, under French law, impunity is granted in the form of a mitigating or absolute excuse and falls exclusively within the jurisdiction of the court of judgment". Nevertheless, this excuse "never exempts the appearance in court and therefore never authorizes the investigating court to dismiss the case[… The offence is constituted and the offender remains criminally responsible".

1.3. *Case law evolution*

In the current state of research, it is not easy to highlight, in the case of France, any change in case law relating to the status of the repentant. Investigations need to be conducted more broadly here to determine any developments in how this still incomplete piece of our criminal legislation is applied.

In the past, we can mention a few rare decisions handed down on this subject of "repentance", in particular a judgment of the Court of Cassation of 18 August 1820 (*Bulletin criminel*, 1820, p. 325, Ferchaud and Cobourg). The court thus decides that "When, on the request made by individuals accused of making counterfeit money, the jury is asked a question as to whether the exemption from punishment provided for in article 138 of the Criminal Code should be applied to them, in favour of those accused of this crime who have denounced the other perpetrators, the criminal court shall reject this request by deciding 1°. That the crime was consummated; 2°. That

the non-consumption of crime is an essential condition for the application of the said law, it commits, on the one hand, usurpation on the functions of the jury in deciding the fact of the consumption of the crime; then, it makes a false application of the law, the accused having, even after the consumption of the crime, the right to have the said question asked".

We can also note the very late emergence in France of a modern conception of "repentance" that is not quite identical to that implemented in Italy, where priority is given to the fight against organized crime. The main target, at a time when French criminal legislation on the subject was becoming clearer in the 1980s, was undeniably terrorism. In this respect, it also appears that "The first French repentant was a repentant: Frédérique Germain, member of the organization Action Directe" and doctor of law. "Arrested in 1984, she confessed to several crimes and "gave" names and facts. Charged with criminal association, she was released in 1986" (J.-F. Gayraud, *op. cit*., p. 270; «Les accusés de la fusillade de l'avenue Trudaine aux assises de Paris – Le repentir de Frédérique Germain, ex-" Blond-Blond"», *Le Monde*, 12 juin 1987).

2. *Current rewarding legislation (where existing)*

2.1. *Applicability conditions*

Several texts of the French Penal Code and the French Code of Penal Procedure concern the status of the "repentant". The latter is generally defined by article 132-78 of the Criminal Code, but this text is applicable, not to any crime or offence, but exclusively when a particular provision so provides, which raises the question of its scope of application (see 2.1.2). In addition, the specific texts, specific to certain offences, sometimes deviate from the letter of the general text, which may modify the scope of the enactment, as will be seen.

2.1.1. *Persons concerned*

With regard first to the definition of "repentant", the first target is the person who has attempted to commit a crime or misdemeanour and who, having notified the administrative or judicial authority, has made it possible to avoid the commission of the offence and, where appropriate, to identify the other perpetrators or accomplices.

Secondly, the person who has committed a crime or misdemeanour and who, having notified the administrative or judicial authority, has made it possible to bring the offence to an end, to prevent the offence from causing damage or to identify the other perpetrators or accomplices. The text adds that it still concerns the person who has made it possible either to avoid the commission of a related offence of the same nature as the crime or offence for which he was prosecuted, or to bring such an offence to an end, to prevent him from causing damage or to identify the perpetrators or accomplices.

The repentant person is therefore, in all cases, the perpetrator of an offence that has been committed or at least attempted. Only the perpetrators of crimes and offences are concerned, it being recalled that under French law, the attempt to commit a crime is always criminalized, whereas the attempt to commit a crime must be expressly provided for in the criminalization text.

2.1.1.1. *Author of an attempt*

In the first case (article 132-78, paragraph 1), the legislator refers to the author of an attempt, i.e., according to article 121-5 of the Criminal Code, the one who either started to execute the offence or performed all the acts of execution but failed, i.e. did not succeed in consuming the offence. This criminal or offender must notify a judicial or administrative authority and, through this approach, make it possible to avoid the commission of the offence and, if necessary, to identify the other perpetrators or accomplices. The doctrine has highlighted the difficulties involved in the application of this text. Thus, since the legislator only mentions the author of the attempt, it seems to exclude that the latter's accomplice may benefit from the mechanism provided for by the text, if one makes a literal interpretation of the latter. This analysis, which leads to a narrower definition of repentance, is generally rejected by the interpreters (V. C. Saas, Jurisclasseur pénal Code, article 132-78, fascicule 20, n° 24; A. Mihman, Exemption and reduction of sentence for repentant persons: contributions of the law of 9 March 2004 known as the "Perben II law", Criminal law 2005, study 1, p. 7).

The text poses another problem, linked to the very notion of attempted offence. Indeed, by targeting the person who attempted the offence and preventing its commission by notifying an authority, it raises the question of whether the "attempt" in question is indeed punishable. The fact of notifying a public authority and thus preventing the commission of the offence seems to imply that the perpetrator will have voluntarily interrupted the execution or will have voluntarily withdrawn, which means that the attempt would then not be punishable, making the text inapplicable. In other words, for the attempt to be punishable, it is necessary, according to article 121-5 of the Criminal Code, that the perpetrator of the acts does not succeed in consummating the offence because of circumstances beyond his control and the fact of notifying an authority and thus obstructing consumption, as provided for in article 132-78, paragraph 1, is inevitably a circumstance that depends on the agent's will. In addition, the text states that the effect of the warning given to the authority must be to avoid the commission of the offence. However, by hypothesis, the perpetrator of an attempt did not carry out the offence, i.e. he did not consume it and the fact of notifying the authority cannot have the effect of preventing the crime or offence from being committed. Either the perpetrator himself stops the execution of the acts and notifies the authority, but he will probably be considered as having voluntarily withdrawn, which will mean that the attempt will not be punishable and that article 132-78 will not be able to apply. Either the perpetrator does not voluntarily stop, being arrested by police officers before consum-

ing the offence, for example, and in this case the attempt will be punishable but the text will be equally inapplicable because the perpetrator can no longer, in this case, notify an authority in order to prevent the offence from being committed. In other words, in this case, it is not the fact of notifying an authority that prevents the offence from being committed, but the fact that the agent has not succeeded in doing so for a reason beyond his control.

The text of paragraph 1 of Article 132-78 therefore poses significant difficulties of interpretation, making it very difficult to apply (see C. Saas, above-mentioned article, Nos. 25 to 28).

During the the first Focus Group, practitioners also identified this obstacle to the application of the status. In practice, the general text cannot be applied because it is not compatible with the condition of interruption for reasons beyond the perpetrator's control.

2.1.1.2. *Author of a consummated offence*

In the second case (Article 132-78, paragraphs 2 and 3), the legislator refers to the person who has committed a crime or offence which, having notified the administrative or judicial authority, has made it possible to bring the offence to an end, to prevent the offence from causing damage or to identify the other perpetrators or accomplices.

It is therefore the perpetrator of a consummate offence who warns a public authority and thus causes three alternative consequences. The same question arises here as for paragraph 1, namely whether only the author himself or the accomplice is concerned. It should be noted here that some specific texts applying the provisions of article 132-78 of the Criminal Code apply not only to the perpetrator but also to accomplices. This is the case, for example, of article 222-6-2 of the Criminal Code, concerning acts of torture and barbarism, article 422-2, concerning acts of terrorism, or article 414-4, concerning attacks on the fundamental interests of the Nation. Since these particular texts are the ones that actually apply, it must be deduced that the author in the strict sense is not the only one targeted and that other participants, co-authors or accomplices, are likely to fall within the scope of the "repentant" status.

The action of notifying the administrative or judicial authority must make it possible either to stop the infringement, or to prevent it from causing damage, or to identify the other perpetrators or accomplices. The latter case does not pose any difficulty because it is a matter of the author denouncing the other participants. On the other hand, the other two, once again, pose a problem of interpretation. The text first takes into account the fact that the warning given to the authority made it possible to "bring the infringement to an end", which implies that it is likely to continue over time. It should therefore be understood here that only continuous offences, i.e. those whose consumption lasts for a certain period of time, by the will of the perpetrator, would be concerned. It can thus be imagined that the mechanism would apply to the case of the author of a sequestration committed by several persons and who notifies the authorities in order to have the persons deprived of their liberty released. It should also be noted that provision is in-

deed made for kidnapping (article 224-5-1, paragraph 2, of the Criminal Code). However, the specific texts, applying the operative provisions of article 132-78 of the Criminal Code, show that the legislator does not only refer to continuous offences, but also to the cessation of offences such as organized gang robbery (article 311-9-1 of the Criminal Code) or organized gang extortion (article 312-6-1 of the Criminal Code) which do not constitute continuous but instantaneous offences. It therefore follows that the rule that the authority's warning must have brought the infringement to an end must be understood very broadly.

Article 132-78 also takes into account the fact that the author who notifies the public authority prevents the offence from causing "damage". As this term is very vague, this damage could be either a necessary element of the offence or an aggravating circumstance of the offence, or another continuation of the offence, not taken into account in the context of the criminalisation. Again, the specific texts applying the mechanism provide valuable insights into it because they often specify which "damage" should be taken into account. Thus, article 224-8-1 of the Criminal Code grants a reduction of sentence to the author or accomplice of a misuse of a means of transport if, having notified the administrative or judicial authority, he or she has prevented the offence from causing "death of a man or permanent disability". However, if the death of a victim is an aggravating circumstance of the offence (article 224-7 of the Criminal Code), this is not the case for permanent disability. Similarly, article 225-4-9 of the Criminal Code, on trafficking in human beings, mentions the fact that the author, by notifying the public authority, must stop the offence or prevent it from causing death or permanent disability when neither of these two consequences constitutes an aggravating circumstance. It therefore appears that the "damage" referred to in article 132-78 of the Criminal Code may be any continuation of the offence and is not necessarily an element of the offence or an aggravating circumstance.

Finally, it should be noted that some special texts refer only to the fact that the agent, by notifying the authority, made it possible to stop the offence or to identify the perpetrators or accomplices, without mentioning the fact that it made it possible to avoid damage (See, in the field of money laundering, article 324-6-1, paragraph 2 of the Criminal Code).

In addition, article 132-78, paragraph 3, of the Criminal Code stipulates that the provisions of the preceding paragraph, i. e. those concerning the perpetrator of a consumed offence, are also applicable when the person has made it possible either to avoid the commission of a related offence of the same nature as the crime or offence for which he was prosecuted, or to bring such an offence to an end, to prevent him from causing damage or to identify the perpetrators or accomplices. This extension of the system therefore implies that the warning given to the administrative or judicial authority has no effect on the offence committed by the perpetrator who carried out this procedure but on another offence which must be both related and of the same nature as the offence committed. These criteria are again not very precise. Thus, connectedness is not precisely defined by the Code of Crimi-

nal Procedure, which is limited to providing illustrations. According to article 203, "offences are related either when they were committed at the same time by several persons gathered together, or when they were committed by different persons, even at different times and in different places, but as a result of a concert formed in advance between them, either where the perpetrators have committed some to obtain the means to commit others, to facilitate, to facilitate, to consummate their execution or to ensure impunity, or where things removed, misappropriated or obtained by means of a crime or offence have been concealed, in whole or in part". The notion, which implies close links between the different offences, depends on the factual circumstances assessed by the judges.

Similarly, the reference to the "nature" of the offence is vague. Thus, while it is easy to admit that offences such as theft and extortion are of the same nature, because they are property offences, it is difficult to know whether an offence such as procuring committed with torture or acts of barbarism (article 225-9 of the Criminal Code) is of the same nature as the crime of torture or barbarity (article 222-1 of the Criminal Code). Here again, there is a considerable margin of appreciation for the courts, which is likely to make it possible to extend the scope of the mechanism applicable to "repentance".

2.1.2. *Infringements concerned*

The scope of the regime applicable to "repentant" depends on the nature of the measures applicable to them.

Indeed, article 132-78 of the Criminal Code provides, on the one hand, for an exemption from punishment for the author of an attempt which, having notified the administrative or judicial authority, made it possible to avoid the commission of the offence and, where appropriate, to identify the other perpetrators or accomplices. On the other hand, the author of a consummate offence who, having notified the administrative or judicial authority, has made it possible to bring the offence to an end, to prevent the offence from causing damage or to identify the other perpetrators or accomplices, shall be entitled to a reduced penalty.

In both cases, the text indicates that these mechanisms do not exist for any crime or offence but only "in cases provided for by law". It is therefore appropriate to make an inventory of legal cases by drawing the distinction again, even if, for certain offences, both the penalty exemption and the penalty reduction mechanisms apply.

It should also be noted that, in the case of participation in a criminal association, the legislator grants, in an original way, an exemption from punishment, not to the author of an attempt, since the attempt to commit this offence is not incriminated, but to the person who participated in the group or agreement if, before any prosecution, he has revealed the group or agreement to the competent authorities and allowed the identification of the other participants (article 450-2 of the Criminal Code). The exemption from punishment therefore benefits here the perpetrator of a consummated and not only attempted offence (see *below* 3.1. for an illustration).

2.1.3. *Offences exempt from punishment*

The offences for which the "repentant" can benefit from an exemption from punishment are found in the Criminal Code, the Defence Code and the Military Justice Code.

2.1.3.1. *Offences under the Criminal Code*

The exemption from punishment is provided, in the first place, for offences against the person, provided for in Book II of the Criminal Code. It is a question of:

– murder and poisoning (Article 221-5-3, paragraph 1, of the Criminal Code);

– acts of torture and barbarism (Article 222-6-2, paragraph1, of the Criminal Code);

– drug trafficking offences (article 222-43-1 of the Criminal Code);

– kidnapping (Article 224-5-1, paragraph 1, of the Criminal Code);

– the misappropriation of means of transport (Article 224-8-1, paragraph 1, of the Criminal Code);

– trafficking in human beings (Article 225-4-9, paragraph 1, of the Criminal Code);

– pimping (article 225-11-1, paragraph 1, of the Criminal Code).

The exemption is applicable, in the second place, for offences of damage to property, provided for in Book III of the Criminal Code. It is a question of:

– theft by organised gangs (Article 311-9-1, paragraph 1, of the Criminal Code);

– organized gang extortion (article 312-6-1, paragraph 1, of the Criminal Code);

– money laundering (article 324-6-1, paragraph 1, of the Criminal Code).

Finally, the exemption is applicable to offences against the Nation, the State and public peace, which are criminalized by Book IV of the Criminal Code. It is a question of:

– offences of attack, sabotage, treason or espionage, delivery of all or part of the national territory, armed forces or equipment to a foreign power and delivery of information to a foreign power (Article 414-2 of the Criminal Code);

– conspiracy (Article 414-3 of the Criminal Code);

– acts of terrorism (Article 422-1 of the Criminal Code);

– escape (Article 434-37 of the Criminal Code);

– counterfeit currency (Article 442-9 of the Criminal Code);

– the criminal association (article 450-2 of the Criminal Code).

2.1.3.2. *Offences under the Defence Code*

The exemption from punishment for the perpetrator of an attempt is provided for several offences. It is a question of:

– the offences provided for in Articles L. 1333-13-3 and L. 1333-13-4 and the first paragraph of Article L. 1333-13-6 of the Defence Code (Article L. 1333-13-9 of the Defence Code) with regard to the protection and control of nuclear materials;

– offences relating to biological or toxin-based weapons (Article L. 2341-6-1 of the Defence Code);

– offences relating to chemical weapons, as provided for in Articles L. 2342-57 to L. 2342-61 (Article L. 2342-75 of the Defence Code).

2.1.3.3. *Offences under the Code of Military Justice*

Article L. 333-5 of the Code of Military Justice provides that a person who has attempted to commit in time of war one of the offences provided for in articles 411-2, 411-3, 411-6, 411-9 and 411-10 of the Criminal Code and mentioned in article L. 331-1 of the Code of Military Justice is exempt from punishment if, having notified the administrative or judicial authority, it has prevented the offence from taking place and, where appropriate, identified the other offenders. These are offences such as treason or espionage, committed in time of war.

2.1.4. *Offences giving rise to a reduction of sentence*

The offences for which the "repentant" can benefit from a reduced sentence are listed in the Criminal Code, the Defence Code, the Military Justice Code and the Internal Security Code.

2.1.4.1. *Offences under the Criminal Code*

First of all, it concerns offences against persons in Book II of the Criminal Code. It is a question of:

– poisoning (article 221-5-3, paragraph 2, of the Criminal Code);

– acts of torture and barbarism (article 222-6-2, paragraph 2, of the Criminal Code);

– drug trafficking (article 222-43 of the Criminal Code);

– kidnapping (article 224-5-1, paragraph 2, of the Criminal Code);

– the misappropriation of means of transport (Article 224-8-1, paragraph 2, of the Criminal Code);

– trafficking in human beings (article 225-4-9, paragraph 2, of the Criminal Code);

– pimping (article 225-11-1, paragraph 2, of the Criminal Code);

The reduction of sentence is applicable, in the second place, for offences of damage to property in Book III of the Criminal Code. It is a question of:

– theft by organised gangs (Article 311-9-1, paragraph 2, of the Criminal Code);

– organized gang extortion (article 312-6-1, paragraph 2, of the Criminal Code);

– money laundering (article 324-6-1, paragraph 2, of the Criminal Code).

The reduction of sentence is provided for, lastly, for offences against the Nation, the State and public peace, as set out in Book IV of the Criminal Code. It is a question of:

– intelligence with a foreign power, the provision of information to a foreign power and the direction or organization of an insurrectional movement (Article 414-4 of the Criminal Code);

– acts of terrorism (Article 422-2 of the Criminal Code);

– passive corruption and influence peddling by public officials (Article 432-11-1 of the Criminal Code);

– active corruption and influence peddling by individuals (Article 433-2-1 of the Criminal Code);

– obstacles to the exercise of justice (article 434-9-2 of the Criminal Code);

– corruption and influence peddling of foreign public officials, both active and passive (Article 435-6-1 of the Criminal Code);

– corruption and influence peddling, both active and passive, by persons exercising judicial functions abroad and persons treated as such (Article 435-11-1 of the Criminal Code);

– counterfeit currency (Article 442-10 of the Criminal Code).

2.1.4.2. *Offences under the Defence Code*

Several offences criminalized by the Defence Code may result in a reduction of sentence in favour of the "repentant". It is a question of:

– the offences provided for in Articles L. 1333-13-3 to L. 1333-13-5 and the first paragraph of Article L. 1333-13-6 (Article L. 1333-13-10 of the French Defence Code) with regard to the protection and control of nuclear materials;

– offences provided for in Articles L. 2339-2 and L. 2339-10 (Article L. 2339-13 of the Defence Code) relating to the manufacture, trade and import of war materials, weapons and ammunition;

– the manufacture, without authorization, of an explosive or incendiary device or explosive product, or any other element or substance intended to be used in the composition of an explosive product (article L. 2353-4, paragraph 5, of the Defence Code);

– offences relating to biological or toxin-based weapons (Article L. 2341-6 of the Defence Code);

– offences relating to chemical weapons, as provided for in Articles L. 2342-57 to L. 2342-61 (Article L. 2342-76 of the Defence Code);

– the offences provided for in Articles L. 2353-5 to L. 2353-8 (Article L. 2353-9, paragraph 1, of the Defence Code) with regard to explosives.

2.1.4.3. *Infractions of the Code of Military Justice*

Article L. 333-6 of the Code of Military Justice provides for a reduction of sentence for the benefit of the perpetrator or accomplice of the offences provided for in articles 411-4, 411-5, 411-7 and 411-8 of the Criminal Code and mentioned in article L. 331-1 of the Code of Military Justice. These are offences such as intelligence with a foreign power or the delivery of information to a foreign power, committed in time of war.

2.1.4.4. *Infractions of the Internal Security Code*

Article L. 317-11 of the Internal Security Code provides for a reduction of sentence for the benefit of the perpetrator or accomplice of the offence, provided for in article L. 317-7 of the same Code, of possession of a warehouse of weapons or ammunition in category C, as well as weapons in category D.

2.2. *Types of rewarding measures*

2.2.1. *Rewarding measures that exclude or mitigate the penalty, initiated at the pre-sentencing stage*

The French legislator expressly provides, for the benefit of the "repentant", two types of measures: an exemption from or a reduction of the penalty. By definition, such a mechanism can therefore only be applied at the time of the imposition of the sanction, by a court of judgment which has previously found the perpetrator guilty, or at the time of enforcement of the sanction, by a court of enforcement of the sentences.

No other measures are explicitly provided for at the pre-trial stage, i.e. the stage prior to the referral to a criminal court. However, it cannot be deduced from this that the question does not arise, in particular at a time when the public prosecutor's office is called upon to decide whether it is appropriate to prosecute the perpetrator. It should be recalled that article 40 of the Code of Criminal Procedure states that "the public prosecutor shall receive complaints and denunciations and shall assess the action to be taken in accordance with the provisions of article 40-1". Article 40-1 specifies this principle by stating that "when he considers that the facts brought to his attention pursuant to the provisions of article 40 constitute an offence committed by a person whose identity and domicile are known and for which no legal provision prevents the initiation of public proceedings, the public prosecutor with territorial jurisdiction shall decide whether it is appropriate:

(1) to institute proceedings;

(2) to implement an alternative procedure to prosecution under the provisions of section 41-1 or 41-2;

(3) to close the procedure without further action if the particular circumstances related to the commission of the facts justify it.

The latter hypothesis, i.e. the consideration of "special circumstances", may apply to the case of a "repentant" who could therefore benefit from a classement sans suite. Indeed, the text of the Code of Criminal Procedure does not provide for a scope of application for the latter measure, which makes it conceivable even for serious offences. In other words, an offender who agrees to cooperate with the judicial authority, in this case the public prosecutor, could obtain, in exchange, such a preferential measure. The great rarity of the application by the courts of the texts relating to exemptions and reductions of sentence tends to confirm that the treatment of the situation of the "repentant" is more often carried out at this stage of the proceedings than at the judgment stage. This can have several advantages. On

the one hand, this practice is discreet and even undetectable, since it leaves no trace in the procedure. On the other hand, the discontinuance does not constitute a judicial decision, which means that it does not extinguish the public action. As it is only an "administrative" measure, the classification may not be final, which means that the public prosecutor may decide to reverse his decision, on the sole condition that the facts are still likely to be prosecuted and are not covered by the statute of limitations. This non-definitive character therefore presents a flexibility that is not found in the case of the exemption and reduction of sentence that are pronounced in decisions having the authority of res judicata.

During the the first Focus Group, the police services pointed out, with regret, that they cannot promise justice collaborators a reduction/exemption from punishment and cannot use this in the negotiation phase. However, they believe that the possibility of offering the reduction or exemption from punishment, in order to be able to "deal" with the candidate, would be beneficial.

In France, this is not possible in practice, as only the sentencing judge can decide on the reduction or exemption from sentence. Making promises at the pre-trial stage would bind the judge at the trial stage. However, the Court of Cassation considers that the court is always free to set a sentence. Law cannot bind the judge on the application of a mandatory sentence, or on the benefit of a favorable status.

This practical impossibility is all the more true when individuals are tried for a crime before the Assize Court, since there is a real judicial hazard linked to the popular jury.

Furthermore, if at the pre-sentence phase, the police promise people a reduction in their sentence and provide protection, and if at the time of judgment there is no reduction in sentence, this discredits the system of collaboration and protection of collaborators. This is problematic, particularly in drug circles, where the value of using the statute is discussed. Offenders therefore do not want to talk and prefer not to be protected.

2.2.2. *Rewarding measures that exclude or mitigate the penalty, initiated at the sentencing stage*

All of the legislative texts previously listed provide for an exemption from punishment or a reduction of punishment, both of which may be applicable, in certain cases, to the same offence or category of offences. The common feature of these two mechanisms is that the person benefiting from them is found guilty and liable for the offence in question by a court of law. The difference is reflected in the fact that the exemption from punishment consists in excluding the imposition of any penalty for "repentance", as long as the legal conditions are met, and without the judges having any discretion as to whether or not to pronounce the said exemption (V. C. Saas, article cited above, No. 51). The reduction of sentence consists in imposing a sentence on the "repentant", which will be reduced in a proportion determined by the text providing for it. The special texts providing for a reduction in penalty set it at half of the maximum duration incurred (see, for example, for drug trafficking, article 222-43 of the Criminal Code or, for procuring, ar-

ticle 225-1-1, paragraph 2 of the Criminal Code). Here again, the mechanism operates as of right, which means that the court cannot modulate the reduction (see C. Saas, article 51 above). More precisely, since the maximum incurred is halved, judges can only impose a penalty equal to or less than half of this maximum.

The mechanism of sentence reduction at the trial stage must be combined with the principle of individualisation of the sanction, which requires the trial courts to take into account, in order to determine the nature, quantum and regime of the sentences imposed, the circumstances of the offence and the personality of its perpetrator as well as his or her material, family and social situation (Article 132-1 of the Criminal Code).

2.2.3. *Rewarding measures that exclude or mitigate the penalty, initiated at the post-sentencing stage*

The French legislator has provided for a case in which a reduction of sentence may be granted after judgment and final conviction of the offender. Article 721-3 of the Code of Criminal Procedure provides that an exceptional reduction of sentence, the amount of which may not exceed one third of the sentence imposed, may be granted to convicted persons whose statements made to the administrative or judicial authority before or after their conviction have made it possible to stop or avoid the commission of an offence mentioned in articles 706-73, 706-73-1 and 706-74. Where these statements have been made by persons sentenced to life imprisonment, they may be granted an exceptional reduction in the probation period provided for in article 729 of the Code of Criminal Procedure, which may be up to five years. These exceptional reductions are ordered by the "Tribunal d'application des peines".

This mechanism is part of a more general mechanism, which is the reduction of custodial sentences that may be granted to persons who have been sentenced to a life imprisonment and are therefore serving their sentences (articles 721 to 721-3 of the Code of Criminal Procedure). In this case, it should be noted that the reduction provided for in favour of "repentance" can only apply in the event of conviction for offences covered by the criminal or organised delinquency regime, i. e. the offences listed in articles 706-73, 706-73-1 and 706-74 of the Code of Criminal Procedure, which does not cover the same hypotheses as reductions in sentence at the trial stage. For example, it is possible for a convicted person on the charge of destroying, damaging or damaging property in an organised gang as provided for in Article 322-8 of the Criminal Code, whereas the trial court could not order a reduction, pursuant to Article 132-78 of the Criminal Code, in the absence of a special text allowing it. This difference in treatment is difficult to justify.

In addition, and contrary to the reduction provided for at the trial stage, it is for the court enforcing the penalties to determine the extent of the reduction, without being able to exceed one third of the penalty imposed. Judges therefore have a discretionary power here that does not exist at the trial stage.

The Court of Cassation ruled, with regard to the scope of application of the mechanism, that the rejection of the request for an exceptional remis-

sion of sentence made by a convicted person was justified when the facts denounced by him, which amounted to rape, aggravated sexual assault and corruption of minors under 15 years of age, did not fall within the provisions of articles 706-73 and 706-74 of the Code of Criminal Procedure (Criminal Cass., 24 May 2006, No. 05-86.772; Bull. crim. No. 148).

2.3. *Counterpart of rewarding measures: the obligations of the repentant*

The above-mentioned texts do not provide for any general obligation on the person enjoying the status of "repentant", but certain obligations may, if necessary, be imposed as part of the protection mechanism provided for in article 706-63-1 of the Code of Criminal Procedure (see *below*).

2.4. *Revocation of rewarding measures*

No grounds for revoking the status are expressly provided for in the texts. More precisely, as we have seen, if the person concerned is not prosecuted, he remains under the threat of prosecution because the discontinuation of the proceedings does not constitute a court decision or a cause of termination of the public proceedings. On the other hand, if it benefits from an exemption from punishment or a reduction of punishment, the favourable measure may not be withdrawn from it if it has been pronounced by a final decision. The same applies to the reduction of sentence granted after final judgment, since article 721-3 of the Code of Criminal Procedure does not provide any grounds for dismissal.

2.5. *Conditions for the application of the measures (procedural aspects)*

A distinction should be made here between the mechanism of exemption and reduction of sentence, provided for in the Criminal Code, and the mechanism of exceptional reduction of sentence, provided for in the Code of Criminal Procedure

2.5.1. *Conditions for the application of the texts of the Criminal Code*

The texts of the Criminal Code providing for grounds for exemption or reduction of sentence do not provide for any specific procedural modalities. It follows from this that the application for the favourable measure does not require any formal requirements. It can therefore be formulated at any stage of the proceedings, during the investigation, investigation or before a court of law.

In criminal matters, article 181, paragraph 3, of the Code of Criminal Procedure states that "the indictment order shall contain, under penalty of nullity, the statement and legal qualification of the facts on which the charge is based and shall specify the identity of the accused. It also specifies, where applicable, that the accused benefits from the provisions of article 132-78 of the Criminal Code. It can therefore be deduced from this text, which does not distinguish between exemption and reduction of sentence, that the in-

vestigating judge can, as early as the judicial information stage, establish the existence of one of these two mechanisms, the problem being to know what scope such a decision would have for the criminal court. In a judgment of the Criminal Division of the Court of Cassation of 16 November 2016 (No. 16-85.101, Bull. crim. No. 302), it was held that the decision of the investigating court concerning the application of Article 132-78 of the Criminal Code is not binding on the trial court, before which the accused may always, if he considers it appropriate, invoke the benefit of the provisions of that article. In the present case, the investigating judge had rejected the argument based on the application of the text on the grounds that the statements of the prosecuted person had not made it possible to avoid the commission of an offence. The question remains, however, whether, if the investigating court were to decide otherwise, the trial court would be bound by that decision, with the result that no special question should be put to the assize court, which would be obliged to apply the exemption or reduction of sentence (see, in this sense, H. Angevin, JurisClasseur Procédure pénale, Art. 347 to 354, fasc. 20, n° 221). The above-mentioned decision of the Court of Cassation does not resolve the difficulty.

If the investigating court does not mention in the transfer decision the existence of a ground for exemption or reduction of sentence, the plea may be raised before the assize court, before which a special question will then be asked. Article 349 of the Code of Criminal Procedure thus provides that, when invoked, each legal ground for exemption or reduction of the penalty must be the subject of a specific question.

In matters relating to tort, no specific procedural rules are provided for regarding exemption or reduction of sentence. Article 468 of the Code of Criminal Procedure merely states that if the accused person has a legal ground for exemption from punishment, the court shall find him guilty and exempt him from punishment, which confirms the automatic nature of the mechanism.

2.5.2. *Conditions for the application of the exceptional penalty reduction*

Article 721-3, paragraph 2, of the Code of Criminal Procedure states that the exceptional reduction it provides in favour of "repentant" persons is granted by the court for the enforcement of sentences in accordance with the procedures provided for in article 712-7. According to the latter text, the decision presupposes a reasoned judgment of the court for the enforcement of sentences seized at the request of the convicted person, at the request of the public prosecutor or at the initiative of the judge responsible for the enforcement of sentences to which the convicted person belongs. This judgment shall be delivered, after consulting the representative of the prison administration, after an adversarial debate held in chambers, during which the court shall hear the requests of the public prosecutor and the observations of the convicted person and, where appropriate, those of his lawyer. If the convicted person is detained, this debate may be held in the prison or by videoconference.

2.6. *Conditions for the use of the declarations obtained (probative value of declarations)*

Article 132-78, paragraph 4, of the Criminal Code provides that no conviction may be handed down solely on the basis of statements made by persons who have been the subject of the provisions of this article. This provision is identical to that provided for, in the case of anonymous testimony, by article 706-62 of the Code of Criminal Procedure (see also, for statements made by judicial police officers or agents who have carried out an infiltration operation, article 706-87 of the Code of Criminal Procedure). It shows that the legislator does not give particular probative value to the declarations of the "repentant" while admitting that this value does exist. Thus, if the statements merely corroborate other evidence of the guilt of the persons charged, they may be taken into consideration by the investigating or trial courts, in accordance with the principle of freedom of evidence. This is also the position of the European Court of Human Rights, which considers that "the statements of the "repentant" must be corroborated by other elements; in addition, indirect testimonies must be confirmed by objective elements" (ECHR, 6 April 2000, Application No. 26772/95, Labita v/ Italy, § 158).

The difficulty, in practice, therefore, is whether the sentence is based solely on the statements of the "repentant" or also on other elements, which results, in principle, from the motivation of the decision, which must be particularly precise on this point (see *below* 3).

2.7. *Measures for the protection of the repentant*

The legislator provides various protective measures for the "repentant". Some of them, not specifically described, are intended to ensure, in general, the physical protection and reintegration of the person concerned. However, special provisions are devoted to the possibility of using an assumed identity.

In practice, protection always precedes exemption or possible reduction of the sentence, whereas the texts suggest the opposite, referring to Article 132-78 of the Criminal Code to determine who is likely to benefit from protection measures. More specifically, people who might be eligible for exemption or reduction in sentence first request protection at the pre-sentence stage before considering a beneficial measure under criminal law. The legal system thus appears to be completely out of step with criminological and judicial realities and should therefore be rethought on the basis of the latter.

Moreover, a major difficulty arises from the fact that, while the mechanism for exemption from punishment is automatic when the conditions are met (see *above*, No. 2.2.2), any reduction in sentence is at the discretion of the courts and can therefore never be certain for the beneficiary, which makes it difficult to obtain his or her cooperation at the stage of the police investigation or inquiry. In addition, there is a significant time lag between the moment of protection and the decision on guilt and sentence, which makes the benefit of awarding measure hypothetical.

Here again, a reform would be necessary in order to make the system more attractive, for example, the reduction in sentence could be acquired by

the repentant person, provided that his or her cooperation is effective and lasting, and awarding measures could be revoked if this is not the case. It could then be decided by the public prosecutor at the investigation stage or by the investigating judge at the judicial investigation stage, and, if necessary, be revoked later by a court trying the case or enforcing the sentence.

2.7.1. *General measures for the protection and reintegration of the "repentant"*

Under article 706-63-1, paragraph 1, of the Code of Criminal Procedure, "the persons mentioned in article 132-78 of the Criminal Code shall be protected, as necessary, in order to ensure their safety. They may also benefit from measures to ensure their reintegration.

The reference to article 132-78 of the Criminal Code suggests that only persons who have benefited from an exemption or reduction of sentence, by decision of a trial court, are concerned by the system. If this interpretation is adopted, it must be deduced that persons who are not prosecuted and are therefore dismissed without further action, after having provided information to prevent an offence, would not be able to benefit from it.

On the other hand, paragraph 5 of the article extends the protection system to family members and relatives of repentant persons.

It can also be observed that this protection is not automatic but only possible if it appears justified or necessary.

In practice, offenders immediately request protection. It is the risk of death that determines the entry into the protection system. In order to enter a protection programme, the threat on the person's head must be significant enough. The sacrifice (social death, change of place of residence, change of name, etc.) must be worthwhile.

The question of reduction or exemption of penalty is only raised at a later stage.

Protection and reintegration measures are defined, at the request of the public prosecutor, by a national commission which sets out the obligations to which the person must adhere and monitors the protection and reintegration measures, which it may amend or terminate at any time. In urgent cases, the competent services shall take the necessary measures and inform the National Commission without delay (Article 706-63-1, paragraph 4, of the Code of Criminal Procedure).

In practice, the philosophy of protection and reintegration is to offer applicants a life outside violence.

In France, this protection is difficult to apply to drug-related crimes and offences. Indeed, for someone who has a very high standard of living thanks to trafficking, the interest of entering a programme is nil from a financial point of view. It is not possible to provide the same lifestyle as in their previous life.

In such cases, protection cases are mainly about settling scores in mafia systems. The system is not used in the fight against terrorism.

The composition and functioning of the National Commission for Protection and Reintegration are determined by Decree No. 2014-346 of 17 March 2014. The Commission is referred to it by the public prosecutor in

charge of the case, or, where appropriate, by the investigating judge who notifies the prosecutor (article 6 of the decree). It may decide on any proportionate measures it defines, in particular physical protection and domiciliation measures, intended to ensure the protection of persons. It also defines, where appropriate, rehabilitation measures, taking into account in particular the material and social situation of the person concerned and, where appropriate, his or her family and close relatives (Article 14).

It can therefore be noted that the protection measures are not precisely defined but are left to the discretion of the committee, which ensures great flexibility for the system.

In practice, protection can also benefits family members. Some protection is provided abroad with the cooperation of Europol. There is no time limit on the duration of protection.

2.7.2. *Authorization to use a borrowed identity*

The legislator provides for the possibility of a special measure, which is the authorization to use the borrowed identity. Article 706-63-1, paragraph 2, provides that, in case of necessity, "repentant" persons may be authorized, by reasoned order issued by the President of the "Tribunal de grande instance", to use a borrowed identity.

Articles 18 to 25 of the Decree of 17 March 2014 describe the procedure for granting and withdrawing authorisation to use such a loan identity. The President of the "Tribunal de grande instance de Paris" is competent to rule on applications for authorization of use and withdrawal of such authorization. It shall be referred to it at the request of the President of the Commission, to which shall be attached the written request of the person concerned. The President of the court may decide to hear the person, this hearing not being public and not giving rise to the establishment of a record.

The order, issued without public notice, shall be notified to the President of the Commission and to the interested party by any means. The rejection of the application for authorization may be appealed to the first president of the Court of Appeal by the President of the Commission, the public prosecutor or the person who requested an identity loan. The time limit for appeal is fifteen days (Article 21 of the Decree).

According to article 24 of the Decree, only the inter-ministerial technical assistance service is authorized to create borrowing identities, to preserve all assigned borrowing identities and to reconcile borrowing and real identities.

Finally, article 25 specifies that in the case of criminal proceedings against a person with a borrowed identity, the person is sentenced under his or her borrowed identity. The conviction is entered in the criminal record under the borrowed identity. In the case of withdrawal of the authorisation to use a borrowed identity, the person shall be convicted under his or her real identity as soon as the withdrawal takes place before the conviction decision.

It should be added that article 706-63-2 of the Code of Criminal Procedure provides for the case in which the "repentant" authorized to use a bor-

rowed identity is brought before a court. The text states that where such appearance is likely to seriously endanger his life or physical integrity or that of his relatives, the court of judgment may, *ex officio* or at his request, order his appearance in camera or under conditions likely to preserve the anonymity of his physical appearance, including by benefiting from a technical device allowing him to be heard at a distance, his voice then being rendered unidentifiable by appropriate technical means.

2.8. *Evaluation and control of the measure*

The National Commission for Protection and Reinsertion may amend or terminate the protection and reintegration measures granted (article 15 of the Decree of 17 March 2014). It may also decide to withdraw the authorization to use a borrowed identity. It shall decide, at the request of the President of the Commission or the person concerned, when this measure no longer appears necessary, in particular when the committee terminates the protection and reintegration measures previously granted or when the person authorised to use an assumed identity no longer so wishes. This withdrawal may also be pronounced when the person receiving the authorisation engages in conduct incompatible with the implementation or proper functioning of the measure (Article 23 of the Decree).

In practice, however, a change of identity means that a person who changes his or her identity remains in the programme for the rest of his or her life, de facto, as this poses far too many problems in terms of civil and criminal law. The collaborator will have to stay in contact with the protection office all his or her life.

3. *Current relevant case law (where existing)*

There is little case law on the application of the exemption and reduction of sentence mechanisms. Nevertheless, there are some illustrations of the implementation of certain specific texts establishing these rules.

3.1. *Application of the texts relating to the exemption from punishment*

The texts providing for an exemption from punishment almost always concern the perpetrator of an attempt and there is no known application of such a device, which seems to confirm that there is a problem of legal technique that prevents such a mechanism when the offence is attempted (see *above* 2.1.1.1.1.). On the other hand, in the case of participation in a criminal association, the mechanism applies to the benefit of the perpetrator of the crime consumed, the attempt not being incriminated.

There is a decision granting such an exemption from punishment, issued by a Court of Appeal (CA Douai, 4th Correctional Chamber, 20 January 2010, No. 08/02104). This decision is interesting because of its detailed motivation. The accused was therefore convicted of participating in a criminal association. The judges note that he provided information to a gendarme,

which led to the discovery of stolen car trafficking and the prosecution and conviction of the participants. Without the information provided by the defendant, the traffic would not have been updated. It adds that article 450-2 of the Criminal Code does not specify the extent or quality of the information provided to the competent authority required for the participant in the criminal association to benefit from the exemption from punishment. It states that the informant cannot be required to have provided a complete list of network members and the perpetrators of vehicle theft, as the data revealed by the accused proved sufficient to update and prosecute the members of the group. The judges conclude that the legal conditions for exemption from punishment are met.

3.2. *Application of the texts relating to the reduction of sentence*

A case decided by the Court of Cassation illustrates the granting of a reduced sentence for drug trafficking and sheds light on the judges' assessment of the textual conditions. In this case, the accused was found guilty on the charges of unlawful importation, transport, possession, possession, offer, transfer, acquisition or use of narcotic drugs and benefited from the reduction by half of the penalty provided for in article 222-43 of the Criminal Code. The judges state that this text does not require either that the information provided by the offender be preliminary to the investigation or that the offender be bound by an obligation of result. They add that the accused promptly acknowledged the facts and provided all the information in his possession, making it possible to identify the sponsors and reconstruct the circumstances of the trafficking, and that "the cessation of the incriminated acts was within the power of the various foreign authorities concerned" and not within the control of the accused. The public prosecutor had lodged an appeal in cassation on the ground that the accused had not allowed all the co-authors and accomplices to be identified, but the Criminal Division of the Court of Cassation rejected this argument, considering that the conditions of the text were therefore met and that the Court of Appeal had made a sovereign assessment of factual circumstances (Cass. crim., 19 June 1997, No. 96-83.639).

Other illustrations can be found in Court of Appeal decisions. Thus, the reduction of sentence in the case of drug trafficking is allowed in a case where the detailed statements of the accused have been verified by investigations carried out on letters rogatory and have made it possible to identify the sponsor and reconstruct the circumstances of the updated trafficking. This defendant thus enabled the criminal court to convict an international drug trafficker (CA Chambéry, Correctional Chamber, 21 October 2009, No. 09/00347).

Similarly, the reduction of sentence was granted, in the same field, to the individual who, upon arrest, offered to assist in the arrest of other persons, giving their address and helping investigators to understand the recorded telephone conversations (C.A. Montpellier, 3rd Correctional Chamber, 12 December 2007, No. 07/01215).

Judges are more often led to conclude that the conditions for benefiting from the preferential measure are not met. Thus, in the field of drug trafficking, an accused who has not informed the administrative or judicial authorities of the existence of the drug trafficking in which he was involved but has confined himself, after his arrest, to claiming that two persons, one of whom could be identified, had forced him to participate in the facts, cannot be granted a reduced sentence (Cass. crim, 7 November 2001, No. 00-87.885; see also, Criminal Cases, 10 April 2002, No. 01-85.360; Criminal Cases, 20 June 1996, No. 93-82.187, 95-81.975, Bull. crim. No. 270).

In the same field, it was held that the defendant who, having contacted customs officials and then a police officer, did not follow up on his initial contacts, could not benefit from the reduced sentence because the information provided was far too imprecise and could not lead to arrest (Cass. crim., 17 December 1998, No. 97-86.451; see also CA Douai, 4th Correctional Chamber, 20 March 2008, No. 08/00005). Similarly, a Court of Appeal has ruled, with the approval of the Court of Cassation, that the commitment to cooperate provided for in article 222-43 of the Criminal Code must be active, constructive and fair and not be limited to answering only the questions asked by the investigators after the arrest (Cass. crim., 30 January 2008, No. 07-82.022).

Another Court considered, in refusing the reduction of sentence, that the information provided by the accused allowed investigations to be carried out on a third party appearing to be involved in money laundering activities related to drug trafficking but that it did not have the effect of preventing the commission of the offence or a related offence, nor to prevent the offence from causing damage, nor even to allow the third party to be identified as actually co-author or accomplice to the offence charged against the accused (CA Douai, 4th Correctional Chamber, 7 September 2011, No. 10/03660).

On the procedural side, a Court of Appeal, before which the defendant, who had invoked the reduction of sentence provided for in article 450-2 of the Criminal Code in matters of criminal association, had called a gendarme as a witness, refused to proceed with this hearing on the ground that the witness did not appear before it and that this hearing is only of relative interest. This decision was censured by the Court of Cassation, which considered that the Court of Appeal should better explain why the requested hearing was impossible or unnecessary to establish the truth (Cass. crim., 12 March 2008, n° 07-84.949).

3.3. *Probative value of the declarations of the beneficiary of a reduced sentence*

Another decision highlights the judges' reasoning regarding the probative value of the "repentant" statements. In this drug trafficking case, one defendant benefited from the reduction of sentence provided for in article 222-43 of the Criminal Code. With the resources provided by the investigators, he phoned a supplier to order heroin. At the scheduled appointment, an individual appeared whom the "repentant" identified and accused of having previously delivered heroin to him. This individual was prosecuted and con-

victed of drug trafficking and alleged a violation of the principle of fair evidence which, in his opinion, would prohibit judges from withholding "repentant" statements invoking the benefit of article 222-43 of the Criminal Code, obtained in questionable and irregular circumstances by police officers. The Court of Cassation rejected this argument on the grounds that the judges established the guilt of this accused on the basis of the statements of the "repentant" also prosecuted, themselves corroborated by the circumstances and presumptions resulting from the investigation (Cass. crim., 31 Oct. 2000, n° 00-82.362). This solution is in line with the provisions of Article 132-78 of the Criminal Code and the case law of the European Court of Human Rights (see above 2.6.).

4. *Conformity of the current rewarding legislation to art. 16 of Directive 541/2017/EU (where existing)*

Article 16 of Directive (EU) 2017/541 of 15 March 2017 on combating terrorism provides for cases where the penalties provided for in Article 15 of the Directive may be reduced. Member States may choose to reduce penalties in cases where the offender "renounces his terrorist activities and provides administrative or judicial authorities with information that they would not otherwise have been able to obtain, helping them to:

– prevent or Mitigate the effects of the offence;
– identify or bring to justice the other offenders;
– find evidence; or
– prevent other offences referred to in Articles 3 to 12 and 14».

Article 16 is optional as it states that "Member States *may* take the necessary measures […]". The European legislator does not require Member States to take measures to reduce the penalty in the event that the offender repents. Unlike the other mandatory articles of the Directive, it is left to the Member States to decide whether or not to introduce a specific regime for "repentant" people. A Member State wishing to establish or strengthen a regime applicable to the status of "repentant" is free to do so *via* the transposition process of the Directive. However, if a Member State decides to set up a regime governing this status, it must comply with European requirements.

As far as France is concerned, the French legislator did not wait until the directive was enacted before taking measures related to the status of "repentant". Indeed, as previously demonstrated, since 1986 and more particularly since 2004 there has been a wide legal arsenal governing this status in French legislation. There is a general article and special articles. Article 132-78 of the Criminal Code, which provides for the general regime applicable to the status of "repentant", and articles 422-1 and 422-2 provide for the regime applicable to "repentant" persons in the case of an attempted or actual commission of an act of terrorism.

It is therefore necessary to ask whether this French legal arsenal is in line with the scheme proposed by the Directive. In this respect, several remarks need to be made.

First of all, it should be noted that the Directive and the French Penal Code use the same mechanism, namely a reduction in the length of the sentence incurred in order to "reward" the "repentant" of the information he has given. Moreover, the two mechanisms have in common that they do not provide for any particular procedural modality. No details on the form or timing of the request are provided.

However, several elements differ between the French and European texts.

First of all, we can notice that there is a difference in the terms used.

The Directive uses the term "offence" while Article 132-78 prefers the term "crime or misdemeanor". The use of the generic term "offence" can be explained by the fact that the Directive is intended to be general and to be understood by all Member States in order to be accepted, through the transposition process, in each of the national legal systems. However, not all Member States have a tripartite categorization of offenses as in France.

However, this semantic difference has no substantive consequences since both French criminal law and the Directive of 15 March 2017 subject all acts of terrorism to a penalty involving deprivation of liberty. When reduced to the French tripartite classification, this excludes the possibility that terrorism could be qualified as a contravention. Consequently, the "offences" of European law are indeed the terrorist "crimes and offences" of French criminal law. Moreover, article 422-2 of the French Criminal Code expressly refers to "the penalty of deprivation of liberty".

This clarifies what is to be understood by the term "sentence". Thus, under French law, only the imprisonment sentences would allow an author or accomplice of an act of terrorism to benefit from the "repentant" regime, to the exclusion of other penalties, in particular complementary ones. Such a limitation is not contained in the Directive, which could suggest a reduction of the fine or an alternative or additional penalty. A question then arises: does not the harmonization of a "law of repentance" imply a prior harmonization of the law of penalties, at least in terrorist matters, beyond the provisions of the directive?

It should also be noted that the first condition proposed by management on 15 March 2017 is not included in any French text. The Directive states that "Member States may take the necessary measures to ensure that penalties[…] can be reduced when the offender *renounces his terrorist activities*". The Directive lays down two cumulative conditions for the reduction of sentence. The perpetrator must renounce his terrorist activities *and* provide information that the public authorities would not otherwise have been able to obtain. The French legislator does not envisage that such an action could be part of the conditions to be met in order to benefit from a reduced sentence. The absence of such a condition in French law seems surprising because it would mean, in theory, that an offender who commits a terrorist

offence could have his or her sentence reduced while continuing terrorist activities. In reality, it is the ambiguity of French law that distinguishes the "reward" attributed to the repentant from the regime of protection from which it benefits, which seems to imply a renunciation of any terrorist activity.

In this respect, French legislation should be amended to be fully compatible with European law.

It should also be noted that the Directive uses the generic term "offender". This can also be understood in the general purpose of the Directive. It is intended to apply in all domestic legal systems, so it does not precisely qualify the term "offender". It seems to have to be heard in its broadest sense. The regime provided for by the Directive would therefore apply both to the perpetrators of an attempted offence and to those of an offence committed or to accomplices. Section 132-78 is more specific than the directive since it refers to "the person who attempted to commit" and "the person who committed". As already mentioned above, the question of the accomplice then arises. Article 422-2 expressly provides for the possibility for an accomplice to benefit from the reduction of sentence provided for in this article. Thus, by articulating the texts of the Criminal Code, it would seem that the French status of repentant in the case of a terrorist act could apply to the same protagonists as those envisaged by the Directive. In this respect, the texts of the Penal Code would be in conformity with the European directive.

However, Article 16 of the Directive, unlike French legislation, does not distinguish between the offence committed and the offence attempted – and this is certainly welcome, given the difficulties of interpreting French law on this point (*supra*, 2.1.1.1.1). Thus, according to the European text, the same criteria should be met for the perpetrator, whether he has attempted to commit or committed an offence, to have his sentence reduced.

In this respect, the French system is more complex than the Directive since it provides for the possibility of exemption from punishment in the event of an attempt. Indeed, according to article 132-78, paragraph 1 of the French Penal Code, in the case where the person who has attempted to commit a crime or offence, and notified the administrative or judicial authority, has made it possible to avoid the commission of the offence, and if necessary, to identify the other perpetrators or accomplices, he could be exempt from punishment. This situation is not provided for in the Directive of 15 March 2017.

This exemption from punishment is possible in the event that the cumulative conditions referred to in the first paragraph of Article 132-78 of the French Criminal Code are met. These conditions are as follows: first, the person must have attempted to commit a crime or misdemeanor. Secondly, that it has notified the administrative or judicial authority. Thirdly, its action must have made it possible to avoid the commission of the offence and to identify the other perpetrators or accomplices of the offence. These conditions for exemption from punishment do not correspond to those of the Directive and are much more restrictive than those provided for in Article 16. In any case, this provision of French law is problematic and confusing, so it

should be repealed, in or outside the context of the transposition of the Directive.

With regard to the case of the consummated offence provided for in article 132-78, paragraph 2, of the French Penal Code, a reduction of penalty shall apply to the perpetrator who notifies an administrative or judicial authority and who has made it possible to bring the offence to an end, to prevent the offence from causing damage or to identify the other perpetrators or accomplices. It is therefore provided that an offender who commits an offence may have his sentence reduced if he notifies a public authority and thus causes three alternative consequences, whereas the European text considers four alternative consequences. French law, unlike European law, does not provide that assistance in finding evidence may result in a reduction of sentence. Nor does it clearly provide that preventing other offences referred to in Articles 3 to 12 and 14[of the Directive] from being committed.

It should be noted, however, that article 422-2 of the Criminal Code provides for a reduction in the penalty in cases where the author, having notified the public authorities, has prevented the offence from causing death or permanent disability. The fact of causing the death of a man or a permanent disability may be classified as a criminal offence under French law. Examples could include the offences of murder, murder or "deadly blows" for "death of a man" and intentional or involuntary violence for "permanent disability". Thus, the fact that the perpetrator of a predicate offence makes it possible, by transmitting information, to prevent the occurrence of a person's death or permanent disability could be associated with the condition laid down in the Directive since the aim would be to prevent other terrorist offences from being committed. However, the provision is too restrictive, since the Directive envisages rewarding the fact of having prevented any other terrorist offence, well beyond offences against the life or integrity of individuals. Consequently, French legislation is more restrictive than European legislation and does not seem to be in conformity with European law on this element either.

As regards the other conditions, those provided for in the Directive and those provided for in the Criminal Code are not identical. However, it is possible to make links between French and European conditions.

Indeed, article 132-78, paragraph 2, provides for the case where the person who has committed a crime or offence and who has notified a public authority has made it possible to bring the offence to an end or to prevent the offence from producing damage. If these two conditions are not expressly provided for in the Directive, it is nevertheless possible to link them to the first condition laid down in Article 16 of the Directive. The latter envisages the case where the offender has provided the public authorities with information that they would not otherwise have been able to obtain, thereby helping them "to prevent or limit the effects of the offence". Several remarks need to be made in order to understand the links between these different conditions.

The article of the Penal Code uses the term "damage" but the text of the directive uses the term "effect". These two terms are both very vague. As

demonstrated above, the term "damage" referred to in article 132-78 of the Criminal Code may be any continuation of the offence and is not necessarily an element of the offence or an aggravating circumstance. If we consider the common definition of the term "effect", it can be defined as the result, the consequence of the action of an agent, of any phenomenon. The two terms seem to have a very similar meaning and can be understood in the same way.

However, article 422-2 of the French Criminal Code, which specifies the regime of "repentance" in matters of terrorism, sheds light on the notion of damage by specifying which type of damage must be taken into account. Thus, it specifies that the penalty of deprivation of liberty of an author or accomplice to an act of terrorism is reduced by half if the information has allowed that "the offence does not result in the death of a man or permanent disability".

Where "effects" seem to be understood very broadly by the Directive, French legislation is extremely restrictive as to the "damage" that must be taken into account in order to benefit from the reduction of the penalty in the case of an act of terrorism.

Finally, the French text provides for the case where the information provided would make it possible to identify the other authors or accomplices. The European text provides for the case where the information would help him "to identify or bring to justice the other perpetrators of the offence" (Article 16, *b*), *ii*)). The Directive, unlike the Criminal Code, does not cover accomplices to the offence. It is possible to wonder whether the penalty reduction envisaged by the Directive could apply if the offender denounces an accomplice. In this respect, it is possible to refer to what has been said previously on the use of the term "offender" by the Directive, which must be considered in the broadest possible way. In any case, since the Directive is an instrument of minimum harmonization, States are free to adopt mechanisms that go further.

In addition, the directive provides for assistance to "identify or bring to justice". The second term does not appear in article 132-78 of the French Penal Code. However, we can ask ourselves whether this is necessary in the directive. Is it possible to help bring someone to justice without first identifying them, in other words, without denouncing them? We could consider assistance in bringing the other perpetrators of the offence to justice by other means such as the provision of evidence other than a denunciation, but this is expressly and particularly provided for in the Directive (Article 16(*b*)(*iii*)). Helping to bring a person to justice seems to have a consequential link to identifying that person. Thus, even if the French text does not refer to this condition, it would seem that it may be induced by the fact of allowing "the identification of other perpetrators or accomplices" (article 132-78, paragraph 2).

In the light of all these elements, a mixed conclusion must be drawn from this comparative analysis. Indeed, even if there are many similarities between French and European legislation and even if the French provisions predate the adoption of the Directive, the absence of certain conditions and

the existence of overly restrictive conditions in French repentance law suggest that French law would not be fully in conformity with European law if the reward clause for repentance were made mandatory and not optional.

In addition, there is considerable resistance to the deployment of collaborators of justice in the fight against terrorism.

Only one type of terrorism currently affects France: Islamic terrorism. In this area, there has not been a case where a defendant has benefited from a reduction or exemption from sentence. Nor is there any protection file open in this area. According to the French Anti-Terrorist Prosecutor's Office, this is explained, on the one hand, by the fact that 98% of cases, an offense has already been completed (which implies that the Anti-Terrorist actors refuse to protect an accused person after the offense, whereas the law would allow it). On the other hand, the profile of the accused is particular: the individuals involved are not afraid to die and do not want any protection. According to counter-terrorism authorities, detainees in terrorism cases experience prison as a divine experience (which may only be true for those who are truly involved in the commission of an attack, but leaves out peripheral protagonists, sometimes with little or even no radicalization).

Moreover, still according to the Anti-Terrorist Prosecutor's Office, the individuals in question are involved in a process of cover-up (taqyia), so that it is not possible to establish a relationship of trust, thus ruling out any collaboration.

On the other hand, the anti-terrorist services recognize that it is not impossible that people may give information about attacks, but this remains extremely theoretical in France today. This is all the more so as the French text is inapplicable since it provides for the case of an attempted attack and, here again, it does not work with voluntary withdrawal.

With regard to the protection of collaborators of justice in terrorism cases, practitioners consider that it is in practice very complicated to integrate a radicalized person into such a programme. Currently in France, counter-terrorism actors consider that we are facing a failure in terms of deradicalization, so that it would be very difficult to get people to completely abandon the radical ideology that leads to violent extremism.

Both the National Commission for the Protection of the Repentant and the magistrates in charge of anti-terrorism are not in favor of using the system of collaborators of justice in the fight against terrorism. They also fear that this would involve the protection programme in managing too many cases, when the system is not designed to do this and is only viable for a very small number of cases. Today, in France, about 50 people are protected. The opening to terrorist litigation (returnees) would potentially concern hundreds of people, what would create a risk of asphyxiation of the system.

CHAPTER 5

GERMANY

HELMUT SATZGER, PATRICK BORN

1. *Introduction*

This questionnaire is intended to describe the opportunities for combating terrorism through the application of rewarding measures under German law, taking into account historical developments in case law and legislation.

The first question that arises in this context is that of the scope of rewarding measures to be analyzed. The first criminal law explicitly dealing

with terrorism came into force in Germany in 1976[1]. It also provided for rewarding measures. However, the first criminal behavior perceived by society as "terrorism" had already taken place in 1968[2]. The possibility of applying rewarding measures by courts, on the other hand, had already existed since 1951, in relation to a certain number of criminal provisions which punished different types of behavior[3]. Still today there is a variety of criminal laws that allow the court to reduce or waive the penalty if the offender behaves in a certain way before or after committing the respective offence.

In order to ensure a target-oriented analysis, the historical and current legislation and jurisprudence to be included must be specified in more detail:

The potential success of a project to combat terrorism through the use of rewarding measures is based on the fact that terrorism is perpetrated by individuals connected in organizations. If a member of a terrorist organization is arrested, it is possible to persuade him or her to cooperate with the authorities by offering mitigation of punishment or even impunity. At the same time, the particular danger of this type of crime, and of any other organized crime, is that there is not only one offender whose capture could avert the thread. Rather, this is only the case when the organization as such no longer exists.

Following this reasoning, an important distinguishing parameter can be established: The analysis has to refer to rewarding measures that do not only apply if an offender merely prevents his own act or contributes to its clarification. Rather, it must concern rewarding measures that tie in with forms of organized crime.

However, this is not sufficient. Organized crime exists in many domains, e.g. in the area of Mafia or white-collar crime structures which, according to general understanding, have no "terrorist purpose" and must therefore be excluded from the analysis.

So what characterizes and distinguishes a terrorist organization from others? There is no uniform definition. However, there exist a number of criteria on the basis of which the general understanding of terrorism has been shaped. In addition to an organizational structure, terrorists typically use violence or destruction as a method of intimidating the population in order to enforce or clarify goals of a political, religious or other ideological nature[4]. The action is mostly directed against random targets, symbolic figures or buildings of a kind contrary to the ideology of the organization[5].

The following analysis will therefore focus on rewarding measures that were applied or are at least also applicable if the offender discloses information about an organization or its actions whose orientation follows the motives outlined above. The rewarding measures and criminal provisions that have been applied by courts to cases in which, according to social percep-

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[1] BGBl. I 1976, p. 2181.
[2] *Peters*, RAF - Terrorismus in Deutschland, 1991, p. 52.
[3] BGBl. I 1951, p. 744.
[4] *https://www.unodc.org/e4j/en/terrorism/module-4/key-issues/defining-terrorism.html.*
[5] *https://www.unodc.org/e4j/en/terrorism/module-4/key-issues/defining-terrorism.html.*

tion, "terrorism" existed or which were created by the legislator under this impression shall provide a guideline for this purpose.

2. *Historical background of rewarding legislation (where existing)*

2.1. *Socio-political reasons*

From 1968 onwards, the Federal Republic of Germany was confronted with an inner-German terror group, the (later) so-called "Rote Armee-Fraktion ("RAF")[6]. This group pursued the communist ideal of the "class struggle" in a radical form by attacking and killing people it deemed important representatives of the capitalist system. Until its self-declared dissolution in 1998, the group was responsible for 33 murders, several hostage-takings, bank robberies and bombings with more than 200 injured[7]. During its existence, 20 members of the RAF died as a result of foreign influence (e.g. as a result of gunfire with the police), suicide or hunger strike after being imprisoned[8]. The activity of the RAF laid the foundations and was the occasion for the creation of terrorism-specific legislation and the introduction of rewarding measures, which applied in particular or exclusively to terrorism.

2.2. *Legislative evolution*

The provisions deemed relevant and thus presented in the following were determined on the basis of their application by the jurisdiction for terrorist activities and of the legislative intention in the creation of such laws.

31st August 1951:

Section 129 of the Criminal Code of the German Reich (Reichsstrafgesetzbuch, "RStGB") had, already in 1871, made the foundation or membership of criminal organizations a criminal offence[9]. After its abuse during the Nazi period (i.e. any grouping contrary to the Nazi ideology was defined as a criminal organization), it was revised in 1951 and added to the German Criminal Code (Strafgesetzbuch, "StGB"). However, the provision does not explicitly deal with terrorism due to the fact that it came into force at a time when the concept of terrorism, at least in Germany, was not yet relevant. It punished the formation of organizations that were oriented towards the commission of criminal offences. Typically, this is also the case for terrorist organizations. It allowed the use of rewarding measures in exchange for information. Section 129 StGB constitutes the legal reference point of German counter-terrorism, German courts having applied this article since the first relevant terrorist activities in the country[10].

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[6] *Peters*, RAF - Terrorismus in Deutschland, 1991, p. 52.

[7] *Peters*, RAF - Terrorismus in Deutschland, 1991, p. 443 et seq.

[8] Lecture by *Scheicher* on 17th June 2011, at the event, «60 Jahre Staatsschutz im Spannungsfeld zwischen Freiheit und Sicherheit», Rote Armee Fraktion (RAF), p. 2.

[9] RGBl. 1871, p. 127.

[10] *Peters*, RAF - Terrorismus in Deutschland, 1991, p. 170.

Provision	Criminal behavior and possible penalty	Rewarding measure
Section 129 StGB	Para. 1: foundation, call for foundation, membership or support of criminal organizations Penalty: Imprisonment of up to 5 years and possible police supervision	Para. 4: *"The offender is not punished if he prevents the continued existence of the criminal organization or reports its existence to an authority in good time so that a punishable offence in accordance with the objectives of the organization can still be prevented. The same shall apply if the offender undertakes the above-mentioned efforts but another circumstance leads to the prevention"*[11].

18th August 1976:

Section 129a StGB was introduced, constituting the first German criminal provision that explicitly deals with the phenomenon of terrorism, as a response to the terrorist activities of the RAF.

Provision	Criminal behavior and possible penalty	Rewarding measure
Section 129a StGB	Para. 1: foundation, membership, promotion or support of an organization whose aim is to carry out typically terrorist offences (such as murder, hostage-taking, arson, etc.)[12]. Penalty: – 6 months up to 5 years of imprisonment – For leading figures: 1 year to 10 years of imprisonment	Section 129a para. 5 StGB declares the rewarding measure according to Section 129 para. 6 StGB to be applicable mutatis mutandis: The above-mentioned rewarding measure in Section 129 para. 4 StGB had been transferred to Section 129 para. 6 StGB[13] and had also changed in content: *"The court may in its discretion mitigate the sentence (section 49(2)) or order a discharge under these provisions if the offender 1. voluntarily and earnestly makes efforts to prevent the continued existence of the organization or the*

[11] BGBl. I 1951, p. 744.
[12] BGBl. I 1976, p. 2181.
[13] BGBl. I 1968, p. 741 et seq.

	– In addition, possible order of supervision and, beginning with a prison sentence of at least 6 months, possible loss of the right to hold public office and to be elected in public elections.	*commission of an offence consistent with its aims; or* *2. voluntarily discloses his knowledge to a government authority in time so that offences the planning of which he is aware of may be prevented;* *if the offender succeeds in preventing the continued existence of the organization or if this is achieved without his efforts he shall not incur criminal liability".*

Sections 129/129a StGB are still in force, although they have been revised several times until reaching their final versions of August and July 2017. However, the content of the rewarding measures has not changed, so that a detailed description of the changes is not of necessity here. For the current versions, see below: 3. "Current rewarding legislation".

16th June 1989:

Adoption of the so-called Leniency Witnesses Act ("Kronzeugengesetz")[14] which initially only applied to terrorist activities. On 28th October 1994 revision of Article 5 and expansion to criminal gangs[15]. The law expired on 31st December 1999.

Provision	Criminal behaviour	Rewarding measure
Article 4 Section 1 Kronzeugengesetz	The offender had to be accused either for committing or participating in an offence under section 129/129a StGB, or for an offence related to an offence under section 129/129a StGB, or for participating in such an offence.	The Federal Public Prosecutor could, with the consent of a criminal senate of the German Federal Court of Justice, waive prosecution of the offender if the offender – directly or through a third party – had disclosed such information to a prosecuting authority, knowledge of which was appropriate to either prevent the commission of any offences referred to in column 2, to promote the clarification of such an offence, if he was involved, beyond his own contribution to the offence, or to lead to the capture of

[14] BGBl. I 1989, p. 1059.
[15] BGBl. I 1994, p. 3186 (3193).

		an offender or participant in such an offence. The aforesaid should only apply if the importance of what the offender or participant had disclosed, particularly in preventing future offences, justified waiving punishment in relation to his own crime.
Article 4 Section 2	see above.	Pursuant to Article 4, Section 2 Phrase 1, also a court could decide to waive punishment under the conditions of Section 1 or in order to reduce the sentence to the statutory minimum of the penalty threatened or to impose a fine instead of a prison sentence. If a court intended to terminate the proceedings under Section 153b Para. 2 German Code of Criminal Proceedings (Strafprozessordnung, "StPO"), i.e. not to impose a sentence, it could only do so in accordance with Article 4 Section 2 Phrase 2 with the consent of the Federal Public Prosecutor.
Article 4 Section 3	Offence under Section 211 StGB ("Murder under specific aggravating circumstances") or 212 StGB ("Murder") of the StGB or offence related to an offence under Section 211 or 212 StGB.	Article 4 Section 3 Phrase 2 prohibited for the court to order discharge of punishment and for the public prosecutor to waive prosecution for intentional homicides and punishment could "only" be reduced to a minimum of three years. Although the regulation restricted the scope of the court, a life sentence had to be imposed in accordance with Section 211 StGB in the event of a murder under specific aggravating circumstances being committed. The possibility of reducing the penalty to three years meant that there now was horrendous scope of mitigation of penalty. In addition,

		a court and the Federal Public Prosecutor could still waive punishment or prosecution for crimes related to a homicide, or the punishment could be reduced by the court. According to Article 4 Section 3 Phrase 3, all of the abovementioned possibilities for the court and the Federal Public Prosecutor also remained for the acts constituting attempt of a homicide, the participation in such an offence or the incitement to such an offence.

June 2000:

After the Kronzeugengesetz had expired on 31st December 1999 there were almost immediate efforts to reintroduce its regulations in German Criminal Law. Already in June 2000, the German Federal State of Bavaria introduced a new draft law into the German Bundesrat, the so-called "Law to Supplement the Leniency Program in Criminal Law" (Gesetz zur Ergänzung der Kronzeugenregelungen im Strafrecht, "KrzErgG"). However, the draft was rejected by the German Bundestag. A special element of the draft was that it contained a procedural component. The sentence should also include the penalty that would have been imposed on the repentant without mitigation[16]. This was intended to ensure that if the information given by the repentant proved to be false after sentencing it would be possible to reopen the proceedings according to Section 362 StPO and – in terms of procedural effectivity – to sentence the alleged repentant to the higher penalty specified in the sentence.

August 2001:

Another draft law provided for the extension of the possibilities for mitigating punishment within the framework of Section 129a StGB and many other non-terrorism-specific regulations[17]. The draft, similar to the draft of June 2000, was characterized by providing for the integration of the rewarding measure into the respective criminal provision to which it should apply, as was already the case with Sections 129 para. 6 and 129a para. 5 StGB. The proposal hence constituted a technical difference to the Kronzeugengesetz, which contained rewarding measures not integrated into the offence in question. The draft was rejected by the Bundestag.

[16] BT-Drs. 14/5938.
[17] BT-Drs. 14/6834.

December 2002:

Following the terrorist attacks of 11th September 2001, calls for the reintroduction of more extensive rewarding measures for terrorist offences became increasingly louder. However, it was not until 2002 that Christian Pfeiffer, then Minister of Justice of the German Federal State of North Rhine-Westphalia, presented a counter-draft to the above draft laws[18]. It was innovative and indicative in several respects. In contrast to the drafts of 2000 and 2001, it was proposed in order to create a general and independent leniency provision. This was similar to the Kronzeugengesetz, which expired in 1999. However, unlike the Kronzeugengesetz, the provision should be integrated into the general part of the German Criminal Code and the penalty could only be mitigated for specified offences. Even if the proposal never passed as a law, a regulation very similar to the proposal is in force today (Section 46b StGB, see below).

January 2004:

The CDU/CSU faction in the Bundestag introduced a draft law to the Bundestag that took up the above-mentioned Bavarian proposal from June 2000[19]. However, the draft law was never put to vote in the Bundestag.

March 2004:

A draft law with similar content to those of June 2001 and January 2004 was introduced to the Bundestag by the Bundesrat upon initiative of the states of Bavaria and Lower Saxony[20]. Once again, the draft was not adopted as law. This was due in particular to the fact that the integration of the rewarding measure into each individual offence to which it should apply was regarded as an ineffective solution in view of the great effort involved and the associated "swelling" of the StGB[21].

1st September 2009:

Section 46b StGB, introduced by the 43rd Amendment to the StGB, came into force[22]. It reintroduced a general leniency provision into the German Criminal Code and provided for mitigation of penalties or waiver of penalties for a large number of offences if the offender disclosed information. In 2013, Section 46b StGB was partially revised, but the central regulatory content remained in force[23]. A detailed analysis can be found in: 3. "Current rewarding legislation".

2.3. *Case law evolution*

Although terrorism by the RAF had become an intensified social problem in Germany since around 1970, legal regulations for leniency witnesses were not provided for in German law for a long time. Although there were

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[18] BR-Drs. 896/02.
[19] BT-Drs. 15/2333.
[20] BT-Drs. 15/2771 annex 1.
[21] BT-Drs. 15/2771 annex 2.
[22] BGBl. I 2009, p. 2288.
[23] BGBl. I 2013, p. 1497.

rewarding measures in Section 129 StGB and since 1976 also in Section 129a StGB, these only applied to the formation of criminal or terrorist associations. However, until the introduction of the Kronzeugengesetz in 1989, there were no legally regulated rewarding measures for crimes typical of terrorism (so-called context offences) such as murder under specific aggravating circumstances (Section 211 StGB). In 1989, however, the RAF had already committed 30 of its 33 murders and had hence already left its most active period behind[24].

Although there was no legal regulation, in the Seventies, former members of the RAF appeared in trials against RAF members as leniency witnesses and testified against them[25]. Thus, the question arises how such a situation came about albeit absence of legal regulations. On the basis of two famous cases, it can at least be assumed that the prosecution authorities reached informal agreements with the repentants in order to convince them to testify.

The first RAF member to testify was Karl-Heinz Ruhland. After his arrest in December 1970, he was charged, among other, with involvement in several cases of serious robbery[26]. For this offence, a minimum penalty of 5 years imprisonment was provided by law. During his interrogations Ruhland made extensive statements about other RAF members and their involvement in the robberies. His statements led, among other sentences, to the conviction of the defense lawyer Horst Mahler to 12 years of imprisonment[27]. Mahler had been active in the left-wing scene and had defended several prominent figures of the scene, including later RAF leaders.

Although Ruhland must have indirectly incriminated himself through his statements (how should he know who was involved in the robberies other than himself being involved), he was sentenced to only 4.5 years imprisonment by the High Court of Düsseldorf in 1972, which was thus below the minimum sentence[28]. As early as 1974 he was pardoned by the then Federal President of Germany, Gustav Heinemann. There were also indications that Ruhland had received payments of DM 1,000 from the Federal Criminal Police Department for several years[29].

Another leniency witness was Gerhard Müller, who was arrested in 1972 and sentenced to 10 years of imprisonment in 1976[30]. After serving 6.5 years imprisonment, his remaining sentence was suspended[31]. He testified in numerous trials against RAF terrorists, including 1975 against the leaders of

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[24] *Peters*, RAF - Terrorismus in Deutschland, 1991, p. 443 et seq.

[25] *Hannover*, Terroristenprozesse - Erfahrungen und Erkenntnisse eines Strafverteidigers, 1991, p. 138 et seq.

[26] Der Spiegel, 24.1.1972, p. 28 et seq.

[27] *Sehueler*, Die Zeit, 9.3.1973, *https://www.zeit.de/1973/10/das-fehlurteil-von-moabit*.

[28] Die Zeit, 21.11.1986, *https://www.zeit.de/1986/48/wunderwaffe-kronzeuge*.

[29] *Hannover*, Terroristenprozesse - Erfahrungen und Erkenntnisse eines Strafverteidigers, 1991, p. 143.

[30] *Hannover*, Terroristenprozesse - Erfahrungen und Erkenntnisse eines Strafverteidigers, 1991, p. 145.

[31] *Hannover*, Terroristenprozesse - Erfahrungen und Erkenntnisse eines Strafverteidigers, 1991, p. 145.

the first generation of the RAF. In Müller's case, according to press reports and observers from that time, it was remarkable that he was convicted only for aiding murder under specific aggravating circumstances, membership of a terrorist organization and explosives offences[32]. Müller had been charged with the murder of a police officer and reportedly there had been convincing evidence against him. This led to the suspicion that Müller had been given special treatment by the judiciary. He had reportedly also been included in a leniency program[33]. However, due to the lack of provisions regulating leniency witnesses, such a program did not exist officially at that time. Although precise information on the details of the activities of informal leniency witnesses and the nature of informal agreements within the judiciary is unavailable, the reports and events described show that there was a need for leniency programs. The absence of a legal regulation, however, led to a disorderly and uncontrolled procedure.

On the other hand, the 1989 Kronzeugengesetz was not thoroughly applied. According to a study by *Mühlhoff* and *Mehrens*, published in 1999[34], it was applied in "an estimated maximum of 25 cases" during the 10 years in which it was in force[35]. The more well-known cases of its application concerned RAF terrorists who had committed crimes during the 1970s and were not arrested until after 1990. The Kronzeugengesetz could also be applied retrospectively in these cases as it favored the perpetrator, thus conforming to German Constitution stipulations. As a result, RAF terrorists Susanne Albrecht, Werner Lotze, Silke Maier-Witt, Hennig Beer and Monika Helbing all received lower sentences[36]. The published judgments concerning Albrecht and Lotze (both accused of murder under specific aggravating circumstances – without the Kronzeugengesetz it would have been compulsory to sentence both to life imprisonment) indicate that Albrecht was sentenced to 12 years and Lotze to 11 years of imprisonment[37]. The Kronzeugengesetz was also applied in the case of PKK official Ali Cetiner. Cetiner was charged with collaborative murder under specific aggravating circumstances (= compulsory life sentence), but was sentenced to only 5 years of imprisonment[38]. He had made numerous statements about PKK leaders and their criminal offences.

3. *Current rewarding legislation (where existing)*

With regard to terrorist offences, three rewarding provisions are currently applicable under German law:

– Section 46b StGB

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[32] *Hannover*, Terroristenprozesse - Erfahrungen und Erkenntnisse eines Strafverteidigers, 1991, p. 144 et seq.

[33] *Hannover*, Terroristenprozesse - Erfahrungen und Erkenntnisse eines Strafverteidigers, 1991, p. 147.

[34] *Mühlhoff/Mehrens*, Das Kronzeugengesetz im Urteil der Praxis, 1999.

[35] Collectively: *Mühlhoff/Pfeiffer*, ZRP 2000, p. 121.

[36] BT-Drs. 12/2610, p. 2.

[37] OLG Stuttgart JZ 1992, p. 537; BayObLG NJW 1991, p. 2575.

[38] BT-Drs. 12/2610, p. 3.

– Section 129a ("Forming terrorist organizations") para. 7 StGB (in conjunction with Section 129 para. 7 StGB)

– Section 89c para. 7 StGB ("Financing terrorism")

Only Section 46b StGB is practically relevant. This was clearly confirmed within the context of the first Focus Group, in particular by the representative of the Office of the Attorney General of the Federal Republic of Germany, upon explicit enquiry. However, for the sake of completeness, a brief reference shall also be made regarding the two other rewarding measures.

3.1. *Principles of sanctioning in German Criminal Law*

To ensure a better understanding of the functioning of rewarding measures in German Criminal Law, a brief introduction to the principles of criminal sanctions in German Criminal Law shall be given in the following. Penalties applicable under German Criminal Law are either imprisonment or fines[39] calculated on the basis of so-called daily rates (Section 40 StGB). Fines are regarded as minor punishment in comparison to imprisonment. Imprisonment penalty can be imposed for a fixed term or as life imprisonment. In the case of fixed term imprisonment, the minimum penalty is one month according to Section 38 StGB. The maximum term of fixed term-imprisonment is 15 years. The most severe sanction under German criminal law is life imprisonment. Section 40 StGB determines the amount of fines. The lowest fine consists of 5 daily rates of one Euro each, i.e. a total of 5 Euro. The highest fine for one offence amounts to 360 daily rates of 30,000 Euro each, thus a total of 10,800,000 Euro.

Each criminal provision specifies an individual minimum and maximum penalty for the criminal offence, e.g. Section 239b StGB ("hostage taking"). If the offender commits an offence under Section 239b para. 1 StGB, he or she shall be liable to imprisonment for a fixed term of not less than five years, i.e. between 5 and 15 years. This constitutes the so-called penalty scale. Within this scale, the court is, according to Section 46 StGB, responsible for deciding on the exact severity of the penalty, taking into account the guilt of the offender and several other factors such as the effects of the offence to the victim or the offender's reasons for committing the offence. In principle, a penalty higher or lower than the penalty provided for by the penalty scale may not be imposed by the court[40].

A deviation from the minimum penalty scale prescribed by a criminal provision is only possible in cases regulated by law, so-called mitigation provisions. Relevant examples are, among others, the above-mentioned rewarding measures according to Section 129a para. 7 StGB (in conjunction with Section 129 para. 7 StGB) and Section 46b StGB[41].

If a mitigating provision is applied, however, the court is not necessarily completely free concerning the determination of the penalty. Rather, all miti-

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[39] *Fischer*, pre § 38 pt. 5.
[40] *Fischer*, § 46 pt. 20.
[41] MüKo-StGB/*Maier*, § 46 pt. 2.

gating provisions of criminal law currently in force refer to Section 49 StGB which determines the scale of mitigating possibilities for the court, as opposed to the Kronzeugengesetz which regulated the legal consequences itself.

Section 49
Special mitigating circumstances established by law

(1) If the law requires or allows for mitigation under this provision, the following shall apply:

1. Imprisonment of not less than three years shall be substituted for imprisonment for life.

2. In cases of imprisonment for a fixed term, no more than three quarters of the statutory maximum term may be imposed. In case of a fine the same shall apply to the maximum number of daily units.

3. Any increased minimum statutory term of imprisonment shall be reduced as follows:

a minimum term of ten or five years, to two years;
a minimum term of three or two years, to six months;
a minimum term of one year, to three months;
in all other cases to the statutory minimum.

(2) If the court may in its discretion mitigate the sentence pursuant to a law which refers to this provision, it may reduce the sentence to the statutory minimum or impose a fine instead of imprisonment.

If a mitigation provision refers to Section 49 para. 1 StGB, it stipulates precisely how the limits of the penalty scale are altered. If a mitigation provision, on the other hand, refers to Section 49 para. 2 StGB, the court may reduce the penalty up to the legal minimum of one month (Section 38 para. 2 StGB) or even impose a fine.

However, the court is not obliged to mitigate the penalty according to Section 49 para. 1 StGB in every case of referral to Section 49 para. 1 StGB[42]. The majority of the provisions solely provide the option to shift the penalty scale if their respective applicability conditions are met[43]. If the court is not obliged to mitigate the penalty scale according to Section 49 para. 1 StGB (and not willing to do so), positive behavior of the accused (e.g. disclosure of information about criminal offences whose planning he is aware of) can still be respected by passing a sentence on the lower level of the original penalty scale according to the latitude of the court under Section 46 StGB.

Regarding Section 49 para. 2 StGB, it only provides the option for the court to mitigate the penalty up to the legal minimum of one month while the maximum term of imprisonment is not affected[44]. In consequence, if the

[42] *Fischer*, § 49 pt. 3.
[43] BeckOK-StGB/*Heintschel-Heinegg*, § 49 pt. 8.
[44] MüKo-StGB/*Maier*, § 49 pt. 29.

applicability conditions of a mitigating provision referring to Section 49 para. 2 StGB are fulfilled, the penalty scale is solely dilated regarding the minimum penalty.

The options available to the court to exclude a penalty entirely are not governed in any general systematic form comparable to the mitigating provisions. Rather, individual provisions apply for individual cases. The relevant provisions within the scope of this questionnaire are presented below.

3.2. *Analysis of Section 46b StGB*

Section 46b
Contributing to the discovery or prevention of serious offences

If the perpetrator of an offence punishable by an increased minimum sentence of imprisonment or a sentence of life imprisonment,

has substantially contributed to the discovery of an offence under section 100a (2) of the Code of Criminal Procedure which is related to his own offence by voluntarily disclosing his knowledge, or

2. voluntarily discloses his knowledge to an official authority in time for the completion of an offence under section 100a (2) of the Code of Criminal Procedure related to his own offence, the planning of which he is aware of, to be averted,

the court may mitigate the sentence under section 49 (1); a sentence of life imprisonment shall be replaced with a term of imprisonment of no less than ten years. In order to determine whether an offence is punishable by an increased minimum sentence of imprisonment, only aggravations for especially serious cases but no mitigations shall be taken into account. If the offender participated in the offence, his contribution to its discovery under the 1st sentence No. 1 above must exceed his own contribution. Instead of a reduction in sentence the court may order a discharge if the offence is punishable by a fixed-term sentence of imprisonment only and the offender would not be sentenced to a term exceeding three years.

(2) In arriving at its decision under subsection (1) above the court shall have particular regard to:

1. the nature and scope of the disclosed facts and their relevance to the discovery or prevention of the offence, the time of disclosure, the degree of support given to the prosecuting authorities by the offender and the gravity of the offence to which his disclosure relates, as well as

2. the relationship of the circumstances mentioned in No. 1 above to the gravity of the offence committed by and the degree of guilt of the offender.

(3) A mitigation of sentence or a discharge under subsection (1) above shall be excluded if the offender discloses his knowledge only after the indictment against him has been admitted by the trial court (section 207 of the Code of Criminal Procedure).

3.2.1. *Applicability conditions*

Section 46b StGB is not exclusively applicable to terrorist offences, but instead constitutes a general rewarding provision unchanged since 2013. Its applicability depends on a number of conditions.

3.2.1.1. *The offence committed by the repentant*

First, application of the rewarding measures requires the offence committed by the repentant to fulfill certain criteria[45]: The repentant is required to have committed an offence that is punishable by an *"increased minimum sentence of imprisonment"* or a *"life sentence of imprisonment"*. This means that not every person accused of an offence under the StGB can benefit from Section 46b StGB. The minimum term of imprisonment under the StGB is one month, according to Section 38 para. 2 StGB. Consequently, the offence committed by the repentant must provide for a higher minimum sentence of imprisonment, which solely is the case for medium and heavy offences (e.g. Section 308 para. 1 StGB "Causing an explosion", for which the perpetrator shall be liable to imprisonment of not less than one year)[46]. Typical terrorist acts, such as Section 129a StGB ("Forming terrorist organizations"), Section 211 StGB ("Murder under specific aggravating circumstances") or Section 308 StGB are covered by this in any case, so that applicability here is regularly given.

3.2.1.2. *The disclosed offence*

Secondly, certain conditions are set out concerning the offence on which the repentant provides information[47]. Rewarding measures can only be applied if information regarding a so-called "catalogue act"[48] according to Section 100a para. 2 StPO ("Conditions Regarding Interception of Telecommunications") is disclosed. Section 100a para. 2 StPO is a procedural provision that regulates the offences for which telecommunications may be intercepted. Thus, the provision in itself has no connection with Section 46b StGB. What is decisive, however, is that it contains a catalogue of criminal offences which represent a "serious criminal offence"[49]. It is hence made clear that rewarding measures are only used on information relating to serious criminal offences. A serious offence is generally regarded as such if the maximum sentence is at least 5 years[50]. Section 100a para. 2 contains a long list of offences under the StGB as well as other criminal provisions from other laws, such as the German Narcotics Act (Betäubungsmittelgesetz, "BtMG"). A detailed description of all offences would be neither conceivable nor purposeful within the framework of this questionnaire. Specific criminal offences regularly (also) present in acts of terrorism, such as Section 129a StGB ("Forming terrorist organizations") or Section 211 StGB ("Murder un-

[45] *Fischer*, § 46b pt. 5.
[46] MüKo-StGB/*Maier*, § 46b pt. 12.
[47] *Fischer*, § 46b pt. 5.
[48] BeckOK-StGB/*Heintschel-Heinegg*, § 46b pt. 14.
[49] BeckOK-StGB/*Heintschel-Heinegg*, § 46b pt. 13.
[50] BeckOK-StPO/*Graf*, § 100a pt. 141.

der specific aggravating circumstances"), are in any case covered by the provision so that also here an applicability will always be given.

3.2.1.3. *The requirement of connection between the offences*

Thirdly, the offence on which the offender provides information must be related to his own offence; i.e. there must be a connection between the two offences. However, this condition has only existed since 2013. According to the legislator's explanatory memorandum when introducing Section 46b StGB, the provision is precisely intended to intervene in terrorist and other criminal organizations and networks[51]. However, due to its broad scope of application, which is limited in this respect only by the severity of the repentant's act and Section 100a para. 2 StGB (which, however, applies to the interception of telecommunications and is therefore not aimed at criminal networks), it is also applicable to other criminal offences which usually do not take place within the framework of an organization. It is precisely in regard to such offences that there is a danger of the alleged repentant randomly accusing a third party, whereas with criminal networks this risk is much lower from the outset, since actual knowledge is regularly given here. When Section 46b StGB was introduced in 2008, an attempt was made to limit the risk of false statements by the repentant by introducing increased penalties in these cases[52]. However, only a few years later, this did obviously not seem sufficient in the view of the legislator so that the additional restriction condition has been introduced in 2013.

Yet, the concept of "relation to the repentant's offence" is not a defined term and therefore requires further definition. According to jurisprudence, determining the point at which a sufficient relation exists depends on the inner and connecting relationship between the repentant's offence and the offence uncovered. As a consequence, it has to be possible to relate the disclosed information concretely to one or more of the repentant's individual offences and therefore to his personally enacted guilt[53].

3.2.1.4. *Behavior of the repentant*

According to Section 46b StGB, the repentant is only privileged if he has substantially contributed to the discovery of an offence under Section 100a para. 2 StPO by voluntarily disclosing his knowledge or if he voluntarily discloses his knowledge to an official authority in time for the completion of an offence under Section 100a para. 2 StPO, the planning of which he is aware of, to be averted.

As a result, the voluntary behavior of the repentant is the principle obligation in order to benefit from a measure under Section 46b StGB, i.e. he or she must act without any form of external compulsion[54]. This is not the case if the repentant is of the opinion to not be able to maintain quiet any longer.

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[51] BR-Drs. 353/07.
[52] BT-Drs. 16/13094, p. 2.
[53] BT-Drs. 17/9695, p. 8; cf. BGH NStZ 1995, p. 193 et seq.
[54] *Fischer*, § 46b pt. 12.

3.2.1.5. *Quality of information according to Section 46b para. 1 phrase 1 No. 1 StGB*

Regarding the quality of the information disclosed, rewarding measures are only granted if the information actually leads to the discovery of an offence under Section 100a para. 2 StPO[55]. Here, however, the question arises as to when criminal offences can be described as discovered. It could be assumed that a perpetrator actually has to be convicted on the basis of the repentant's statement. On the other hand, it is also conceivable that the mere suspicion that another person has committed a crime is sufficient. Neither, however, does justice to the purpose of the rewarding provision. Since rewarding measures always entail the danger of misleading the repentant to provide false information, the mere substantiation of any suspicion cannot suffice. At the same time, however, waiting for a conviction would be neither feasible nor acceptable. As a result, the repentant must provide information that produces reliable findings about a criminal offence and its perpetrators. However, it is not necessary for a person to have been arrested. Rather, it is sufficient if the information is highly likely to lead to a conviction[56].

3.2.1.6. *Quality and point of time according to Section 46b para. 1 phrase 1 No. 2 StGB*

It is decisive that the information is passed on to the authorities at such an early point in time that an offence under Section 100a para. 2 StPO, the planned commission of which the offender is aware of, can still be averted. Here, it is not necessary that the respective offence is in fact prevented[57]. Rather, the condition must be determined objectively, i.e. whether the offence could have been prevented by the authorities. Mistakes made by the law enforcement authorities therefore do not fall within the risk area of the repentant.

3.2.2. *The types of rewarding measures under Section 46b StGB*

3.2.2.1. *Direct application of Section 46b StGB*

Section 46b StGB stipulates two rewarding measures for the disclosure of information, mitigation and discharge of punishment. Its direct application can only be conducted by a court during the main proceedings.

Mitigation of penalty

Although the point in time and conditions of application for mitigating measures are regulated in Section 46b StGB, the exact scale of the court's mitigating decision in the conviction cannot be found in the provision itself. Rather, as explained above, reference is made to Section 49 para. 1 StGB which leads to an optional shift of penalty scale. If the repentant, for example, is accused of having committed an offence under Section 308 para. 3 StGB by having caused a non-nuclear explosion that killed another person, the penalty

[55] BeckOK-StGB/*Heintschel-Heinegg*, § 46b pt. 15.
[56] *Fischer*, § 46b pt. 14.
[57] MüKo-StGB/*Maier*, § 46b pt. 140.

scale would be imprisonment of no less than 10 years (i.e. between 10 and 15 years). If the applicability conditions of Section 46b StGB are met, the court is given the option to mitigate the penalty scale according to Section 49 para. 1 No. 3 alternative 1 StGB. Accordingly, the penalty scale is then mitigated to a possible sentence between 2 years and 11 years and 3 months.

Nota bene: Contrary to Section 49 para. 1 No. 1 StGB, life imprisonment is not replaced by a minimum sentence of three years, but rather ten years, according to Section 46b para. 1 phrase 4 StGB.

Discharge of penalty

Concerning discharge of penalty, there is no general provision such as Section 49 StGB, which is the reason for its location directly in Section 46b para.1 sentence 4 StGB. An entire exclusion of penalty is only possible if the repentant's offence is punishable by a fixed-term sentence of imprisonment only and the offender would not be sentenced to a term exceeding three years. The court must therefore consider whether it would hypothetically sentence the offender to more than three years of imprisonment without taking into account the disclosure of information as mitigating factor[58]. The exclusion of punishment is therefore only possible for minor offences and does not only depend on the value of the repentant's information.

Procedural point of time

Regarding the procedural point of time the rewarding measures must be initiated, the German criminal procedure involves four stages: Investigation, interim, main and enforcement proceedings[59]. The investigation procedure (pre-sentencing stage) is initiated when the prosecution authorities become aware of facts that justify the assumption that a prosecutable offence has been committed[60].

Intermediate proceedings (pre-sentencing stage) are opened when the prosecutor's office applies to the court for the main proceedings to be opened[61]. With the opening order of the court, the main proceedings (sentencing stage) begin[62]. If the defendant is convicted, the sentence is executed in the enforcement proceedings (post-sentencing stage)[63].

The rewarding measures according to Section 46b StGB must be initiated at the pre-sentencing stage (investigation or intermediate proceedings). Section 46b para. 3 StGB stipulates that rewarding measures are mandatorily excluded if the repentant only discloses his knowledge after the indictment against him (main proceedings, sentencing stage) has been admitted by the trial court. Direct effect of Section 46b StGB only occurs at the level of the sentencing stage, since it can only be applied by a court when determining the penalty (or dispensing with it in the conviction).

The procedural point of time the information has to be disclosed re-

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[58] BeckOK-StGB/*Heintschel-Heinegg*, § 46b pt. 26.
[59] MüKo-StPO/*Kudlich*, introduction pt. 206 et seq.
[60] MüKo-StPO/*Kudlich*, introduction pt. 214.
[61] BeckOK-StPO/*Gorf*, § 170 pre pt. 1.
[62] BeckOK-StPO/*Ritscher*, § 207 pt. 1 et seq.
[63] MüKo-StPO/*Nestler*, § 449 pt. 1 et seq.

sults in serious insecurity on the side of the repentant. On the one hand, in order to benefit from the rewarding measures, he is not only obliged to disclose information about the offences committed by a third party, but also to provide information about offences committed by himself. On the other hand, the repentant therewith contributes to his own conviction without being assured that the court will actually make use of the rewarding measures as the court retains its discretionary power, whether or not it intends to make use of rewarding measures[64]. The outer limit of this power is only reached if and when the court has made gross mistakes concerning taking into account the positive conduct of the repentant. In Section 46b para. 2 StGB, however, there can be found grounds which the court must take into account when deciding whether to apply rewarding measures:

"In arriving at its decision under subsection (1) above the court shall have particular regard to:

1. the nature and scope of the disclosed facts and their relevance to the discovery or prevention of the offence, the time of disclosure, the degree of support given to the prosecuting authorities by the offender and the gravity of the offence to which his disclosure relates, as well as

2. the relationship of the circumstances mentioned in No. 1 above to the gravity of the offence committed by and the degree of guilt of the offender".

This should ensure a simpler review of the decision by a higher court and at least gives the repentant a certain degree of certainty[65].

3.2.2.2. *Indirect legal consequences as a result of the existence of Section 46b StGB*

The direct application of Section 46b StGB by a court also causes several indirect legal consequences due to general rules of criminal and criminal procedural law.

Pre-Sentencing Stage (investigation and intermediate proceedings)

Section 153b para. 1 StPO provides that the prosecution of the repentant may already be dispensed with by the public prosecution if the relevant conditions are met. As shown above, Section 46b para. 1 phrase 4 StGB provides for such a possibility. Consequently, already the investigation proceedings (pre-sentencing stage) against the repentant may be dispensed with without him being convicted or even indicted, i.e. before the initiation of the intermediate proceedings. The result is that Section 46b StGB is not applied at all; on the contrary, the mere fulfillment of its conditions can already lead to a legal consequence. As a restrictive element, the proceedings can only be dispensed with the consent of the court that would have jurisdiction over the main proceedings[66].

As soon as the public prosecutor's office applies to the court for the opening of the main proceedings (sentencing stage) and thus the intermedi-

[64] MüKo-StGB/*Maier*, § 46b pt. 118.
[65] Schönke/Schröder/*Kinzig*, § 46b pt. 16.
[66] MüKo-StGB/*Maier*, § 46b pt. 108.

ate proceedings are opened (pre-sentencing stage), it is no longer responsible for closing the proceedings. Therefore, Section 153b para. 2 StPO provides that the court may dispense with the proceedings before the opening of the main proceedings if the conditions set out in paragraph 1 are met. For the proceedings to be dispensed with, both the public prosecutor's office and the accused must consent[67].

Sentencing stage (main proceedings)

After the opening of the main proceedings, Section 46b StGB is applied directly if the conditions are met and the court decides to do so. However, the fulfilment of the requirements of Section 46b StGB can also be taken into account indirectly if the court decides against mitigating the penalty scale (or dispensing penalty) according to Section 49 para. 1 StGB[68]. Under Section 46 StGB, the court has discretion in determining the exact penalty. Although in this case it would remain within the original (non-mitigated) penalty scale provided for by the infringed provision, the court would have to indirectly take into account the fulfillment of the requirements of Section 46b StGB within this original penalty scale.

Post-sentencing stage (enforcement proceedings)

According to Section 46b para. 3 StGB, the rewarding measures do not apply if the repentant discloses his knowledge after the main proceedings have been opened. However, the repentant can still benefit, even if he discloses information at a later point in time, at the post-sentencing stage, and thus Section 46b StGB is not directly applicable[69]. According to Section 57 StGB, a court may, under certain further conditions, grant conditional early release of a fixed-term prison sentence after the convicted offender has served two thirds or at least half of his sentence (if it does not exceed 2 years). The conditions under which the court may grant the conditional early release also relate to the behavior of the offender after the conviction. Here, compliance with the (although no longer applicable) requirements of Section 46b StGB can make a decisive contribution to conditional early release in this regard[70].

3.2.3. *Counterpart of rewarding measures: The obligations of the repentant*

As the obligations of the repentant are also prerequisite for the application of the rewarding measures, see: 3.2.1. "Applicability conditions".

3.2.4. *Revocation of rewarding measures*

3.2.4.1. *In case of direct application of Section 46b StGB*

If Section 46b StGB is applied by a court, an immediate revocation of the rewarding measure is not stipulated by law. In other words, once the

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[67] MüKo-StPO/*Peters*, § 153b pt. 19.
[68] MüKo-StGB/*Maier*, § 46b pt. 131.
[69] BeckOK-StGB/*Heintschel-Heinegg*, § 46b pt. 29.
[70] BeckOK-StGB/*Heintschel-Heinegg*, § 46b pt. 29.

(presumed) repentant has been convicted by a final sentence using a rewarding measure, even if the court has completely dispensed with punishment in accordance with Section 46b para. 1 phrase 4 StGB, this cannot be revoked if it is subsequently discovered that the conditions for application were not met or if the (presumed) repentant provided false information (Section 362 StPO conclusively regulates the cases in which a revocation is possible. None of these cases are related to rewarding measures.).

However, this does not mean that the alleged repentant may state false statements without any consequences if he provides false information about a "catalogue offence" pursuant to Section 100a para. 2 StPO. The negative consequence of rewarding measures according to Section 46b StGB is the threat that the perpetrator of an offence threatened with an increased minimum imprisonment penalty may provide false information about offences connected to his offence under Section 100a para. 2 StGB, of which he claims to know or falsely accuses uninvolved third parties of an offence under Section 100a para. 2 StPO that he claims was committed in connection with his offence. In order to counter this danger, already existing criminal provisions concerning false accusations and mislead of authorities about the commission of an offence were intensified for the case that the perpetrator thereby wanted to obtain a reward in the sense of Section 46b StGB[71]. If the alleged repentant falsely accuses another person of having committed a criminal offence in order to benefit from rewarding measures under Section 46b StGB, he shall be liable to imprisonment from six months to ten years according to Section 164 para. 3 StGB ("false accusation"). If the alleged repentant falsely claims to have knowledge about criminal offences committed, but without naming a specific perpetrator (in order to benefit from rewarding measures under Section 46b StGB), he shall be liable to imprisonment from three months to five years according to Section 145d para. 3 StGB ("misleading the authorities about the commission of an offence").

These measures are intended to discourage the repentant from making false statements[72]. However, at least on a theoretical level (see: 3.2.6.2. "Probative value" for the practical relevance of false statements), this leads to the dilemma that precisely those perpetrators who have committed the most serious offences benefit from false statements. Those who face a life sentence can only be sentenced to a sentence between 10 years (Section 46b para. 1 phrase 1 StGB deviating from Section 49 para. 1 No. 1 StGB) and 15 years if Section 46b StGB is applied. If a final conviction is passed, it cannot be subsequently revoked. If Section 46b StGB is applied because the offender has mislead the authorities about the commission of an offence, an additional maximum sentence of "only" 5 years may be imposed. In the case of false accusation under Section 164 para. 3 StGB an additional maximum penalty of 10 years.

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[71] Schönke/Schröder/*Kinzig*, § 46b pt. 22.
[72] BR-Drs. 353/07, p. 3.

3.2.4.2. *In case of indirect legal consequences as a result of the existence of Section 46b StGB*

If the investigation proceedings (pre-sentencing stage) against the alleged repentant are dispensed with by the public prosecutor according to Section 153b para. 1 StPO, the public prosecutor is not prohibited to reopen proceedings against the alleged repentant: If the repentant makes false statements about criminal offences and thereby achieves a suspension of the investigation procedure, a "revocation" of the rewarding measure is possible by simply continuing the investigation proceedings[73]. In addition, in this case, a further accusation for violation of Section 164 para. 3 or Section 145d para. 3 StGB can be considered. As a result, the alleged repentant expects not only a non-mitigated sentence for his original offence, but an increased sentence for his false statements.

Section 153b para. 2 StPO provides that the court may dispense with the proceedings before the opening of the main proceedings if the conditions set out in paragraph 1 are met. If the court suspends the proceedings according to Section 153b para. 2 StPO, the result is a limited *ne bis in idem*-effect regarding the further prosecution of the alleged repentant. Further prosecution will therefore only be possible if further evidence or facts emerge which, if known, would not have led to a suspension of the proceedings[74]. If the repentant expresses false statements, this leads to the fact that Section 46b StGB would not have been applicable in the main proceedings, as a result of which it would no longer have been possible to dismiss the case pursuant to Section 153b para. 2 StPO. If the false statements become apparent, this constitutes new facts and evidence, the knowledge of which would not have led to a suspension of punishment.

Regarding the indirect impact of Section 46b StGB on the application of Section 46 and 57 StGB, the possibility of an immediate revocation is not provided by law. However, the alleged repentant can be prosecuted for offences under Section 164 para. 3 StGB or 145d para. 3 StGB.

3.2.5. *Conditions for application of the measures (procedural aspects)*

See: 3.2.2.1. "Direct application of Section 46b StGB".

3.2.6. *Conditions for the use of declarations obtained (probative value of declarations)*

3.2.6.1. *Conditions for use*

The repentant's statements can be applied at several levels of the prosecution process, with different requirements for their use.

Initially, they can establish an initial suspicion that justifies the initiation of the investigation procedure (pre-sentencing stage). The only requirement for such a case is that, according to general criminalistic experience, it is possible that a prosecutable offence has been committed. According to

[73] MüKo-StPO/*Peters*, § 153b pt. 17.

Section 170 StPO, the public prosecution may indict the accused if there is "sufficient suspicion", i.e. a conviction is objectively more probable than an acquittal (intermediate proceedings, pre-sentencing stage)[75]. This, as well, can already be caused by a statement of the repentant (but usually supported by further investigations by the prosecution).

In the main hearing (sentencing stage), on the other hand, the principle of personal examination applies, Section 250 StPO. This means that the declarations of the repentant made during the investigation process accusing another person do not automatically count as evidence in the main hearing. Rather, in principle, a personal testimony of the witness is always necessary, i.e. he must appear at the court hearing and make his accusations in presence of the accused[76]. Deviations from this rule are only possible under certain circumstances. According to Section 247 phrase 1 StPO, the accused may be removed from the courtroom during the repentant's statement if it is to be feared that the repentant won't tell the truth when examined in the presence of the defendant. Nevertheless, the repentant is questioned personally. For his additional protection, the court may exclude the hearing from public access under Section 172 No. 1a of the German Courts Constitution Act (Gerichtsverfassungsgesetz, "GVG") if endangerment of the life, limb or liberty of the repentant is to be feared. It is also possible to deviate from the principle of examination in person. According to Section 247a StPO, the hearing of the witness may take place at a place other than the courtroom and be transmitted live audio-visually to the courtroom if there is an imminent risk of serious detriment to the well-being of the repentant. A certain disguise of the repentant is also permissible[77]. Furthermore, recordings of audio-visual interrogations can be displayed during the main hearing according to Section 255a StPO and Section 251 para. 1 No. 2 StPO, if the repentant cannot be interrogated. This may be the case if his identity may not be revealed within the framework of a witness protection program[78]. Finally, under the same conditions according to Section 251 para. 1 No. 2 StPO, written statements of the repentant may also be read out.

3.2.6.2. *Probative value*

There is no explicit legal provision dealing with the probative value of information obtained by the repentant. Ultimately, it depends on the court (pursuant to Section 286 StPO) whether it believes the repentant in its proceedings and applies Section 46b StGB (or agrees/decides to terminate the proceedings under Section 153b StPO). The same applies to the court which has to decide on the conviction of a person accused by the repentant.

In principle, the legislator has tried to increase the probative value of the information through several safeguarding mechanisms. On the one hand, the threat of punishment according to Sections 164 para. 3 and 145d

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[74] MüKo-StPO/*Peters*, § 153b pt. 22 et seq.
[75] MüKo-StPO/*Kölbel*, § 170 pt. 14.
[76] BeckOK-StPO/*Ganter*, § 250 pt. 1.
[77] BVerfG NStZ 2007, p. 534 et seq.
[78] MüKo-StPO/*Kreicker*, § 251 pt. 56.

para. 3 StGB. In addition, by the fact that the information must be disclosed very early, i.e. before the opening of the main proceedings (i.e. during the pre-sentencing stage, Section 46b par. 3 StGB), in order to ensure that the information disclosed can be verified. And finally also by the wording of Section 46b para. 1 No. 1 and 2 StGB, according to which the application depends on the "detection" or "prevention" of a criminal offence and thus already requires well-founded findings of the prosecution authorities.

However, the opinion of practitioners, i.e. of judges, prosecutors and lawyers, of the probative value of rewarding measures is not uniformly high. This is confirmed by two empirical studies investigating the practical application of Section 46b StGB.

Empirical study by Frahm

The first study dates back to 2012 (thus before the introduction of the connection requirement between the offence of the repentant and the offence about which he provides information). 170 practitioners were interviewed, including 112 prosecutors, 37 criminal judges and 21 lawyers[79]. Here, more than 85% of the lawyers rated the risk of abuse of Section 46b StGB as "high or rather high". In contrast, only 16.6% of prosecutors and 28.6% of judges were of this opinion[80].

In response to the statement "the testimony of the repentant is only of limited probative value due to the increased incentive for false accusations", 40% of the judges answered "applies or is more likely to apply". Regarding public prosecutors, 30% replied with "applies or is more likely to apply". In contrast, over 90% of the lawyers were of the opinion that the statements of the repentant were of only low probative value.

However, it should be noted that only 21.1% of the prosecutors surveyed had already had practical experience with Section 46b StGB. The figure was 64.9% for judges and 66.7% for lawyers[81]. Consequently, the result of the study is not entirely significant.

Empirical study by Christoph

In the empirical study published by *Christoph* in 2019, the data of 387 practitioners (106 lawyers, 106 prosecutors, 102 judges and 73 police officers) was processed and analyzed[82]. Of these, 207 respondents were already involved in proceedings in which the application of Section 46b StGB was at least a possibility. 154 of them, i.e. close to 40%, were involved in proceedings where this provision had actually been applied[83].

Of the 207 participants who had had experience with this provision, almost 60% reported that false accusations by the repentant had never, rarely or rather rarely been made. Approximately 58% also confirmed that the repentant had never, rarely or rather rarely attempted to mislead the authorities. On the other hand, 15.5% of the participants replied that there had al-

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[79] *Frahm*, Die allgemeine Kronzeugenregelung, 2014, p. 285 et seq.
[80] *Frahm*, Die allgemeine Kronzeugenregelung, 2014, p. 318.
[81] *Frahm*, Die allgemeine Kronzeugenregelung, 2014, p. 289.
[82] *Christoph*, Der Kronzeuge im Strafgesetzbuch, 2019, p. 286.
[83] *Christoph*, Der Kronzeuge im Strafgesetzbuch, 2019, p. 288.

ways, frequently or rather frequently been a proven false suspicion or mislead of the authorities[84]. 21.7% of all respondents (i.e. 387 persons) were of the opinion that the existing security measures (i.e. Sections 145d para. 3 and 164 para. 3 StGB) were sufficient to prevent false statements. 65.4% of the respondents expressed their clear opposition[85].

3.2.7. *Measures for the protection of the repentant*

In Germany, witness protection outside criminal proceedings (for protection during proceedings see: 3.2.6.1. "Conditions for the use") is primarily regulated by the Law on the Harmonisation of the Protection of Endangered Witnesses (Zeugenschutz-Harmonisierungsgesetz, "ZSHG")[86]. According to Section 1 para. 1 ZSHG, the admission of a person into a witness protection program is conditional upon the existence of a concrete danger for a person without whose details the investigation of the facts of the case or the determination of the accused's whereabouts in criminal proceedings would be futile or substantially impeded. Depending on the quality of the statement, this also applies to the repentant who discloses information in order to benefit from Section 46b StGB. With their consent, these individuals can be protected if there are actual indications which make the occurrence of damage to life, limb, freedom or property appear probable on the basis of the statement[87]. According to Section 1 para. 2 ZSHG, relatives of the repentant or persons close to him may also participate in the protection[88].

According to the wording of the provisions of the ZSHG, the repentant has no legal claim to inclusion in a protection program. In principle, he neither has a claim to individual protection measures of the Witness Protection Office. The decision on the beginning, nature, extent and termination of such measures presupposes in each individual case an examination of proportions in which, in particular, the seriousness of the act, the reason for the danger, the rights of the person against whom testimony is to be made and the effects of witness protection must be taken into account[89]. Section 1 para. 4 ZSHG determines when witness protection measures may be terminated. This is the case particularly if the danger has ceased to exist. On the other hand, the termination of criminal proceedings does not automatically lead to the termination of witness protection. This means that even if the repentant is no longer considered as evidence in criminal proceedings, witness

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[84] *Christoph*, Der Kronzeuge im Strafgesetzbuch, 2019, p. 347.

[85] *Christoph*, Der Kronzeuge im Strafgesetzbuch, 2019, p. 349.

[86] Deutscher Bundestag - Wissenschaftliche Dienste, Zeugenschutz im Strafverfahren, p. 4, File number WD 7 - 3000 - 059/18, *https://www.bundestag.de/resource/blob/553366/c4114898b2fc5327cb00423d0a3c320e/wd-7-059-18-pdf-data.pdf*.

[87] Deutscher Bundestag - Wissenschaftliche Dienste, Zeugenschutz im Strafverfahren, p. 5, File number WD 7 - 3000 - 059/18, *https://www.bundestag.de/resource/blob/553366/c4114898b2fc5327cb00423d0a3c320e/wd-7-059-18-pdf-data.pdf*.

[88] Deutscher Bundestag - Wissenschaftliche Dienste, Zeugenschutz im Strafverfahren, p. 5, File number WD 7 - 3000 - 059/18, *https://www.bundestag.de/resource/blob/553366/c4114898b2fc5327cb00423d0a3c320e/wd-7-059-18-pdf-data.pdf*.

[89] Deutscher Bundestag - Wissenschaftliche Dienste, Zeugenschutz im Strafverfahren, p. 5, File number WD 7 - 3000 - 059/18, *https://www.bundestag.de/resource/blob/553366/c4114898b2fc5327cb00423d0a3c320e/wd-7-059-18-pdf-data.pdf*.

protection is maintained until the specific danger to the repentant ceases[90]. According to Section 5 ZSHG, the witness protection authorities are obliged to provide the persons to be protected with documents and receipts which can be used to trace a fictitious curriculum vitae (camouflage identity). According to Section 4 ZSHG, the witness protection services can refuse the distribution of information about the repentant's personal data to public and non-public authorities (but not towards the public prosecutor's office), as far as this is necessary for his or her protection.

3.2.8. *Evaluation and control of the (rewarding) measure*

3.2.8.1. *Evaluation by authorities*

Section 46b StGB is not currently subject to periodic review or evaluation by the legislator or authorities as to its operation and effectiveness. Although an evaluation was announced in 2013 by the then governing parties Christian Democratic Union (CDU), Christian Social Union (CSU) and Social Party of Germany (SPD) in their coalition treaty, the state has not yet implemented such an evaluation[91]. As far as its practical evaluation is concerned, only the previously cited empirical analyses by *Frahm* and *Christoph* have dealt with the topic (see: 3.2.8.2. "Scientific evaluation and general criticism regarding rule of law and practical aspects" for further results of *Christoph*'s study). However, according to German law, there are basically two ways in which a law can be reviewed for its compatibility with the Constitution of the Federal Republic of Germany, the Grundgesetz ("GG") before the Federal Constitutional Court. On the one hand by means of Art. 93 para. 1 No. 2 GG upon request by the federal government, a federal state government or one fourth of the members of the Bundestag. In addition, if a court has to apply a provision of law in a certain conviction, as may be the case with Section 46b StGB, it may submit it to the German Federal Constitutional Court according to Art. 100 para. 1 phrase 1 GG to determine whether the law is compatible with the Grundgesetz. However, none of these control instruments have been applied to date to the rewarding measures in question.

3.2.8.2. *Scientific evaluation and general criticism regarding rule of law and practical aspects*

Rule of law

From the point of view of rule of law, concerns have always been expressed against rewarding measures. This was also the reason why, although the RAF had been active since the early 1970s, it was not until 1989 that the Kronzeugengesetz introduced a rewarding measure applicable to more than one offence[92].

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[90] Deutscher Bundestag - Wissenschaftliche Dienste, Zeugenschutz im Strafverfahren, p. 5, File number WD 7 - 3000 - 059/18, *https://www.bundestag.de/resource/blob/553366/c4114898b2fc5327cb00423d0a3c320e/wd-7-059-18-pdf-data.pdf*.

[91] Coalition agreement CDU/CSU and SPD 2013, p. 102.

[92] *König*, NJW 2009, p. 2481 et seq.

First and foremost, criticism mentions a conflict with the so-called "principle of guilt"[93]. This is a consequence of the principle of rule of law, emanating from Art. 20 para. 3 GG and of the principle of human dignity, set out in Art. 1 para. 1 phrase 1 GG and states that every perpetrator of an offence must be appropriately punished for his guilt (cf. also Section 46 para. 1 phrase 1 StGB)[94]. The problem is that the perpetrator's guilt is already established upon completion of the offence[95]. The assistance with investigations in the later course after the crime can therefore basically have no effect on the perpetrator's guilt[96]. In this respect, it is criticized that Section 46b StGB leads to inappropriate punishments for the perpetrator's guilt[97].

Others argue that the consideration of the offender's behavior after the commission of the offence is not unknown to the law[98]. Even Section 46 para. 2 StGB mentions the offender's behavior after the offence and his efforts to compensate for the damage as a factor to be taken into account in the sentencing. Also, the purpose of the punishment is not only retaliation, but preventive aspects must also be taken into account. In general, distinction is made between preventive effects of the punishment on the offender himself (special prevention) and effects on society in general (general prevention). According to some, Section 46b StGB enables the offender to be reintegrated into society at a later date, since his statement made it difficult for him to return to his former criminal environment[99].

This is however countered by the argument that the reintegration of the perpetrator is clearly made more difficult because he is doubly stigmatized: as a traitor and as a criminal. However, there are no meaningful research results on this question[100].

For reasons of general prevention, some assume that Section 46b StGB contributes to sowing mistrust within organized criminal structures and that these thus develop less cohesion[101]. Others deny this, especially with regard to religiously motivated organizations[102]. Here, too, there is a lack of meaningful data. However, the general sense of justice among the population could actually be disrupted if serious offenders are punished lightly under application of Section 46b StGB. However, it remains to be seen whether this will actually happen, as the courts are, as shown, very independent in the application of rewarding measures.

Section 46b StGB is furthermore criticized in constitutional regard under the aspect of the general principle of equality, which is set out in Art. 3 para. 1 GG[103]. This prohibits the state to exercise unequal treatment in any

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[93] *Peglau*, ZRP 2001, p. 103 et seq.
[94] *Adam/Schmidt/Schumacher*, NStZ 2017, p. 7 et seq.
[95] *Kaspar/Wengenroth*, GA 2010, p. 453 (462).
[96] *Christoph*, Der Kronzeuge im Strafgesetzbuch, 2019, p. 195.
[97] *Jeßberger*, in: FS Beulke, p. 1153 (1159).
[98] *Kaspar/Wengenroth*, GA 2010, p. 453 (465).
[99] *Kaspar/Wengenroth*, GA 2010, p. 453 (466).
[100] *Hannover*, Terroristenprozesse - Erfahrungen und Erkenntnisse eines Strafverteidigers, 1991, p. 144.
[101] *Frank/Titz*, ZRP 2009, p. 137 (138).
[102] *Füllkrug*, MDR 1989, p. 119 (121).
[103] *Kaspar/Wengenroth*, GA 2010, p. 453 (458 et seq.).

respect. Consequently, essentially identical facts may not be treated unequally by the state. Within the framework of Section 46b StGB, several points are susceptible to not abiding by this principle. Particularly prominent is the criticism that perpetrators of serious offences (increased minimum penalty) can benefit from Section 46b StGB, but perpetrators of smaller offences can not[104]. Here, some see an unequal treatment that cannot be justified under constitutional law, since even the criminal offence of the repentant does not suggest the quality and value of his statement[105].

Ultimately, Section 46b StGB also experiences criticism with regard to the principle of freedom of self-incrimination (nemo tenetur se ipsum accusare), which is an expression of the fair trial-principle[106]. Since the repentant must have made his statement by the time the main proceedings begin, but at the same time does not know whether he will also benefit from the application of Section 46b StGB, the critics believe that he is ultimately in a dilemma that runs counter to this important principle[107].

In the framework of the Focus Group, concrete criticism was also expressed in regard to the structure of Section 46b StGB. The fact that the repentant, unlike in Art. 16 of Directive 541/2017/EU, where the perpetrator has to renounce terrorist activities, did not have to show any remorse, but only had to benefit the prosecution, constituted a particularly serious violation of the principle of guilt.

Scientific evaluation and practical criticism

The only available evaluations were conducted by *Frahm* and *Christoph*. However, *Frahm*'s results are not taken into account here due to their low significance. In addition to questioning 387 practitioners, 207 of whom already had experience with Section 46b StGB, *Christoph*'s study also examined the frequency of application of Section 46b StGB from 2009 to 2014[108].

Large criticism also emanates from legal persons dealing with Section 46b StGB every day, in particular concerning its modus operandi. The absence of possibilities to reopen the procedure (= revocation of rewarding measures) is considered to be particularly problematic since the safeguard mechanism chosen by the legislator through the introduction of paragraphs 3 in Sections 164, 145d StGB is deemed practically insufficient[109].

Additionally, the Focus Group dealt with the judicial problem that the judge often doesn't have sufficient information about whether and to what extent the repentant's statement had brought about the necessary investigation success Section 46b StGB to be applied. Whether an investigation was successful and whether the repentant's statements were true could often only be clarified within the framework of the follow-up proceedings concerning the persons against whom the repentant had testified. However, since such a

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[104] *Kaspar/Wengenroth*, GA 2010, p. 453 (471).
[105] *Fischer*, § 46b pt. 6a.
[106] *Christoph*, Der Kronzeuge im Strafgesetzbuch, 2019, p. 234 et seq.
[107] *Hassemer*, StV 1986, p. 550 (553).
[108] *Christoph*, Der Kronzeuge im Strafgesetzbuch, 2019, p. 404 et seq.
[109] *Christoph*, Der Kronzeuge im Strafgesetzbuch, 2019, p. 387.

trial only takes place after the repentant has been sentenced, this uncertainty often leads to Section 46b StGB not being applied.

Another major criticism was that Section 46b StGB is generally applicable and not, like the Kronzeugengesetz, limited to certain forms of crime. This means that Section 46b StGB in fact finds its main field of application in crimes of everyday life and precisely not in those for which it was actually intended (terrorism, organized crime). This assessment is also supported by *Christoph*'s investigation. Between 2009 and 2014, only 126 criminal proceedings were found in which Section 46b StGB was applied[110]. Of these, only 2% were attributed to terrorism and 15% - 25% to organized crime[111]. The remaining offences related to so-called "everyday crimes". It should be noted restrictively that the application of Section 46b StGB does not have to be reported to the German Federal Central Register for Criminal Offences (Bundeszentralregister, "BZRG"). Actual frequency of application can hence differ. In addition, a statement by the representative of the Office of the Attorney General of the Federal Republic of Germany in the Focus Group showed that the use of Section 46b StGB has increased significantly in recent years, particularly with regard to terrorism. According to the representative, the reason for this is the return of persons who had joined the Islamic State.

Altogether, both in the Focus Group and in *Christoph*'s study, the vast majority of practitioners were in favor of retaining Section 46b StGB, but not in its current form[112].

3.3. *Analysis of Section 129a para. 7 in conjunction with Section 129 para. 7 StGB*

Section 129a
Forming terrorist organizations

(1) Whosoever forms an organization whose aims or activities are directed at the commission of

1. murder under specific aggravating circumstances (section 211), murder (section 212) or genocide (section 6 of the Code of International Criminal Law) or a crime against humanity (section 7 of the Code of International Criminal Law) or a war crime (section 8, section 9, section 10, section 11 or section 12 of the Code of International Criminal Law); or

2. crimes against personal liberty under section 239a or section 239b,

or whosoever participates in such a group as a member shall be liable to imprisonment from one to ten years.

(2) The same penalty shall be incurred by any person who forms an organization whose aims or activities are directed at

1. causing serious physical or mental harm to another person, namely within the ambit of section 226,

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[110] *Christoph*, Der Kronzeuge im Strafgesetzbuch, 2019, p. 407.
[111] *Christoph*, Der Kronzeuge im Strafgesetzbuch, 2019, p. 413.
[112] *Christoph*, Der Kronzeuge im Strafgesetzbuch, 2019, p. 381 and 388.

2. committing offences under section 303b, section 305, section 305a or offences endangering the general public under sections 306 to 306c or section 307 (1) to (3), section 308(1) to (4), section 309 (1) to (5), section 313, section 314 or section 315 (1), (3) or (4), section 316b(1) or (3) or section 316c (1) to (3) or section 317 (1),

3. committing offences against the environment under section 330a (1) to (3),

4. committing offences under the following provisions of the Weapons of War (Control) Act: section19 (1) to (3), section 20(1) or (2), section 20a(1) to (3), section 19 (2) No. 2 or (3) No. 2, section 20 (1) or (2), or section 20a (1) to (3), in each case also in conjunction with section 21, or under section 22a (1) to (3) or

5. committing offences under section 51 (1) to (3) of the Weapons Act;

or by any person who participates in such a group as a member, if one of the offences stipulated in Nos 1 to 5 is intended to seriously intimidate the population, to unlawfully coerce a public authority or an international organization through the use of force or the threat of the use of force, or to significantly impair or destroy the fundamental political, constitutional, economic or social structures of a state or an international organization, and which, given the nature or consequences of such offences, may seriously damage a state or an international organization.

(3) If the aims or activities of the group are directed at threatening the commission of one of the offences listed in subsection (1) or (2) above, the penalty shall be imprisonment from six months to five years.

(4) If the offender is one of the ringleaders or hintermen the penalty shall be imprisonment of not less than three years in cases under subsections (1) and (2) above, and imprisonment from one to ten years in cases under subsection (3) above.

(5) Whosoever supports a group as described in subsections (1), (2) or (3) above shall be liable to imprisonment from six months to ten years in cases under subsections (1) and (2), and to imprisonment not exceeding five years or a fine in cases under subsection (3). Whosoever recruits members or supporters for a group as described in subsection (1) or subsection (2) above shall be liable to imprisonment from six months to five years.

(…)

(7) Section 129 (7) shall apply mutatis mutandis.

Section 129
Forming criminal organizations

(…)

(7) The court may in its discretion mitigate the sentence (section 49 (2)) or order a discharge under these provisions if the offender

1. voluntarily and earnestly makes efforts to prevent the continued existence of the organization or the commission of an offence consistent with its aims; or

2. voluntarily discloses his knowledge to a government authority in time so that offences the planning of which he is aware of may be prevented;

if the offender succeeds in preventing the continued existence of the organization or if this is achieved without his efforts, he shall not incur criminal liability.

3.3.1. *Scope of Application*

First, the question arises as to the interrelation between Section 129a para. 7 StGB and Section 46b StGB. Section 129a para. 7 StGB applies only to the perpetrator of an offence according to Section 129a para. 1 - 5 StGB, whereas Section 46b StGB applies to all offenses that are punishable by a raised minimum sentence of imprisonment. However, this also includes offences under Section 129a StGB; therefore both provisions can be applicable in case of a repentant who cooperates with the investigating authorities. However, both rewarding provisions do not reward the same behavior and also regulate different rewarding measures, i.e. they are different both in their conditions and in their legal consequences. In principle, however, the rewarding measure pursuant to Section 129a para. 7 in conjunction with Section 129 para. 7 StGB takes precedence as the more specific provision (lex specialis) for offences under Section 129a StGB[113]. If their conditions are not fulfilled, Section 46b StGB can nevertheless be applied[114].

Since Section 129a para. 7 StGB only applies to one criminal provision and Section 46b StGB applies to this provision, the question arises as to the practical benefit of Section 129a StGB. Its practical significance is indeed small, especially since the introduction of Section 46b StGB. This was clearly confirmed within the context of the first Focus Group, in particular by the representative of the Office of the Attorney General of the Federal Republic of Germany, upon explicit enquiry. The same can be assumed between 1989 and 1999 when the Kronzeugengesetz was in force and took precedence. Although Section 129a StGB allows for more generous rewarding measures for the repentant in some cases, the applicability conditions are harder to accomplish, only likely to be attained by very few repentants. As a result, Section 46b StGB is generally also applied to offences under Section 129a StGB.

3.3.2. *Applicability conditions*

In technical terms, the rewarding measure under Section 129a StGB, unlike under the Kronzeugengesetz and Section 46b StGB (see above), is integrated into the provision that also regulates criminal conduct. This means that the first condition of applicability of Section 129a para. 7 StGB requires the offender to have performed an offence under Section 129a para. 1 - 5

[113] Schönke/Schröder/*Sternberg-Lieben/Schittenhelm*, § 129 pt. 18a.
[114] BT-Drs. 16/6268, p. 15.

StGB. As a consequence, Section 129a para. 7 StGB does not apply to any other offences, including those offences mentioned in Section 129a para. 1 and 2 StGB (e.g. Section 212 StGB "Murder").

In addition to the fact that the repentant must have committed an offence stipulated in Section 129a para. 1 - 5 StGB, Section 129 para. 7 StGB, to which Section 129a para. 7 StGB refers, sets out further requirements on what must be achieved through the offender's cooperation so that he can benefit from rewarding measures.

According to Section 129 para. 7 phrase 1 No. 1 alternative 1 StGB, the offender must voluntarily and earnestly make efforts to prevent the continued existence of the terrorist organization.

This requires an organization within the scope of Section 129a StGB to still exist at the time at which the repentant becomes active[115]. Moreover, his conduct is not linked to success. It is sufficient for the repentant to merely attempt to prevent the organization from continuing to exist[116]. However, this attempt must be voluntary, i.e. without external coercive effect, and serious[117]. An attempt is serious if the repentant assumes that the organization will continue to exist without his intervention and that his action will dissolve the organization and its continued existence[118].

Section 129 para. 7 phrase 1 No. 1 alternative 2 StGB is applicable if the repentant either merely tries to prevent the commission of an offence manifesting the aims of the terrorist organization, or if such a commission is actually prevented. It is not necessary that the act is prevented by causality through his efforts[119]. However, his behavior must again be voluntary and serious. The act that the repentant prevents must correspond to the goals of the terrorist organization and must therefore be one from the catalogue of Section 129a para. 1 or 2 StGB. It should be noted that in particular this part of the regulation, but also No. 1 alternative 1 is a rewarding measure, since it rewards the repentant for a behavior after his act. However, it is not absolutely necessary for him to cooperate with the authorities and pass on information. Rather, the person who merely prevents the commission of a criminal offence by the organization, e.g. by disarming a bomb (criminal offence under Section 308 StGB), can also benefit.

According to Section 129 para. 7 phrase 1 No. 2 StGB, the application of rewarding measures is also possible if the repentant discloses his knowledge about the organization or the crimes planned by it to an authority in good time so that such crimes can be prevented. It should be noted here that, unlike Section 46b StGB, the requirement of a connection between the offence of the repentant and the offence about which he provides information does not exist. Suitable authorities to disclose information to are, among others, the police and other criminal prosecution authorities[120]. The

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115 Lackner/Kühl/*Heger* StGB, § 129 pt. 12.
116 MüKo-StGB/*Schäfer/Anstötz*, § 129 pt. 161.
117 BeckOK-StGB/*Heintschel-Heinegg*, § 129 pt. 28.
118 BGH NStZ-RR 2006, p. 232 (233).
119 MüKo-StGB/*Schäfer/Anstötz*, § 129 pt. 162.
120 MüKo-StGB/*Schäfer/Anstötz*, § 129 pt. 164.

repentant's efforts only have to be directed at preventing a single planned offence, even if the organization as such still exists. He must reveal to the authorities all his knowledge concerning the planned offence and thus make it possible to prevent it[121]. As a consequence of the wording of the provision ("can be prevented"), it is not necessary that the planned offence is actually averted. It is sufficient that the repentant informs the authorities in a timely and comprehensive manner[122].

According to Section 129 para- 7 phrase 2 StGB, the offender may also benefit to a greater extent (see below 3.3.3: "Types of rewarding measures (…)") if he prevents the continuation of the association or, if this success is achieved without his involvement, he has voluntarily and seriously attempted to do so. The decisive factor is therefore the termination of the organization's activities, not the causality of the repentant's actions in this respect[123].

3.3.3. *Types of rewarding measures under Section 129a para. 7 StGB in conjunction with Section 129 para. 7 StGB*

3.3.3.1. *Mitigation of penalty*

According to Section 129 para. 7 StGB, the court has full discretion to mitigate the penalty according to Section 49 para. 2 StGB, or fully discharge the penalty if the repentant has behaved according to phrase 1 No. 1 or 2. If the penalty under Section 49 para. 2 StGB is mitigated, the court may reduce the penalty up to the legal minimum of one month (Section 38 para. 2 StGB) or replace imprisonment by imposing a fine. Here, again, the court is not obliged to make use of its mitigation option.

> Section 49
> Special mitigating circumstances established by law
>
> (…)
>
> (2) If the court may in its discretion mitigate the sentence pursuant to a law which refers to this provision, it may reduce the sentence to the statutory minimum or impose a fine instead of imprisonment.

3.3.3.2. *Discharge of penalty*

However, if the repentant, according to Section 129 para. 7 phrase 2 StGB, succeeds in preventing the continued existence of the organization or if this is achieved without his efforts, the law stipulates compulsorily, i.e. without alternative option for the court, that the repentant is not punished.

Procedural point of time

In contrast to Section 46b para. 3 StGB, Sections 129 and 129a StGB do not stipulate up to which procedural point the offender must become ac-

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[121] MüKo-StGB/*Schäfer/Anstötz*, § 129 pt. 165.
[122] MüKo-StGB/*Schäfer/Anstötz*, § 129 pt. 166.
[123] MüKo-StGB/*Schäfer/Anstötz*, § 129 pt. 167.

tive in order to benefit from the rewarding measures. However, since the rewarding measures must be pronounced by a court in the verdict, the repentant must in principle have fulfilled the preconditions for an application by this point in time. Due to the nature and extent of what the repentant must do for applicability, however, in practice the repentant will regularly be forced to fulfil the preconditions for application already at the pre-sentencing stage. Theoretically, however, it would also be conceivable that the repentant would only fulfil the preconditions for application after his conviction, i.e. at the post-sentencing stage, and that the proceedings pursuant to Section 359 No. 5 StPO would therefore have to be reopened in his benefit.

> Section 359
> Reopening for the Convicted Person's Benefit
>
> Reopening of the proceedings concluded by a final judgment shall be admissible for the benefit of the convicted person
>
> (…)
>
> 5. if new facts or evidence were produced, which, independently or in connection with the evidence previously taken, tend to support the defendant's acquittal or, upon application of a less severe penal norm, a lesser sentence or a fundamentally different decision on a measure of reform and prevention;

Regarding the indirect legal consequences as a result of the existence of Section 129a para. 7 StGB in conjunction with Section 129 para. 7 StGB, the same applies as in relation to 46b StGB (see above: 3.2.2.2. "Indirect legal consequences as a result of the existence of Section 46b StGB").

3.3.4. *Counterpart of rewarding measures: The repentant's obligations*

As the repentant's obligations are also prerequisite for the application of the rewarding measures, see: 3.3.2. "Applicability conditions". This applies both to direct application and to indirect legal consequences.

3.3.5. *Revocation of rewarding measures*

With regard to the revocation of rewarding measures, there is only very little difference to what applies to Section 46b StGB, so essentially, reference can be made to: 3.2.4. "Revocation of rewarding measures".

However, there is a small difference concerning direct application. If the alleged misleads the authorities about the commission of an offence or falsely accuses another person of a criminal offence, he is not punishable according to Section 145d para. 3 StGB (3 months up to 5 years imprisonment) or Section 164 para. 3 StGB (6 months up to 10 years imprisonment), but only according to Section 145d para. 1 or 2 StGB (up to 3 years imprisonment or fine) or Section 164 Sections 1 or 2 StGB (up to 5 years imprisonment or fine). This is a consequence of the fact that paragraphs 3 of Sections 164 and 145d StGB refer only to 46b StGB.

3.3.6. *Conditions for the application of the measures (procedural aspects)*

See above: 3.2.2.1. "Direct application of Section 46b StGB".

3.3.7. *Conditions for the use of the declarations obtained (probative value of declarations)*

See above: 3.2.6. "Conditions for the use of the declarations obtained (probative value of declarations)". With regard to the probative value of the information obtained, there are no empirical studies comparable to the studies investigating Section 46b StGB.

3.3.8. *Measures for the protection of the repentant*

See above: 3.2.7. "Measures for the protection of the repentant"

3.3.9. *Evaluation and control of the (rewarding) measure*

See above: 3.2.8.1. "Evaluation by authorities"

3.4. *Analysis of Section 89c para. 7 StGB*

Section 89c StGB criminalizes financing of terrorism. Anyone who collects, receives or makes available assets with the knowledge or intent that they be used by another person for the commission of an offence listed in Section 89c para. phrase 1 No. 1 - 8 StGB shall be punished with a term of imprisonment of 6 months to 10 years. These are crimes that are typical for terrorist activities (homicides, arson, explosives, etc.)[124]. Furthermore, phrase 2 requires that the act be intended to intimidate the population in a significant manner, to unlawfully coerce an authority or an international organization by force or threat of force, or to eliminate or significantly impair the basic political, constitutional, economic or social structures of a state or an international organization, and to cause substantial damage to a state or an international organization by the nature of its commission or its effects. According to paragraph 2, likewise punished shall be any person who collects, receives or makes available property in a manner described in phrase 2 of paragraph 1, in order to himself commit any of the offences referred to in the first sentence of paragraph 1.

The rewarding measure can be found in paragraph 7:

"The court may, at its discretion, mitigate the punishment (Section 49 paragraph 2) or waive punishment under this provision if the offender voluntarily abandons further preparation of the offence and averts or substantially mitigates the danger caused and identified by him that others will further prepare or perform the offence, or if he voluntarily prevents completion of the offence. If, without the involvement of the offender, the designated danger is averted or substantially reduced or the completion of the offence is prevented, his voluntary and serious efforts to achieve this goal shall suffice".

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[124] BeckOK-StGB/*Heintschel-Heinegg*, § 89c pt. 2.

The wording closely resembles the wording of Section 129a StGB. In the absence of greater practical relevance, no further explanations shall therefore be given at this point since essentially the aforesaid regarding Section 129a StGB can be applied mutatis mutandis.

4. *Current relevant case law (where existing)*

Within the last few years, two terrorist developments in Germany have emerged in particular: Right-wing extremist terrorism and Islamist terrorism.

4.1. *Right-wing extremist terrorism*

For a long time, the phenomenon of terrorism by right-wing radical groups was widely underestimated in Germany. According to the Amadeu Foundation which is recognized by the Federal Agency for Civic Education, 198 people have died as a result of right-wing violence since 1990[125], most recently, on 9th October 2019, when a single perpetrator, heavily armed, attacked a synagogue in the city of Halle an der Saale and killed two people[126]. For the same period, according to the Amadeu Foundation, the Federal Government lists only 85 homicides[127] The extent to which the aforementioned cases actually involve "terrorism" in the sense of an organization acting in the background and not only spontaneous acts of supporters of right-wing ideologies cannot be conclusively determined. This is due in particular to the fact that the right-wing scene, as was only discovered in the last few years, appears to systematically and successfully network undergroun[128]. More precise findings about this do not yet exist. Particularly in recent years there have been cases in which individual perpetrators have committed killings motivated by right-wing motives without any warning in advance, and it is only afterwards that it becomes apparent that the individuals had previously radicalized and connected themselves to right-wing underground organizations[129].

Public attention to this tendency was first aroused on a large scale in 2011 when the existence of the so-called National Socialist Underground (NSU) was discovered[130]. Only three people belonged to the core of the movement. The discussion about the number of supporters and confidants, on the other hand, is controversial, which illustrates the aforementioned uncertainty about the connections in the right-wing scene. It is assumed that there were up to 200 people involved[131]. The three main perpetrators had been acting underground since 1998 and had committed 10 murders (in-

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125 *https://www.amadeu-antonio-stiftung.de/todesopfer-rechter-gewalt/.*

126 *https://www.sueddeutsche.de/politik/halle-anschlag-chronik-1.4634951.*

127 *https://www.amadeu-antonio-stiftung.de/rassismus/todesopfer-rechter-gewalt/.*

128 Cf. *https://www.tagesschau.de/investigativ/ndr/luebcke-rechtsterrorismus-101.html.*

129 E.g. *https://www.tagesschau.de/inland/rechter-terror-luebcke-103.html*; *https://www.zeit.de/thema/halle-an-der-saale.*

130 Report of the Federal Government, p. 3 et seq., *https://www.bmjv.de/SharedDocs/Archiv/Downloads/ Bericht_NSU_Untersuchungsausschuss.pdf?__blob=publicationFile&v=4.*

131 *https://www.politische-bildung-brandenburg.de/lexikon/nationalsozialistischer-untergrund-nsu.*

cluding 9 migrants and one policewoman), two bomb attacks and 15 robberies between 1999 and 2011[132]. The activity was uncovered by the extended suicide of two of the three perpetrators on 4th November 2011 who feared being seized by the police following a bank robbery[133]. On 8th November 2011, the third main perpetrator, Beate Zschäpe, turned herself in to the police.

On 11th July 2018, after more than five years of trial, The High Court of Munich found Zschäpe guilty, inter alia, of murder under specific aggravating circumstances in 9 cases, attempted murder under specific aggravating circumstances in 32 cases (by one and the same bomb attack), attempted murder under specific aggravating circumstances (another bomb attack), murder under specific aggravating circumstances and attempted murder under specific aggravating circumstances (of two police officers in Heilbronn), robbery, attempted murder under specific aggravating circumstances by an aggravated arson attack and membership of a terrorist organization (NSU). The court sentenced the accused to life imprisonment[134].

Four other persons were charged with Zschäpe: Andre E., Holger G., Ralf W. and Carsten S. While Ralf W. was sentenced to imprisonment of 10 years for aiding and abetting murder in 9 cases[135], the other three defendants received significantly lower sentences. Andre E. was sentenced to 2 years and 6 months imprisonment for supporting a terrorist organization[136]. Holger G. was sentenced to 3 years imprisonment for three cases of support of a terrorist organization[137]. Carsten S., who was adolescent at the time of the crime, was sentenced to 3 years for aiding and abetting murder under specific aggravating circumstances in 9 cases[138]. In particular, S. is often described as the "principal witness" of the trial, as he made extensive statements very early on, especially against Ralf W.[139]. However, since he was convicted under juvenile criminal law, Section 46b StGB was presumably not applied here since it is not yet clarified to what extent Section 46b StGB is applicable in this respect[140]. Holger G. also testified at an early stage. In particular, he provided information about Zschäpe's role amongst the three main perpetrators. This was of great importance as Zschäpe, due to the death of the other two main perpetrators, took the position that she had not been a main perpetrator, but merely an accomplice. Without G., it would have been significantly more difficult to prove her to the contrary[141]. G's goal was to benefit from Section 46b StGB. Whether this was actually applied or whether G's conduct was only taken into account in the sentencing has not

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[132] BT-Drs. 17/14600, p. 71 et seq.

[133] *http://www.bpb.de/politik/extremismus/rechtsextremismus/167684/der-nationalsozialistische-untergrund-nsu.*

[134] OLG München, press release 78 dated 11th July 2018.

[135] OLG München, press release 78 dated 11th July 2018.

[136] OLG München, press release 78 dated 11th July 2018.

[137] OLG München, press release 78 dated 11th July 2018.

[138] OLG München, press release 78 dated 11th July 2018.

[139] *https://www.br.de/nachricht/nsu-prozess/170119-tagebuch-gerichtsreporter-100.html.*

[140] *Christoph*, Der Kronzeuge im Strafgesetzbuch, 2019, p. 413.

[141] *https://www.spiegel.de/panorama/justiz/nsu-prozess-staatsanwalt-lobt-aussagen-von-carsten-s-und-holger-g-a-1073043.html.*

yet been clarified as the judgment is not yet available. According to reports, however, during the trial his "leniency witness status" was revoked and he was also released from the witness protection program.[142] Andre E. remained silent about the allegations and therefore did not benefit from rewarding measures.

4.2. *Islamist terrorism*

Islamist terrorism and Germany's criminal law response is of high relevance due to the return of supporters of the "Islamic State" in Syria to Germany because of its failure. According to the representative of the Attorney General's Office present at the Focus Group, the proceedings initiated against the IS returnees on account of their membership in a terrorist organization and related acts lead to a significant increase in the application of Section 46b StGB. There are currently no empirical studies on this subject and many proceedings have not yet been concluded. The proceedings against the presumed heads of the IS in Germany before the High Court of Celle[143], which are based in particular on statements by the leniency witness Anil O., are particularly prominent. Anil O. himself received a 2-year probation[144] and has been in the Witness Protection Program ever since. However, there are some doubts about his testimony[145]. Further insights can only be gained after the trial against the IS leadership has been concluded[146].

5. *Conformity of the current rewarding legislation to Art. 16 of Directive 541/2017/EU (where existing)*

> *Article 16*
> Mitigating circumstances
>
> Member States may take the necessary measures to ensure that the penalties referred to in Article 15 may be reduced if the offender:
>
> (*a*) renounces terrorist activity; and
>
> (*b*) provides the administrative or judicial authorities with information which they would not otherwise have been able to obtain, helping them to:
>
> (*i*) prevent or mitigate the effects of the offence;
>
> (*ii*) identify or bring to justice the other offenders;
>
> (*iii*) find evidence; or
>
> (*iv*) prevent further offences referred to in Articles 3 to 12 and 14.

[142] *https://www.neuepresse.de/Nachrichten/Niedersachsen/NSU-Prozess-Drei-Jahre-Haft-fuer-Holger-G.*

[143] *https://oberlandesgericht-celle.niedersachsen.de/startseite/aktuelles/presseinformationen/verfahren-gegen-ahmad-abdulaziz-abdullah-a-abu-walaa-ua-176237.html.*

[144] OLG Düsseldorf, judgement dated 15th May 2017, file number: III-5 StS 1/17.

[145] *https://www.haz.de/Nachrichten/Der-Norden/Uebersicht/Prozess-gegen-Abu-Walaa-Zweifel-am-Kronzeugen-Anil-O.*

[146] The judgement was issued after the completion of this paper on 24th February 2021. Despite certain doubts, the court based its decision, among other factors, on the statement of Anil O. The main defendant was sentenced to 10 years and 6 months custody.

When examining Art. 16, it becomes apparent that the wording and the application requirements are quite similar to those in Section 46b StGB. Together, both provisions permit rewarding measures if the repentant contributes to the success of an investigation or prevents criminal offences committed by third parties.

Beyond Section 46b StGB, and thus more along the lines of Section 129a para. 7 StGB, Art. 16 also permits rewarding measures if the offender prevents the effects of his own offence. Furthermore, rewarding measures can be applied if the repentant merely provides assistance in gathering evidence.

Art. 16 presupposes that the offender has received a penalty in accordance with Art. 15, which in turn presupposes the realization of a criminal offence in accordance with Art. 3 - 12 or 14. This differs from Section 46b StGB. Art. 16 applies specifically to terrorism, while Section 46b StGB applies to all criminal offences of the StGB that are punishable by an increased minimum penalty of imprisonment.

In particular, however, the two provisions differ in that Section 46b StGB does not require repentant conduct on the part of the offender in the sense of renunciation of the organization. Moreover, Art. 16 merely provides for a possibility of mitigation, while Section 46b StGB allows for a discharge of penalty. This raises the question of the mandatory effect of Art. 16, which has not yet been clarified and is to be investigated within the framework of WP2, with regard to the question of whether and to what extent a Member State, when introducing rewarding measures, must observe the provisions of Art. 16 and to what extent it may create more extensive measures than the rewarding measures outlined. It will also be necessary to clarify to what extent the stipulation of fewer requirements concerning the behavior of the repentant with regard to his renunciation of the terrorist organization comply with Art. 16.

CHAPTER 6

LUXEMBOURG

Silvia Allegrezza, Valentina Covolo, Dimitrios Kafteranis

1. *Historical background of rewarding legislation*

The criminal offences of terrorism and related activities have been introduced under Luxembourg law by the Law of 13 August 2003 on the repression of terrorism and its financing, which transposed the European legislation and the international conventions on the matter[1]. Beside the criminalisation of terrorist activities in Chapter III-1 of the Criminal Code, the Law of 2003 also set forth some rewarding measures, consisting in the exclusion and reduction of penalties for the authors of those crimes that decide to collaborate with the law enforcement authorities.

According to the explanations contained in the draft law, said rewarding measures should allow in practice, a more effective fight and prevention of terrorist acts. Furthermore, it is specified that the mechanisms for an automatic reduction or exoneration of penalty thereby established meets the conditions laid down in Article 6 of Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism. The introduction of such rewarding measures is motivated by having a stronger incentive effect than one left to the discretion of the judge. On the other hand, the mitigating and exonerating circumstances reflect one already existing in the Criminal Code in relation to organised crime offences.

[1] Loi du 12 août 2003 portant 1) répression du terrorisme et de son financement, 2) approbation de la Convention internationale pour la répression du financement du terrorisme, ouverte à la signature à New York en date du 10 janvier 2000, Mém. A n° 137.

2. *Current rewarding legislation*

2.1. *Applicability conditions*

Luxembourg law subjects the applicability of the rewarding measures in the field of terrorism to distinct conditions depending on the nature of the specific measure: while reduction of the penalty is more easily accessible, more requirements are to be met in order to benefit from an exoneration of the penalty.

In particular, the exonerating circumstance under Article 135-7, paragraph 1 of the Criminal Code is granted on the condition that the accused collaborates with the authorities before the attempt of committing a terrorist offence and before the initiation of the prosecution. Likewise, the exonerating circumstance set out in Article 135-8 of the Criminal Code is subject to the condition that the member of a terrorist group provides to the authorities the required information before an attempt to commit a terrorist act takes place and before the initiation of the prosecution.

By contrast, the attenuating circumstance established in Article 135-7, paragraph 2 of the Criminal Code is applicable upon the mere condition that the accused collaborates with the authorities by providing the necessary information even after the decision to prosecute.

2.2. *Types of rewarding measures*

2.2.1. *Rewarding measures that exclude or mitigate the penalty, initiated at the pre-sentencing stage*

In should first be noted that in Luxembourg a State Prosecutor enjoys discretion as to whether to prosecute a criminal offence[2]. In this perspective, the decision not to initiate criminal proceedings is based on written guidelines whereby the General State Prosecutor sets forth priorities in the crime policy, as well as on an individual assessment on a case-by-case basis, which might include the cooperative attitude of the suspect. As emphasised by the interviewed stakeholders, the principle of discretionary prosecution, also defined as opportunity principle (*opportunité des poursuites*) plays a crucial role in the daily practice and may ultimately constitute the first and among the commonest form of rewarding measures.

A second measure frequently used by the Luxembourg authorities to mitigate the penalty are the so-called *'décriminalisation'*[3] and *'décorrectionellisation'*[4]. Luxembourg law distinguishes among three categories of offences that depending on the severity of the penalty defined by law[5] fall within the jurisdiction of different courts: cases related to misdemeanors punished by a fine only (*'contraventions'*) fall within the jurisdiction of the *'tribunaux de police'*[6], the *'chambre correctionnelle'* of district court (*'tribunal*

[2] Art. 23 (1) Code of criminal procedure, hereinafter Ccp.
[3] Art. 132 Ccp.
[4] Art. 132-1 Ccp.
[5] Art. 7 ff. Criminal Code.
[6] Art. 137 ff. Ccp.

d'arrondissement') has jurisdiction to rule over criminal offences punished by an imprisonment not exceeding five years[7] and, lastly, the most serious crimes punishable by an imprisonment term of at least five years fall within the jurisdiction of the '*chambre criminelle*' of the competent district court[8].

However, at the end of the investigation, the State Prosecutor may request the court having jurisdiction to refer the case for trial to take into consideration mitigating circumstances[9] – including the fact that the accused collaborated with the judicial authorities – which will have the effect of decreasing the penalty provided by law[10] and, in some cases, requalify the offence in a less serious one. For instance, a '*crime*' punished by imprisonment for a term between 10 and 15 year may become a '*délit*' punished by an imprisonment not exceeding five years ('*décriminalisation*')[11]. Likewise, a '*délit*' punished by imprisonment may become a misdemeanor sanctioned by a fine only ('*décorrectionellisation*')[12]. In such hypothesis, the competent court will refer the case to the tribunal having jurisdiction over the less serious category of offences to which the requalified act belongs. The competent trial court has *ab initio* jurisdiction over the case. This implies that it cannot reject the mitigating circumstances validated by the court referring the case for trial nor can it impose a penalty higher than the maximum reduced after implementing such mitigating circumstance. The requalification of the offence into a less serious one is not possible, however, for crimes punished by an imprisonment term exceeding 15 years[13]. In that case, it is for the competent trial court to consider mitigating circumstances at the sentencing stage of the criminal proceedings[14].

2.2.2. *Rewarding measures that exclude or mitigate the penalty, initiated at the sentencing stage*

In Luxembourg, the rewarding measures provided by the legislation that exempt or mitigate the penalty for the terrorist offences set out in Chapter III-1 of the Criminal Code are only applicable during the criminal trial, in particular at the sentencing phase when the competent court determines the sanction to impose. These measures are established by the subsequent provisions:

– Art. 135-7 Criminal Code[15]

The person who, before any attempt to commit an offence under Articles 112-1, 135-1, 135-2, 135-5, 135-6, 135-9 and from 135-11 to 135-16 of the

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[7] Art. 179 Ccp.
[8] Art. 217 Ccp.
[9] Art. 132 and 132-1 Ccp.
[10] According to the rules provided under Art. 73 ff. Criminal Code.
[11] Art. 74 Criminal Code.
[12] Art. 78 Criminal Code.
[13] Pursuant Art. 74 Criminal Code, in that case the application of mitigating circumstance cannot transform a '*crime*' into a '*délit*'.
[14] See below.
[15] Art. 135-7 Criminal Code reads '*Est exempté de peines celui qui, avant toute tentative d'infractions aux articles 112-1, 135-1, 135-2, 135-5, 135-6, 135-9 et 135-11 à 135-16 et avant*

Criminal Code and before a decision to prosecute, reveals to the authority the existence of acts preparing the commission of offences under the same articles or the identity of the persons having committing said acts, is exempted from sanctions.

In the same cases, the sanction is reduced according to Article 52 Criminal Code and in the measure thereby provided, for the person who, after a decision to prosecute, reveals to the authorities the identity of the perpetrators that are still unknown.

– Art. 135-8 Criminal Code

The member of a terrorist group that, before any attempt to commit a terrorist act object of the group and before a decision to prosecute, reveals to the authorities the existence of the group and the names of its leaders or deputies is exempted from sanctions[16].

One can thereby distinguish between two exonerating circumstances, a general and a specific one, and one attenuating circumstance.

As to the exonerating circumstances (*excuses absolutoires*), in the first place, Article 135-7, paragraph 1 of the Criminal Code lays down an exonerating circumstance applicable to several offences related to terrorism. In particular it is awarded to the person who, before any attempt to commit an offence of attack to persons benefitting from international protection (Art. 112-1 Criminal Code), terrorism (Art. 135-1 et 135-2 Criminal Code), terrorist financing (Art. 135-5 et 135-6 Criminal Code), terrorist attack with explosives (Art. 135-9 Criminal Code) or any other offence related to terrorism defined from article 135-11 to 135-16 of the Criminal Code (such as incitation to terrorism, recruitment or training of terrorists), and before the prosecution, reveals to the authorities the existence of acts preparing the commission of offences under the same articles or the identity of the persons having committing said acts. The exemption from sanctions is thus granted to the person collaborating with justice where the following cumulative conditions are met:

– The repentant informs the authorities about the existence of acts preparing the commission of terrorist offences or the identity of the authors of those acts;

– The information is provided before a decision to prosecute has been taken;

– The information is provided before those acts have reached the level of attempt of a crime.

Secondly, Article 135-8 of the Criminal Code establishes an exonerating circumstance that is specific to the offence of participation in a terrorist

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toutes poursuites commencées, aura révélé à l'autorité l'existence d'actes destinés à préparer la commission d'infractions aux mêmes articles ou l'identité des personnes ayant posé ces actes.

Dans les mêmes cas, les peines de réclusion criminelle sont réduites dans la mesure déterminée par l'article 52 et d'après la graduation y prévue à l'égard de celui qui, après le commencement des poursuites, aura révélé à l'autorité l'identité des auteurs restés inconnus'.

[16] Art. 135-8 Criminal Code reads '*Est exempté de peines le coupable de participation à un groupe terroriste qui, avant toute tentative d'actes de terrorisme faisant l'objet du groupe et avant toutes poursuites commencées, aura révélé à l'autorité l'existence de ce groupe et les noms de ses commandants en chef ou en sous-ordre*'.

group. More precisely, it can benefit from such a measure only the member of terrorist group that, before any attempt to commit a terrorist act object of the group and before a decision to prosecute, informs the authorities of the existence of such group and the names of its leaders or deputies. This rewarding measure thus applies where the following cumulative conditions are met:

– The person collaborating with justice is the member of a criminal group;

– The repentant informs the authorities about the existence of the terrorist group and the names of its leaders or deputies;

– The information is provided before a decision to prosecute has been taken;

– The information is provided before any attempt on the part of the group to commit a terrorist offence that is the objective of the group.

As to the attenuating circumstance (*excuse atténuante*), it is laid down in Article 135-7, paragraph 2 of the Criminal Code. It is granted to the author of one of the terrorist offences listed in paragraph 1 of the same provision (those for which the exempting circumstance is also applicable) with the exception of the offence of participation in a terrorist group, who after being prosecuted, informs the authorities the identity of unknown accomplices. In such case, the attenuating circumstance entails a reduction of the applicable penalty to that immediately lower according to Article 52 of the Criminal Code. Pursuant to such provision, the immediately lower penalty is:

Imprisonment from twenty to thirty years, where the applicable penalty would be life imprisonment;

a) Imprisonment from fifteen to twenty years, where the applicable penalty would be imprisonment from twenty to thirty years;

b) Imprisonment from ten to fifteen years, where the applicable penalty would be imprisonment from fifteen to twenty years;

c) Imprisonment from five to ten years, where the applicable penalty would be imprisonment from ten to fifteen years;

d) Imprisonment of at least three months, where the applicable penalty would be imprisonment from five to ten years.

The above-mentioned measures apply without prejudice to general mitigating circumstances (*circonstances atténuantes*), which are not defined by law[17] but can be taken into consideration and applied by trail courts in individual cases when determining the sentence[18].

2.2.3. *Rewarding measures that exclude or mitigate the penalty, initiated at the post-sentencing stage*

As previously mentioned, Luxembourg law does not foresee any specific rewarding measure in the field of terrorism that is applicable at the

[17] D. Spielmann, *Droit pénal général luxembourgeois* (Bruylant 2002) at 454.
[18] Art. 79 Criminal Code.

post-sentencing stage. Nevertheless, the interviewed stakeholders noted that the fact that a person decides to collaborate with the judicial authorities after the conviction can be taken into consideration by the Prosecutor according to the general rules on the execution of the penalty[19], when assessing the behaviour of the person for the purpose of granting beneficial measures related to alternative modalities of execution of the penalty, such as for instance conditional release, early release and placement under electronic surveillance.

2.3. *Counterpart of rewarding measures: the obligations of the repentant*

It should be preliminarily observed that with relation to the general measures described above which are not specific for terrorist offences, such as the principle of opportunity, the decriminalisation and the alternative measures for the execution of the penalty, the law does not regulate the corresponding obligations for the repentant. This can be easily explained because collaborating with the authorities is not a specific requirement to obtain such measure, but only one of the possible elements taken into account. Therefore, this section will focus only on the specific rewarding measures for terrorist offences under Article 135-7 and 8 of the Criminal Code.

In order to benefit from the exemption of sanctions under Article 135-7, first paragraph of the Criminal Code, the author of the offence has the duty to provide to the authorities information either on the existence of acts preparing the commission of the offences related to terrorism listed in the said provision, or on the identity of the authors of those acts.

To the contrary, the attenuating circumstance set out in Article 135-7, paragraph 2 of the Criminal Code is granted upon the condition that the author has revealed to the authorities the identity of the authors of the terrorist offences that are still unknown.

Finally, with regard to the exempting circumstance under Article 135-8 of the Criminal Code, the member of a criminal group is required to inform the authorities the existence of the group and, at the same time, the names of its leaders or deputies.

2.4. *Revocation of rewarding measures*

The exempting and attenuating circumstances foreseen in the Luxembourg Criminal Code in relation to terrorist offences are applied by the court at the stage of the determination of the applicable penalty, in other words once the judge has already established the criminal liability for a terrorist offence of the defendant collaborating with the authorities. Consequently, the law does not provide the possibility to revoke such measures of exemption or reduction of the penalty, exception made for the case where those measures have been granted in violation of the law.

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[19] Art. 673 ff. Ccp.

2.5. *Conditions for the application of the measures (procedural aspects)*

The law does not regulate the procedural aspects concerning the application of the rewarding measures described.

2.6. *Conditions for the use of the declarations obtained (probative value of declarations)*

The probative value of the information provided by the offender who cooperates with the enforcement authorities varies depending on his status in the criminal proceedings. The interviewed stakeholders first noted that a person involved in criminal activities who is not subject to criminal prosecution may play the role of an informant (*'indic'*). This practice is particularly used in cases of drug trafficking and organised crime. Under this scenario, the information provided has a mere informative value insofar as it is only used by the police authorities to further investigate the case. Hence, the informant does not become a party to the criminal proceedings, nor is his identity recorded and disclosed in the case file.

This first scenario is to be distinguished from the situation in which the offender who cooperates with the law enforcement authorities holds the status of witness or defendant in criminal proceedings. In the lack of specific provisions, general rules governing the admissibility and assessment of evidence apply to the declarations obtained. Under Luxembourg law, it is worth reminding that evidentiary rules are based on three fundamental principles. On the one hand, criminal offences published by imprisonment can be established by any means of evidence (*'liberté de la preuve'*)[20]. Hence, the competent trial court assesses freely the evidentiary value of statements made by a person collaborating with justice and benefitting from rewarding measures[21]. On the other hand, however, restrictions on the admissibility of evidence may arise where the statements are collected in violation of the procedural requirements prescribed by law (*'légalité de la preuve'*) or by means of unfair tactics or subterfuges (*'loyauté de la preuve'*)[22]. It thus follow that Luxembourg courts excludes illegally gathered evidence from being used at trial only if the breach of procedural requirements is sanctioned by nullities (*'nullité'*), the violation undermines the reliability of evidence or where the use of evidence would entail a breach of the fundamental right to a fair trial[23].

Against this background, two aspects are worthy of mention. Firstly, even though a trial court may take into consideration incriminating statements made by a co-defendant, such statements cannot form the sole and decisive evidence of conviction[24] Secondly, Luxembourg law does not allow

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[20] V. Bolard, *Preuve et vérité*, Annales de Droit luxembourgeois, 2013, vol. 23, 39-97, at 75 ff.

[21] G. Vogel, *Lexique de procédure pénale* (Larcier, 2009), at 346.

[22] For a more detailed anaylsis of the admissibility of illegally collected evidence, see V. Covolo, *Luxembourg*, in S. Allegrezza, V. Covolo (ed.), *Effective defence rights in criminal proceedings. A European and Comparative Study on Judicial Remedies* (Kluwer/Cedam, 2018), at 365 ff.

[23] CSJ cass. 22 November 2007, No. 2474.

[24] See for instance, CSJ corr. 13 November 2013, No. 556/13 X; CSJ corr. 14 March 2018 No. 112/17 V; CSJ crim. 31 January 2017, No. 5/17.

anonymous testimony. In 2003, the government presented a bill of law which intended to introduce procedural rules governing totally and/or partially anonymous witnesses that were largely inspired by the existing provisions under Belgian law[25]. The initiative was however abandoned owing that the reform was irreconcilable with the right to defence and fair trial.

2.7. *Measures for the protection of the repentant*

Luxembourg law does not provide for any specific measure for the protection of the repentant, neither does it provide for other measures of protection of witnesses in general. As regards the participation of the repentant at the criminal proceedings, it has been mentioned above that anonymous witness is not allowed in Luxembourg. Although the use of videoconference at the hearing at trial is still rare, it is worth mentioning that oral testimony via videoconference constitutes an admissible evidence under Luxembourg law. Regarding witness and informants protection programs, the interviewed stakeholders suggested that the cooperation of foreign authorities might prove particularly valuable

2.8. *Evaluation and control of the measure*

Luxembourg law does not provide for any mechanism of evaluation and control of the rewarding measure applied.

3. *Current relevant case law (where existing)*

To date, there is no case-law in Luxembourg regarding terrorist offences, nor concerning rewarding measures that apply in this field.

4. *Conformity of the current rewarding legislation to art. 16 of Directive 541/2017/EU (where existing)*

The national legislation on rewarding measures for terrorist offences described above appears to be in line with Article 16 of Directive 541/2017/EU. In particular, Article 135-7, second paragraph, allows to reduce the penalty applicable to terrorist offences where the offender provides the judicial authorities with information that they did not already have and which is able to help them to identify and bring to justice the other offenders, as well as prevent further offences, as required by the Directive. Even though Luxembourg law does not expicitly require that the offender also renounces to terrorist activities, this does not affect the conclusion of conformity with Article 16 of the Directive, since such provision lays down a simple option and not a veritable duty for the Member States.

[25] Projet de loi n° 5156 renforçant le droit des victimes d'infractions pénales et améliorant la protection des témoins, 9.10.2003, Doc. No. 5156/00A.

CHAPTER 7

SPAIN[1]

MANUEL CANCIO MELIÁ, SABELA OUBIÑA BARBOLLA

1. *Historical background of rewarding legislation*

1.1. *Socio-political reasons: overview of the legislative policy discussion*

According to the debate taking place within the relevant literature, there are two main reasons behind the introduction of rewards in counterterrorism legislation. As we shall see, these reasons are different in nature and entity.

At first, it may be asserted that the reasons behind the implementation of rewarding measures are to be found primarily in pragmatic or utilitarian criminal policy considerations. These measures may facilitate investigations and contribute to the dismantling of terrorist organizations by undermining a supposedly strong internal cohesion. This utilitarian ground would be a common denominator of other rewarding provisions, such as the classical

[1] Manuel Cancio Meliá (Full Professor Criminal Law); Sabela Oubiña Barbolla (Associate Professor Procedural Law: The authors wish to thank all professors and researchers for attending the Seminar on *Terrorism and Rewarding measures: criminal and substantive aspects*, organized by Manuel Cancio Meliá and Sabela Oubiña Barbolla as part of the FIGHTER project that took place on the 24th of October 2019 at the Law Department of the Autonomous University of Madrid and for sharing their thoughts; special thanks to the experts invited to the Seminar and to the rapporteurs Marta Pantaleón Díaz and Ángela Fernández Rodríguez for their useful work.

mitigating circumstance[2] of confession[3], redress[4] and regret or other special provisions applicable to felonies such as drug trafficking[5], bribery[6], rebellion and sedition[7].

Nevertheless, along with this dominant socio-political explanation, there are voices that contend the use of the notion[8] and the concept of "rewarding" measures. According to this position, by carrying out the conducts triggering the application of the different measures, the general and special prevention fundamentals that justify the handing down and execution of the punishment would be undermined[9]. Indeed, especially with regard to terrorism, reasons related to the ideological-expressive component inherent to this phenomenon should not be overlooked; rewarding the terrorist that abandons the organization represents a blow to the set of values, them being political or religious in nature, to which terrorism of any kind resorts to in other to justify its acts; in this sense, the dropping out of members and their cooperation with authorities discredits, from within their own ranks, those alleged values and the acts perpetrated in their name. More specifically, according to the most relevant literature, it can be asserted that terrorism offences[10] include elements of danger and of expression among their definitional elements: they amount to serious crimes against individual legal rights that are manipulated to achieve political goals outside a constitutional regime. Regarding the particularly dangerous dimension, the constitutive elements of a terrorist act are different from those qualifying other offences because its *extra* harmfulness, strictly linked to its terrorist character, refers to the future in a double sense: on one side, the existence of an organization, of a dimension of continuity beyond the single individuals, looks to the fu-

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[2] An introductory explanation of mitigating circumstances in the Spanish Criminal Code can be found in L. Pozuelo Pérez (R. Alcácer Guirao; L. Martínez Garay), "Circunstancias atenuantes", *Memento Práctico Francis Levebvre Penal 2019* (F. Molina Fernández, coord.), Madrid, pp. 491-539.

[3] Art. 21.4º of Crim. Code in force.

[4] Art. 21.5º of Crim. Code in force.

[5] Art. 376 of Crim. Code in force.

[6] Art. 426 of Crim. Code in force.

[7] Arts. 480 and 549 of Crim. Code in force.

[8] During the discussions taking place within the first panel "State of art in Spain" of the Seminar on *Terrorism and Rewarding measures: criminal and substantive aspects*, this issue was raised precisely by two criminal law professors. According to J. Nuñez Fernández, the notion "rewarding" may lead to exceptionality and scepticism, while it should actually be considered a common case where the penalty shall be reduced in accordance with its own objectives. Something similar occurs with the notion of repentance because it is not requested for the purpose of penalty mitigation but appears only at penitentiary level, where renouncing to the objectives is required; he suggests that these dubious labels contribute, in practice, to their poor performance. In this line, L. Pozuelo Pérez (Associate Professor of Criminal Law at Autonomous University of Madrid, participant at the discussion seminar), highlighted that talking about cooperation with justice is more adequate than talking about repentance. Furthermore, criminal law cannot request repentance from the accused; in her opinion, the mistake lies in the fact that what is often requested from the accused is a *mea culpa* and this entails impossible procedural issues.

[9] See, for all, J. Núñez Fernández, *Sobre punibilidad, terrorismo, víctimas y pena*, 2017.

[10] See only M. Cancio Meliá, "El concepto jurídico-penal de terrorismo entre la negación y la resignación", in A. Alonso Rimo, A. Fernández Hernández, and M.L. Cuerda Arnau (eds.), *Terrorismo, sistema penal y derechos fundamentales*, editorial Tirant lo Blanch, València, 2018, p. 95, for further references.

ture by guaranteeing the continuation of the joint terrorist project. On the other side, the political dimension of the goals pursued by the organization confer special intensity to its continuity (while the underlying conflict is alive). Hence, the special risk dimension arising from the existence and continuity of an organization disappears in respect of a subject who has abandoned the joint terrorist project if there is a definitive cessation of violation on his behalf given that he would no longer share the motives behind past actions[11]. Furthermore, the aim of defying the State and ultimately subverting the constitutional regime disappears the minute the subject abandons the terrorist strategy[12]. This does not necessarily imply a reduction of the subject's dangerousness – an event that may arise with regard to the perpetrator of any crime and that shall not justify limiting the length or the enforcement of his punishment. What is relevant here is that the future-oriented approach that defines the entire legislative treatment of terrorism, both in terms of the risk arising from an armed organization and in terms of a violent attack to the basis of the constitutional legal order, disappears in respect of the individual that drops out from the terrorist organization. The individual stops speaking the violent language that is terrorism and the penalty imposed shall indeed reflect it.

What has just been said does not change in any way the fact that individual legal rights have been harmed, being the subject responsible for it. Moreover, from a retrospective criminal law perspective, the subject's abandonment of terrorist violence does not in any way erase the damage inflicted on the legal rights of individual victims as a consequence of the terrorist activity. As a result, an extraordinary weakening of the *collective* dimension of the offence of which the convicted terrorist is part, takes place. Conversely, this does not occur in respect of the individual subjective harm element.

Consequently, from this point of view, the *plus* in the offences against individual legal rights (that is, the difference between the penalties for common homicide and terrorist murder, etc.) vanishes in this new situation. In the same way, an important part of the harmfulness fades away in the offences that do not cause individual harm such as organizational crime (collaboration and membership), the various forms of preparatory acts that amount to an offence and the types of communication acts constituting crime. In all of these cases, there are sound reasons that can be found in the very essence of the crime of terrorism to hold that it is necessary to adopt rewarding, penitentiary or pardon measures that take into account the new so-

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[11] For a parallel reasoning on the effects that the dismantling of a terrorist organization may have on the sentences to be served by its former members see M. Cancio Meliá, "Concepto jurídico-penal de terrorismo y cese definitivo de la violencia", in A. Cuerda Riezu, *et al.* (dir.), *El Derecho Penal ante el fin de ETA*, Tecnos, Madrid, 2016, p. 46 onwards.

[12] These two elements appear differently in the case of State terrorism (on this concept and on the adequacy of qualifying the dirty war activities carried out by State organs as terrorism, in application of Spanish Law see M. Cancio Meliá, *Los delitos de terrorismo: estructura típica e injusto*, 2010, p. 187 onwards.): obviously, once the terrorist activity has ceased, the *organization* "State" subsists, together with its capacity to use its coercive power to carry out terrorist activities. This implies that there can be no definitive cease of violence (see the definition suggested here in n. 11 and on the problem with regard to Chile and its initially enacted amnesty law see Mañalich, *Terror, pena y amnistía*, 2010, *passim*, p. 155 onwards).

cial context that results from the definitive cease of terrorist violence on behalf of the subject that now rejects terrorist strategy.

This being said, the historical and sociological conditions needed for rewarding measures in the scope of terrorism to succeed in practice have never being met in Spain. The application of these rules, as will be later discussed, has been merely symbolic. In this context, two factors should be highlighted:

On one side, it must be pointed out that the fact that the Basque separatist organization ETA has been in the spotlight until recently has determined the relevant role that has been granted to its structural, political and social features.

On the other side, the progressive restriction of rewarding provisions – the details of this development will be later presented in the text of this report – has culminated in the current version of article 579-*bis* 3 Crim. Code, enacted in 1995, which seems to have been drafted with the aim of accumulating a series of requirements that make its application virtually impossible.

As any careful observer will notice, the events hereby presented are intimately connected to the existing environment in respect of the Spanish counter-terrorism policy, which gave rise, during ETA's last years of activity (and operational decline), to the most bitter confrontations between the two main political parties[13]. As a result, the coordination and unity among political forces reached during the most active years of ETA, has disappeared. Some victims' associations have taken part in these conflicts, coordinating their activities with a given political force and standing by certain political groups when demanding a "harder" treatment of individuals convicted of terrorism (this has obviously implied the exclusion of any measure that may mitigate or reduce the penalty of terrorist convicts). The factual and normative difficulties together with the problems encountered when attempting their practical application (that will be referred to later on in this questionnaire) have historically led to resorting to similar institutions, which are, strictly speaking, functional or quasi-functional equivalents of rewarding measures: the extended application of certain mitigating circumstances established in the Criminal Code, the granting of pardon or the progressive application of a normalized penitentiary regime (that is to say, the withdrawal of those regimes that, *de facto* o *de iure*, are more oppressive for those individuals convicted of terrorism), depending on the case.

As for the first factor, it is well known that terrorism has played a key role in Spain in the last decades. Despite the considerable number of terrorist groups that carried out their activities during the transition from General Franco's dictatorial regime to the current political system that came into force following the 1978 Constitution, until very recently, the leading role in this matter belonged to the terrorist organization Euskadi ta Askatasuna" (ETA, "Basque Country and Freedom") in Basque language. The terrorist attacks perpetrated by the Basque nationalist organization which claimed to be extreme left, between the death of the dictator until 2011, when they

[13] See M. Cancio Meliá, *Derecho Penal Contemporáneo* No. 55 (2016), p. 37 onwards.

abandoned unilaterally their activity, have caused more than 800 deaths (that is, without considering the attacks perpetrated during the dictatorship, among which, the murder of Prime Minister and representative of the "hard sector" of the national-catholic regime, Admiral Carrero Blanco, in 1973, may be highlighted. Among the various terrorist groups different from ETA that were active during the transition period, the "anti-fascist groups of the First of October", the Catalan nationalist group "Terra Lliure" ["Free Country" in Catalan] and the police dirty war organization "Anti-terrorist Groups of Liberation", that perpetrated attacks against ETA militants and people close to them, may be mentioned). The 2004 terrorist attacks in Madrid also evidenced the presence of Jihad terrorism in the country. It follows that, unlike other European countries, Spain *enjoys* a broad and longstanding experience in the practical application of terrorism offences (the cessation of ETA activity was not the result of a negotiation between the terrorist group and the State, and hence, the crimes committed before this moment continue to be prosecuted). Despite this massive application of the criminal system, as will be explained below, rewarding provisions have only been applied on a residual basis; so has been the case with its functional equivalents (pardon, application of mitigating circumstances or of non-rewarding penitentiary measures). In the case of ETA, the significant support it enjoyed within certain social groups and territories in the Basque country and Navarra[14] – it had managed to build within the so-called "abertzale left" (patriotic left, in Basque) a sort of complete social and political "environment" which supported the organization – did not certainly encourage abandonment and even less, did it favour whistleblowing.

More recently, some authors have pointed out that rewarding measures may not be effective in tackling the so-called Jihad terrorism, given that in this case we face a particularly intense belief-based terrorism, where the legal consequences of the authors' acts are irrelevant in terms of motivation. However, some scholars agree with recent decisions that suggest that in the coming years it will be necessary to follow the evolution of this phenomenon, as the possibility of de-radicalisation exists also among this group. Moreover, contrary to what occurred in the case of ETA[15], in Spain, these terrorists do not usually enjoy a well-structured context, with a group of population that is aligned with the terrorist organization's strategy (and, as various recent empirical studies show, the *online* environment cannot replace personal interactions and links). Perhaps, terrorists belonging to these groups are more likely than ETA members to resort to these measures once they have abandoned the terrorist project.

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[14] Together with the strength conferred to the group by its French sanctuary until the 1990 decade.

[15] See M.L. Cuerda Arnau, "El premio por el abandono de la organización y la colaboración con las autoridades como estrategia de lucha contra el terrorismo en momentos de crisis interna", *Estudios penales y criminológicos*, No. 25, 2004, pp. 3-68. See, specially among others, pp. 9-12, footnote 4. See further, J. Núñez Fernández, *Sobre punibilidad, terrorismo, víctimas y pena*, 2017. See also some empirical studies, F. Reinares, C. García-Calvo, *Estado Islámico en España*, Madrid, Real Instituto Elcano, available at: *http://www.realinstitutoelcano.org/publicaciones/libros/Informe-Estado-Islamico-Espana.pdf*.

The absence of the aforementioned historical and sociological circumstances, together with the past and present lack of legislation on these measures, explain the data hereby presented. Unlike in Italy, where these measures were extremely successful, in Spain, as will be later discussed (see section 2 of this chapter), in the scope of terrorism[16] rewarding measures have rarely been implemented in practice.

1.2. *Legislative evolution*

At the time of writing, October 2019, the Spanish legislator sets out a special rewarding measure for terrorism offences in art. 579-*bis* 3 Crim. Code:

"In the felonies foreseen in this Subchapter, the Judges and Courts of Law *may* impose, giving the reasons in the judgement, a *punishment lower by one or two degrees* to that stated by the Law for the felony concerned, when the subject *has voluntarily quit his criminal activities and has appeared before the authorities to confess the acts* in which he has participated and *has also collaborated actively* with the authorities *to prevent the felony taking place* or *effectively aids the obtaining of decisive evidence* to identify or capture the others who are responsible, or to prevent the action or development of the terrorist organizations or groups to which he has belonged, or with which he has collaborated" (emphasis added).

This provision, as will be explained hereunder, is not particularly ground-breaking. Since ancient times[17], the Spanish legal system, either in its Criminal Codes[18] or in other special laws[19], has foreseen similar mechanisms to those contemplated in the current art. 579-*bis* 3 Crim. Code, with the scope of avoiding and/or repressing serious crimes that are usually perpetrated in group and that amount to an attack against the State's internal security.

Leaving aside its most ancient antecedents, the legislation in force finds its closer and most recent precedent in the old Criminal Code of 1973 (hereinafter 1973 Crim. Code); specifically, in article 57-*bis* of the 1973 Crim. Code, which was modified at the end of 1984 by Organic Law No. 9/1984 of the 26th of December, against acts perpetrated by armed bands and terrorist elements[20] which developed art. 55.2 of the Constitution. Art. 6 of the cited

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[16] This is valid for all versions of rewarding measures contemplated in the various criminal codes. For an in-depth analysis of the legal evolution of these provisions see section 1.2 of the present questionnaire.

[17] M.L. Cuerda Arnau, invited speaker to the seminar carries out an exhaustive and brilliant analysis of those historical precedecents in her monograph, *Atenuación y remisión de la pena en los delitos de terrorismo*, Madrid, Ministerio de Justicia e Interior, 1995, see especially Chapter 1 on the historical evolution, pp. 27-125.

[18] 1822 Criminal Code (see, among others, arts. 292 y 305); 1848 Criminal Code (arts. 143, 182, 304); 1870 Criminal Code (art. 258); 1928 Criminal Code (art. 299); 1932 Criminal Code (art. 253); 1944 Criminal Code (art. 226); 1973 Criminal Code (arts. 57-*bis b*, 174-*bis c*) following Organic Law No. 4/1981).

[19] Freemasonry Act of 1940; on State security Act of 1941; Decree 123/1947, on banditry and terrorism; Decree 231/1960 de rebellion, banditry and terrorism; Organic Law No. 9/1984 (art. 6).

[20] BOE, January 3, 1985.

Organic Law No. 9/1984, entitled "Penalty mitigation in the case of abandonment with the purpose of social reintegration" reads as follows:

"1. For felonies under art. 1, the following will be considered qualifying circumstances for the individual graduation of the penalties:

a) The subject *has voluntarily quit* his criminal activities *and has appeared before the authorities to confess* the acts in which he has participated.

b) The subject's *abandonment of his criminal activities has prevented or reduced significantly a situation of danger, has avoided the harmful result or has effectively aided the obtaining of decisive evidence* to identify or capture the others who are responsible for the offense.

2. In the cases mentioned in the previous section, *the Judges and Courts of Law may impose a punishment lower by one or two degrees to that stated by the Law for the felony concerned* without considering the increase in the penalty established in art. 3. *Moreover, the punishment may be suspended when the subject's active collaboration has effectively aided to identify those responsible, to prevent the felony taking place or to prevent the action or development of the terrorist or rebel group, as long as he is not accused of actions that may have caused death or injuries listed in art. 420.1 and 2 Crim. Code.* Suspension of the punishment shall be on *condition he does not commit any of the felonies foreseen in this Law.*

3. *The member of a group or armed gang who is serving custodial sentence may be granted probation if any of the circumstances* foreseen in section 1.*b*) of this article concur, *as long as a third of the sentence has been served*" (emphasis added).

The first two sections of art. 6 of Organic Law No. 9/1984 were enshrined in art. 57-*bis b*) of the 1973 Crim. Code, which established that:

"1. For felonies under art. 57-*bis a*) of the 1973 Crim. Code, the following will be considered qualifying circumstances for the individual graduation of the penalties:

a) The subject has voluntarily quit his criminal activities and has appeared before the authorities to confess the acts in which he has participated.

b) The subject's abandonment of his criminal activities has prevented or reduced significantly a situation of danger, has prevented the harmful result or has effectively aided to obtain decisive evidence to identify or capture the others who are responsible for the offense.

2. In the cases mentioned in the previous paragraph, the Judges and Courts of Law may impose a punishment lower by one or two degrees to that stated by the Law for the felony concerned without considering the increase in the penalty established in the previous article. Moreover, the punishment may be suspended when the subject's active collaboration has effectively aided to identify those responsible, to prevent the felony taking place or to prevent the action or development of the armed gangs, terrorist or rebel groups, as long as he is not accused of actions that may have caused death or injuries listed in arts. 418, 419 and 420 of the Crim. Code. and 2 Crim. Code. Suspension of the punishment shall be on condition that he does not commit any of the felonies foreseen in art. 57-*bis a*) of the 1973 Crim. Code".

As a study carried out by CUERDA ARNAU[21] reveals, art. 57-*bis* of the 1973 Crim. Code was only applied twice; see the National High Court decisions (SSAN), Sentencias de la Audiencia Nacional, section 2, no 69/1985, of the 5th of November and section 3, no 58/1986, of the 30th of June. In terms of numbers, the application of this article is merely symbolic – the high number of cases for terrorism offences should be recalled –. Furthermore, in both cases, the provision was only enforced indirectly. While in the first case, from 1985, this measure was applied as a sort of analogous mitigating circumstance, in the second case, from 1986, this institution was indirectly used to request a partial pardon on the basis of analogy with the content of the relevant provision.

As we have already mentioned, the 1995 Criminal Code (hereinafter 1995 Crim. Code) also included a special rewarding measure in the scope of terrorism. The content of the provision has not been modified since 1995. However, formally, as a result of the various reforms of the 1995 Crim. Code, this article has been moved from one number to another.

Originally, in 1995, this provision was to be found in art. 579 of the Crim. Code, which at the time, had one single section. Following the enactment of Organic Law no 7/2000 of the 22nd of December, which modified the 1995 Crim. Code, and Organic Law No. 5/2000 of the 12th of January governing the criminal responsibility of minors, with regard to the crime of terrorism, the original content of art. 579 Crim. Code was moved to the third paragraph of that same provision (art. 579.3 Crim. Code). Almost a decade ago, with the adoption of Organic Law no 5/2010, it would become the fourth paragraph (see art. 579.4 Crim. Code). More recently, the entry into force of Organic Law no 2/2015 turned this provision into the already mentioned art. 579-*bis* 3 of the Crim. Code[22]. Variations in the location of the relevant article have not modified its material content, which remains unchanged since 1995.

This detailed chronological review allows us to infer that, for the purpose of this research project, the comparative analysis on rewarding measures should address art. 57-*bis b*) of the 1973 Crim. Code and current art. 579-*bis* of the 1995 Crim. Code (in its current wording).

The table below illustrates the significant differences between the 1973 Crim. Code and the 1995 Crim. Code (in force) in respect of rewarding measures with regard to terrorism. The few experts[23] on the topic have pointed

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[21] M.L. CUERDA ARNAU, "El premio por el abandono de la organización y la colaboración con las autoridades como estrategia de lucha contra el terrorismo en momentos de crisis interna", *supra*, p. 15.

[22] "In the felonies foreseen in this Subchapter, the Judges and Courts of Law *may* impose, giving the reasons in the judgement, *a punishment lower by one or two degrees* to that stated by the Law for the felony concerned, when the subject *has voluntarily quit his criminal activities and has appeared before the authorities to confess the acts* in which he has participated and has also *collaborated actively* with the authorities to *prevent the felony taking place* or *effectively aids the obtaining of decisive evidence* to identify or capture the others who are responsible, or to prevent the action or development of the terrorist organisations or groups to which he has belonged, or with which he has collaborated" (emphasis added).

[23] M.L. CUERDA ARNAU, "El premio por el abandono de la organización y la colaboración con las autoridades como estrategia de lucha contra el terrorismo en momentos de crisis interna", *supra*.

out that the former 1973 Crim. Code offered better and more certain benefits to the terrorist offender than the 1995 Crim. Code. While in 1973, the lowering of the penalty was compulsory[24] and suspension[25] was a possibility, the 1995 Crim. Code in force only provides for the possibility of lowering the penalty, excluding suspension regardless of how significant the collaboration has been.

Moreover, the behaviour requested by the 1973 legislator (during the dictatorship) seems to be more realistic, or less impossible to attain, than that demanded nowadays by the – so-called "democratic" – 1995 Crim. Code. The text drafted in 1973 included two types of relevant behaviours: 1) Voluntary quit with confession; or, 2) voluntary quit (without confession) in addition to: *i*) the prevention or mitigation of a situation of danger; *ii*) the prevention of the harmful result; *iii*) effectively aiding to obtain decisive evidence to identify or capture the others who are responsible. By requiring three cumulative actions from the accused, the 1995 Crim. Code in force establishes requirements that are very hard to meet: *i*) voluntary quit; *ii*) confession; and, *iii*) effectively aiding to obtain decisive evidence to identify or capture the others who are responsible or to prevent the action or development of the terrorist organisations or groups.

Art. 57-*bis b*) of the former 1973 Crim. Code	Art. 579-*bis* 3 of the 1995 Crim. Code
1. For felonies under art. 57-*bis a*) of the 1973 Crim. Code, the following will be considered qualifying circumstances for the individual graduation of the penalties: *a*) The subject has voluntarily quit his criminal activities and has appeared before the authorities to confess the acts in which he has participated. *b*) The subject's abandonment of his criminal activities has prevented or reduced significantly a situation of danger, has prevented the harmful result or has effectively aided to obtain decisive evidence to identify or capture the others who are responsible for the offense.	In the felonies foreseen in this Subchapter, the Judges and Courts of Law *may* impose, giving the reasons in the judgement, *a punishment lower by one or two degrees* to that stated by the Law for the felony concerned, when the subject *has voluntarily quit his criminal activities and has appeared before the authorities to confess the acts* in which he has participated and has also *collaborated actively* with the authorities to *prevent the felony taking place* or *effectively aids the obtaining of decisive evidence* to identify or capture the others who are responsible, or to prevent the action or development of the terrorist

[24] It should be noted that the second paragraph of art. 57-*bis b*) of the 1973 Crim. Code was formulated in mandatory and not optional terms: "the Tribunal shall *impose*".

[25] The second section of art. 57-*bis b*) of the 1973 Crim. Code recognized the Tribunal's power to suspend the penalty upon particularly significant collaboration from the subject.

2. In the cases mentioned in the previous paragraph, the Judges and Courts of Law may impose a punishment lower by one or two degrees to that stated by the Law for the felony concerned without considering the increase in the penalty established in the previous article. Moreover, the punishment may be suspended when the subject's active collaboration has effectively aided to identify those responsible, to prevent the felony taking place or to prevent the action or development of the armed gangs, terrorist or rebel groups, as long as he/she is not accused of actions that may have caused death or injuries listed in arts. 418, 419 and 420 of the Crim. Code. and 2 Crim. Code. Suspension of the punishment shall be on condition that he/she does not commit any of the felonies foreseen in art. 57-*bis a*) of the 1973 Crim. Code.	organisations or groups to which he has belonged, or with which he has collaborated.

Together with these differences, it is important to highlight that the criminal codes under analysis foresee variations in the objective scope of application of these rewarding measures. Under the 1973 Crim. Code, the range of felonies to which these measures could be applicable was wider. This was still the case following the entry into force of Organic Law No. 5/2010 that modified the 1995 Crim. Code. Thus, while under art. 57-*bis b*) of former 1973 Crim. Code, these measures could be applied to *members of armed gangs or related to terrorist or rebel activities*, the 1995 Crim. Code establishes a narrower scope. The 1995 legislator[26] limited its applicability to *felonies of terrorism* (see both its original wording from 1995, which entered into force on the 24th of May 1996 and its wording on the 23rd of December

[26] From the entry into force of the 1995 Crim. Code until the 23rd of December 2010, the cited mitigating circumstance was only applicable to *felonies of terrorism*, under that specific section (art. 579). The relevant provision began by asserting that "*For felonies foreseen in this section*, the Judges and Courts of Law may impose, giving the reasons in the judgement, a punishment lower by one or two degrees (…)". As from the 24th of December 2010, date in which the Organic Law No. 5/2010 which modified the 1995 Crim. Code entered into force, the objective scope of the cited measures has been widened to include all the felonies comprehended in Chapter VII of Title XXII of Book II of the Crim. Code, entitled *On terrorist organisations and groups and felonies of terrorism.*

2010); this objective scope was widened almost a decade ago following the enactment of Organic Law No. 5/2010 of the 23rd of December to include *all* of the felonies under Chapter VII of Title XXII of Book II entitled *On terrorist organisations and groups and on felonies of terrorism.*

1.3. *Case-law evolution*

Between 1981 and 2019, special rewarding measures regarding terrorism have been applied in no more than ten cases. This fact reveals, on one side, the failure of these rewarding mechanisms in Spain, conversely to what has happened in Italy, and on the other, the Tribunals' reticence towards the application of exceptional measures.

As will be seen in the section below[27], the Spanish judiciary (or the Government, in the cases of pardon) has mainly resorted to alternative mechanisms either through the application of general (ordinary or very qualified) mitigating circumstances or through the granting of pardon. In addition, the previous experience of the Law No. 46/1977 of Amnesty[28], should be taken into account as it represents a key moment of the transition towards a new constitutional order.

In any case, it seems that in practice Spain has resorted to the *ad hoc* application of general mitigating circumstances as their functional equivalent. As will be seen below, their incidence has nevertheless been quite limited. As suggested before, this limited application may be linked to the political situation in Spain in respect of terrorism as from 2000, which was characterized by an escalating tension between political forces (despite the fact that ETA's most deadly years were prior to the 2000 decade).

2. *Current rewarding provisions*

The Spanish Crim. Code in force foresees a series of general mitigating circumstances in its article 21, as well as a series of offence-specific mitigating circumstances. The most relevant content of both types of circumstances will be presented hereunder; to answer the emerging questions, a general overview of the Spanish legal system will be presented only to examine in a more detailed way, when appropriate, those topics of interest for the purpose of this project: terrorism and rewarding measures. Hereinafter, reference will be made to an approximate and material concept of "rewarding measures", examining other legal institutions that may fulfil, though incompletely, the same function.

The Spanish legislator establishes the following general mitigating circumstances: 1) The causes stated in the preceding Chapter (see art. 20 Crim.

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[27] See section 3. Relevant current case-law for a list of decisions in which (former) art. 57-*bis b*) of the 1973 Crim. Code or art. 579 of 1995 Crim. Code have been applied; see also the list of pardons granted between 1996-2019 in section 2.2.3. Rewarding measures that exclude or mitigate penalty, *initiated at a post-sentence stage*.

[28] BOE, October 17, 1977.

Code), when not all the necessary requisites to exclude accountability in the respective cases concur; 2) The convict acting due to his serious addiction to alcoholic beverages, toxic and narcotic drugs, psychotropic substances or others that cause similar effects; 3) The convict acting due to causes or stimuli so overpowering that they produced fury, obstinacy or another similar state of mind; 4) The convict having proceeded to confess his crime to the authorities before having knowledge of the judicial proceedings brought against him; 5) The convict having compensated the victim for the damages caused or having lessened the effects thereof, at some phase of the procedure and prior to the trial taking place; 6) Extraordinary or undue drawing out of the formalities of the proceedings, as long as this is not due to the convict, such prolongation being disproportionate to the complexity of the cause; 7) Any other circumstance of a similar importance to the aforesaid.

Nevertheless, as previously stated, other offence-specific rewarding measures have been scattered within the Crim. Code in force; see, for instance, drug trafficking[29] (art. 376 Crim. Code); bribery (art. 426 Crim. Code[30]); rebellion[31] and sedition[32] (arts. 480 and 549 Crim. Code, respectively); and, as we have examined in the previous section[33], terrorism (art. 579-*bis* 3 Crim. Code[34]). These offence-specific rewarding measures are quite heterogeneous in terms of their content and effects.

With regard to their effects, in respect of some felonies, such as terrorism or drug-trafficking, the law only foresees the possibility of lowering the punishment by one or two degrees; the Spanish legislator foresees instead the suspension of the penalty before certain behaviours in the cases of

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[29] Art. 376 Crim. Code: In the cases foreseen in articles 361 to 372, the Judges or Courts of Law, giving the reasons in their judgement, *may impose a lower punishment by one or two degrees* to that stated by the law for the offence concerned, as long as the subject *has voluntarily abandoned his criminal activities and has actively collaborated with the authorities or their agents either to prevent the offence from taking place, or to obtain decisive proof for identification of capture of others who are responsible or to prevent actions or the furtherance of the organisations or assemblies to which they have belonged or with which they may have collaborated.*

Likewise, in the cases foreseen in articles 368 to 372, the Judges or Courts of Law *may impose the punishment lower by one or two degrees upon the convict who, being addicted to drugs at the moment of committing the acts, sufficiently accredits that he has successfully completed detoxification treatment, as long as the quantity of toxic drugs, narcotics or psychotropic substances was not of notorious importance or extreme seriousness.*

[30] Art. 426: Should a *natural person* who has *coincidentally obtained a handout or other remuneration* made by an authority or public officer *report the fact to the authority whose duty is of proceeding to investigate the matter*, before proceedings commence, *as long as no more than two months have elapsed from the date of the events*, he shall be *exempt of punishment for the felony of corruption*.

[31] Art. 480: 1. Whoever, *being involved in an offence of rebellion, discloses it in time to be able to avoid its consequences, shall be exempt of the punishment for it*. 2. *Those who are merely instrumental, who lay down their weapons before having used them, submitting to the lawful authorities, shall be subject to the lower degree sentence of imprisonment*. The same punishment shall be imposed if the rebels *disperse or submit to the lawful authority prior to the call or due to it*.

[32] In application of art. 549 Crim. Code, rewarding measures foreseen in art. 480 Crim. Code, either in the form of suspension or of mitigation, are also applicable to the offense of sedition: "The provisions contained in Articles 479 to 484 are also applicable to the offence of sedition".

[33] See Section 1.2. Legislative evolution.

bribery, rebellion or sedition. It should be noted that, except for the felonies of rebellion and sedition[35], the lowering of the penalty in one or two degrees is optional and hence, subject to the decision of the Judge or the Court. Conversely, suspension is always formulated in mandatory terms. Now, according to the most expert authors on the subject[36], the optional character of the offence-specific mitigation circumstances refers to the decision to lower the penalty in one or two degrees, not to the decision of lowering the penalty *tout court*.

In terms of content, it should be noted that there is an offence-specific mitigation circumstance applicable both to drug-trafficking (first paragraph of art. 376 Crim. Code) and terrorism (art. 379-*bis* 3 Crim. Code) that is not identical but similar. It can be inferred from the table below that the offence-specific mitigation circumstance in the case of terrorism is more demanding than that applicable to drug-trafficking. In fact, in case of terrorism, confession is required in addition to voluntary quit and collaboration.

Drug-trafficking (art. 376. I Crim. Code)	Terrorism (art. 579-*bis* 3 Crim. Code)
(…) the Judges or Courts of Law, giving the reasons in their judgement, *may impose a lower punishment by one or two degrees* (…), as *long as the subject has voluntarily abandoned his criminal activities* and has actively *collaborated with the authorities or their agents either to prevent the offence from taking place, or to obtain decisive proof for identification of capture of others who are responsible or to prevent actions or the development of the organisations or associations to which they have belonged or with which they may have collaborated.*	(….) the Judges and Courts of Law *may impose*, giving the reasons in the judgement, *a punishment lower by one or two degrees* (…), when the subject has *voluntarily quit his criminal activities* and has appeared before the authorities *to confess* the acts in which he has participated and has also *collaborated actively with the authorities to prevent the felony taking place or effectively aids the obtaining of decisive evidence* to identify or capture the others who are responsible, or to prevent the action or development of the terrorist organisations or groups to which he has belonged, or with which he has collaborated.

[34] See the content and analysis of this provision in the section above.

[35] Art. 480 Crim. Code, and art. 549 Crim. Code, establish the mandatory lowering of the penalty to those who are merely instrumental if they lay down their weapons before having used them, and to rebels if they disperse or submit to the lawful authority.

[36] This was pointed out by M.L. Cuerda Arnau, Professor of Criminal Law from the Universidad Jaume I, during her presentation on *"Criminal aspects of the indicted's cooperation with the proceedings in the Crim. Code*: special reference to its regulation with respect to felonies of terrorism", within the Seminar on *Terrorism and Rewarding measures: criminal and substantive aspects*, organized by Manuel Cancio Meliá and Sabela Oubiña Barbolla as part of the FIGHTER p.

Despite their differences, offence-specific rewarding measures enshrined in the Spanish Crim. Code share important common denominators. Therefore, though it may seem that the legislator ignores these aspects when drafting the law, the rationale behind these measures is purely utilitarian, and, directly related to aiding the criminal investigation and/or to crime prevention. On the other hand, despite the subtle differences among their requirements, the triggering act always amounts to a positive *post delictum* behaviour, being this a reparation and/or a procedural collaboration. The effects of offence-specific rewarding measures are always stated in the judgements and, as previously mentioned, they are mostly of a mitigating character, although sometimes they may also act as exempting circumstances.

Finally, strong similarities can also be found among constitutional problems and criticisms. According to most Spanish authors[37], problems have been found to concern three main issues: *i*) the principle of equality; *ii*) offender-based criminal law; and, *iii*) the fundamental right to the presumption of innocence. An in-depth analysis of these problems is beyond the scope of this paper, but we would like to refer briefly to some of them.

From the perspective of the principle of equality, these rewarding measures seem to be formulated in unequal terms insofar in can be inferred from their wording that they are addressed to leaders at the top of the hierarchy, hence excluding those subjects who, notwithstanding their lower position, are willing to cooperate.

The regulation of these measures in the 1995 Crim. Code, especially after the 2003 amendment, has introduced the problem of offender-based criminal law by conditioning the lowering of the penalty and the granting of probation to the existence of a given conduct; no precedents can be found to the chosen formula in the previous Criminal Codes or in Comparative Law. In short, and especially as far as terrorism is concerned, the legal wording of the terrorist's reinsertion appears as offender-based criminal law.

Lastly, the probative value of the co-defendant's rewarded statement undoubtedly affects the fundamental right to the presumption of innocence. The significant evolution of the Spanish case-law will be examined below; while initially, the mere statement of a co-defendant (who is not a witness and may therefore not be telling the truth) was enough (to meet the probative requirements), critical voices on the impact of such a statement on the co-defendant's right to a defense and to remain silent motivated a shift with regard to this interpretation, that was reflected in the Constitutional Court's judgement STC 153/1997, of the 29th of September; this position was consolidated by the Supreme Court's Criminal Chamber decisions[38] that followed,

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[37] On these and other problems (amorality of the reward, principle of proportionality, results) see E. Garro Carrera, "Comportamiento postdelictivo positivo y delincuencia asociativa", *Indret*, 1/2013. In extenso, M.L. Cuerda Arnau, *Atenuación y remisión de la pena en los delitos de terrorismo*, Madrid, Centro de Publicaciones del Ministerio de Justicia e Interior, 1995.

[38] See, among others, legal finding 6: *When the co-defendant's statement amounts to the only incriminating evidence*, it should be recalled that, unlike the witness, the *accused* has no obligation to tell the truth. Moreover, in application of *the right to remain silent and not to*

leading to a qualitative improvement by requiring the authentication of the cited statement[39]. There are, nevertheless, still many pending issues (e.g. the problem of statements retracted during oral hearings).

2.1. *Conditions of applicability*

Under this section, only the terrorism-specific rewarding measures enshrined in art. 579-*bis* 3 of the Crim. Code in force will be addressed. Among other reasons, as previously stated, the failure of rewarding mechanisms in the scope of terrorism may be explained by an inadequate legal formulation that ignores the ultimate utilitarian purpose that defines them. Conversely to what is established in both in the former Spanish legislation[40] and in the Italian laws in force, currently, the legislator foresees a series of cumulative requirements that may be rarely met in practice. The relevant provision requires:

– Voluntary abandonment of the criminal activity. This requirement poses two questions:

- On one side, case-law holds that if the abandonment follows the subject's arrest it will not be considered "voluntary" for the purpose of this report.

- On the other side, the requirement of the renounce to the "goals" recalls a demand of repentance, in its ideological sense, thus overlooking the rationale behind the institution's criminal policy, which is purely utilitarian.

– Total or partial confession.

– Active collaboration with the authorities to prevent the felony taking place, to obtain decisive evidence to identify or capture the others who are responsible, or to prevent the action or development of the organisations. This requirement aims to encourage the collaboration from within, thus complying with the measure's secondary purpose (mentioned at the beginning) through the weakening of the organisation.

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incriminate oneself (art. 24.2 of the Spanish Constitution (hereinafter, CE), which are instrumental to the broader right to a defense, the accused may remain partially or totally silent and even lie. Hence, *the co-defendant's incriminatory statement may not qualify as incriminatory evidence when it is not corroborated by other evidence* against the affected co-defendant. In this case, the Constitutional Court granted the individual appeal for protection of rights, because the only incriminatory evidence presented was the co-defendant's statement. There was no attempt on behalf of the accusation to verify the content of the cited statement.

[39] See Criminal Chamber, Supreme Court Judgment (hereinafter, STS), sentencia del Tribunal Supremo No. 186/2017 of the 23rd of March (RJ/2017/1268) which notes that the co-defendant's statement may not confirm the authenticity of another co-defendant's statement. Criminal Chamber, STS No. 773/2015 of the 9th of December (RJ/2015/5557) highlights the need to verify the authenticity of the statement issued by a co-defendant that has been tried previously and that appears as a witness in a second trial against other co-defendants. Criminal Chamber, STS No. 651/2915, of the 3rd of November, (RJ/2015/4802) holds that when an indictment is left without effect, the person may appear as a witness and issue a statement, as long as the questions are not related to facts/events for which he was, at the time, indicted. Criminal Chamber, STS No. 16/2014 of the 30th of January (RJ/2014/939), asserts, on the other side, that the existence of potential penalty benefits to deny any probative value to the co-defendant's statements. This will only be the case when a lack of credibility may be rationally inferred.

[40] See the analysis of the legislative developments carried out in section 1.2 of this chapter-report.

The 1995 Crim. Code in force requires an unrealistic behaviour (for the costs of all kinds that it entails for the subject to whom the rewarding measures may be applied) that provides little benefits for the subject. Three cumulative actions are required from the subject convicted of terrorism: *i*) voluntary quit; *ii*) confession; and, in addition, *iii*) effectively aiding to obtained decisive evidence to identify or capture the others who are responsible, or to prevent the action or development of the terrorist elements, organisations or groups. If the aforementioned requirements are met, the penalty may only be lowered in one or two degrees; this potential benefit is also uncertain as, despite the fact that the leading scholar position holds that the lowering of the penalty is mandatory upon compliance of the requirements (according to this opinion, the discretionary power would refer to the decision to lower the penalty in one or two degrees), there is a minority opinion which considers the mere lowering of the penalty to be discretionary. It should also be pointed out that the existing legal framework in Spain does not guarantee the protection of the witness-collaborator. The inadequacy and obsolency of the 1994 Organic Law on Witness Protection[41] will be outlined in a later section[42]. The fact that its regulatory developments were never enacted may serve to illustrate how limited the application of this Law has been in practice.

It may thus be inferred that if a cost-benefit analysis of the subject's decision was to be carried out, the costs would most certainly outnumber the (little) benefits. One of the conclusions that may be drawn from the above is that success of rewarding measures in the scope of terrorism depends on multiple factors (e.g. social, political, etc.). One would consequently expect the legislator to formulate the rewarding provision in such a way not to hinder or impede its practical application. But, as we have just seen, the Spanish legislator does exactly the opposite.

2.2. *Types of rewarding measures*

2.2.1. *Rewarding measures that exclude or mitigate the penalty initiated at the pre-sentencing stage*

The Spanish legal system does not generally foresee the application of mechanisms that may mitigate criminal accountability in a *criminal process*[43] *for terrorism* before a decision has been issued.

Despite the above, the institution of conformity[44] may be considered to amount to an early termination of the criminal procedure, through convic-

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[41] Organic Law No. 19/1994, of the 23rd of December, on Protection of Witnesses and Experts in Criminal Procedures. BOE, December 25, 1994.

[42] See section 2.8. Measures for the protection of the repentant for an analysis of the law's original problems, the drawbacks of its application to the present case and the challenges currently posed by this issue.

[43] For an explanation of criminal procedure in this topic, see *Terrorism in Spain: a procedural approach*, in which several authors focus on a specific detail; the book was directed by V. Moreno Catena and H. Soleto Muñoz, and coordinated by A. Fiodorova, Valencia, Tirant lo Blanch, 2017.

[44] The Spanish legal system foresees the accused's possibility to admit the most serious accusation against him terms which are also consistent with the most serious accusation

tion in the agreed upon terms which are also consistent with the most serious accusation issued. It should be recalled that this institution ultimately enables the subject to obtain a lower penalty than that initially requested. Plus, despite the fact that the Prosecutor's performance within the criminal procedure is based on the principle of legality, in practice, in those cases of collaboration or abandonment of the terrorist organization, he may tend to agree to a conformity decision. This possibility may end up privileging those subjects that do not meet the requirements for the direct application of the offence-specific mitigating circumstance provided for in art. 579-*bis* 3 Crim. Code in the decision.

2.2.2. *Rewarding measures that exclude or mitigate the penalty initiated at the sentencing stage*

We refer here to art. 579-*bis* 3 Crim. Code, which has been examined in the previous sections. The cited provision reads as follows:

"In the felonies foreseen in this Chapter (*On terrorist organisations and groups and on felonies of terrorism*), the Judges and Courts of Law may impose, giving the reasons in the judgement, a punishment lower by one or two degrees to that stated by the Law for the felony concerned, when the subject has voluntarily quit his criminal activities and has appeared before the authorities to confess the acts in which he has participated and has also collaborated actively with the authorities to prevent the felony taking place or effectively aids the obtaining of decisive evidence to identify or capture the others who are responsible, or to prevent the action or development of the terrorist organisations or groups to which he has belonged, or with which he has collaborated".

2.2.3. *Rewarding measures that exclude or mitigate the penalty initiated at the post-sentencing stage*

At first sight, no terrorism-specific rewarding mechanisms may be identified. In fact, as we have critically evidenced in another section, the Crim. Code in force does not only not provide for specific rewarding measures applicable to those convicted of terrorism during the execution phase,

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issued when the penalty requested for the offence does not exceed six years of prison (arts. 655, 787 of the Criminal Procedure Rules – hereinafter, LECrim –) as long as the legal qualification is correct, the penalty is adequate and the conformity is voluntary and conscious. On conformity within the Spanish criminal proceedings, we suggest the following explanations: V. Moreno Catena, "Lección 24. La fase inicial del juicio oral", *Derecho Procesal Penal*, 9ª ed., 2019, pp. 406-411. The institution of conformity has been extensively studied by S. Barona Vilar, *La conformidad en el proceso penal*, Valencia, Tirant lo Blanch, 1994. A. Del Moral García, "La conformidad en el proceso penal: reflexiones al hilo de su regulación en el ordenamiento español", *Revista autoritas prudentium*, nº 1, 2008. On its possible future regulation see, M.D. Fernández Fustes, "La conformidad en el Borrador de Código Procesal penal", *Reflexiones sobre el nuevo proceso penal. Jornadas sobre el nuevo Código Procesal Penal* (R. López Jiménez, coord.) (V. Moreno Catena, dir.), Valencia, Tirant lo Blanch, 2015, pp. 871-889.

but quite the opposite. The Spanish legislator hardens[45] the conditions to access probation for those convicted of terrorism, and, more generally, for the progression in the degree for those terrorists who do not collaborate with the Spanish legal system. Specifically, art. 90.8 provides that:

"In the case of persons found guilty of felonies related to terrorist organisations and groups and offences of terrorism under Section two of Chapter VII of Title XXII of Book II of this Code, or for felonies committed within criminal organisations, the suspension of the penalty imposed as well as the granting of probation require the convict *to show unequivocal signs of having abandoned the ends and means of the terrorist activity and has also actively collaborated with the authorities*, either to prevent other offences being committed by the armed gang, organisation or terrorist group, or to mitigate the effects of the felony, or to identify, capture and prosecute those responsible for terrorist offences, to obtain evidence, or to prevent the activities or development of the organisations or associations to which he has belonged or with which he has collaborated, *which may be accredited by a specific statement of disavowal of their criminal activities and abandoning violence, and specifically apologising to the victims of his offence, as well as by means of technical reports that accredit that the convict has really cut off ties with the terrorist organisation and the environment and activities of unlawful assemblies and groups that surround these, and that he has collaborated with the authorities*" (emphasis added).

At this stage, it should be recalled that, unlike the Crim. Code in force, the 1973 Crim. Code did establish a privileged regime to access probation for "repentant" terrorists (see art. 98-*bis b*) of the former 1973 Crim. Code, following the reform introduced by Organic Law No. 3/1988[46]). The relevant provision stated that *those convicted of the crimes foreseen in article 57*-bis a*), may be granted probation if one of the circumstances established in sections 1, b), or 2 of art. 57*-bis*,* b*) concur, and once at least a third of the sentence imposed has been served.*

In the absence of terrorism-specific rewarding mechanisms during the execution of the sentence, the person convicted of a terrorism offense may resort to these general mechanisms. See, for instance, the suspension of the

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[45] Following the debate held during the Seminar on Terrorism and Rewarding measures, E. Peñaranda Ramos (Full Professor of Criminal Law at Autonomous University of Madrid) asserted that the current regulation can be considered to be shy because it does not even dare to say that detachment is enough; that in the case of terrorism, a part of the punishment is related to the existence of a linkage to the organization (structure, potential to intimidate, etc.) and that the disengagement of one of its members entails in itself a value because there is a sort of "continuing wrong" in the convict's continuous belonging to the organization during the serving of the sentence which disappears when the perpetrator detaches himself from it. Solar Calvo pointed out two interesting judgements in this sense. See National High Court, Criminal Chamber, Order No. 38/2017 of the 8th of February and Penitentiary Parole Board Court, Order of the 2nd of March (Majarenas case). None of the judgements grant the pre-release classification, although apparently, the requirements established in Art. 72.6 of the General Penitentiary Organic Law are met. Somehow, the seriousness of the perpetrated crimes or the former link to the gang limit this direct access to the pre-release classification. Conversely, the issued decisions opt for a middle path by applying the flexible regime enshrined in Art. 100.2 of the Penitentiary Rules.

[46] BOE, May 26, 1988.

execution of sentences (arts. 80 onwards Crim. Code). However, suspension would only apply to a small group of terrorism offences that formally qualify as such (i.e. apologism and other offences of expression), because their penalties fall within the limit of two years that the Spanish legislator has established for the suspension of the execution of custodial sentences. This requirement limits significantly the chances of resorting to this mechanism for most convictions of terrorism.

The reinsertion mechanisms available to those convicted of terrorism during the execution of the sentence amounts to a general rewarding provision applicable within the penitentiary context. The applicability of these mechanisms appears to be strictly linked to the abandonment of the band, the acknowledgement of the facts and the victims' reparations. Though the above does not imply the application of specific legislation, these *post-delictum* behaviours (abandonment, acknowledgment and reparation) have recently acquired a significant importance in the light of the *Encuentros Restaurativos*[47] (Restorative Meetings) project developed in the Nanclares de la Oca[48] prison in Álava (known as the *Nanclares way*). Most notable, they have had an impact on the revision of the penitentiary classification (see arts. 100 onwards of the Penitentiary Rules[49]). A brief description of this project's key features will be presented below[50].

The Restorative Meetings project was born and initially conceived as entailing purely personal consequences for the parties (victim and perpetrator) involved; the legal consequences, as will be explained below, emerged later on. In the prison of Nanclares de la Oca there were thirty prisoners of ETA who had already signed the resignation and had abandoned the prisoners' group. It was initially stressed to both parties that the cited meetings would not be followed by penitentiary benefits. The project had several phases but explaining the design and work behind each of them is well beyond the scope of this paper. The initial phase consisted in interviewing the prisoners, firstly in order to explain the project to them and to gain their trust, given their general suspicion[51]. The interviews that followed addressed

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[47] Royal Decree-Law No. 190/1996, of the 9th of February. BOE, February 15, 1996.

[48] E. Pascual Rodríguez, Criminal mediator and coordinator of the aforementioned Restorative Meetings was one of the expert guest speakers in the Seminar on *Terrorism and Rewarding measures: criminal and substantive aspects*. Pascual Rodríguez shared her experience and thoughts with the *focus group* through her presentation on the *Legal consequences of restorative meetings*.

[49] The team reflected extensively on the project's name. E. Pascual Rodríguez, explained that other possibilities such as "criminal mediation" were considered and later discarded because the project could not strictly be qualified as mediation as it was not an autocompositive method prior to the criminal proceeding that leads to the victim's reparation and usually, to the lowering of the penalty. As stated before, the project is carried out during the execution of the sentence and it has a strictly personal character, with no legal consequences initially attached.

[50] Nevertheless, the reading of VV.AA., *Los ojos del otro. Encuentros restaurativos entre víctimas y ex miembros de ETA* (E. Pascual Rodríguez, ed.), Maliaño, Sal Terrae, 2ª ed., 2013, is strongly recommended to any researcher or jurist interested in the topic.

[51] The prisoners' suspicion went as far as thinking that the coordinator, Esther, and her colleagues were undercover agents, journalists and members of the National Intelligence Centre (CNI), Centro Nacional de Inteligencia, etc.

those aspects that would potentially be of interest for the victims. Next, the project's coordinators met with Victims Directorate in order to select those victims who were able and willing to participate in those meetings. Once the first eight victims had been selected (mainly women), another meeting was held with the double scope of addressing the question of forgiveness and the motivations behind their participation in the Restorative Meetings project; there were all sorts of motivations, though reference was mainly made to the future coexistence in Euskadi, to religion, etc.[52]. Henceforth, one-to-one meetings are held with the victims. Strangely enough, victims require a smaller number of preparatory meetings than prisoners. The selected victims, having left behind the phase of hatred of the criminal, were in an advanced stage. Nevertheless, the fact that this project would not imply the granting of penitentiary benefits for the prisoners was a shared concern among most of them. Finally, the victim-perpetrator restorative meeting took place (with the direct victim in some cases and indirect victims in other); these meetings were very successful and, little by little, more victims and prisoners express their interest in participating and consequently, the number of meetings started to grow. However, following a change of government, the restorative meetings are suspended without further explanation to any of their participants: coordinators, victims and prisoners. At this time, as a result of the ECtHR[53] reversal of the Parot doctrine, some individuals convicted of terrorism were released from prison. Since both parties (victims and perpetrators) continued to request the celebration of these meetings, these become *Extra penitentiary Restorative Meetings* (penitentiary and extra penitentiary restorative meetings reach a total number of 28). The usefulness of restorative meetings is multiple: on one side, they may be used to answer victims' questions[54] to which only the perpetrator knows the answer (e.g. why me?), and that the criminal proceeding would have left unanswered. On the other side, these meetings offer the victim an empowerment opportunity by enabling her to express the pain resulting from victimization before the perpetrator. Whereas the terrorists´ apologies emerge almost naturally, victims react to them in various ways: some accept the apologies and some don't, but all of them highlight that the apologies are very much appreciated; in fact, many victims contact the team members out of concern of developing the Stockholm syndrome, as they develop an interest in keeping in contact with the perpetrator. Finally, the meetings enable the perpetrator to understand the scope and real impact of the crime. Many declare to have

[52] After the first interviews with the victims, two of them decide not to participate upon request of their sons and daughters who considered that it would amount to a disrespect towards their dead fathers. In other occasions, the victims were not prepared.

[53] ECtHR, Judgment of the 21st of October of 2013 (Rio Prada vs. Spain). About this doctrine, see F. Molina Fernández, "The legal scars of terrorism: the unreasonable Parot Doctrine", in *Multilevel protection of the principle of legality in criminal law* (M. Pérez Manzano, J.A. Lascuraín Sánchez, dirs.), Springer, 2018, pp. 123-140.

[54] J. Olalde Altarejos, "Encuentros restaurativos en victimización generada por delitos de terrorismo: bases teóricas", in *Los ojos del otro. Encuentros restaurativos entre víctimas y ex miembros de ETA* (E. Pascual Rodríguez, coord.), Maliaño, Sal Terrae, 2nd ed., 2013, p. 51-76.

regained their dignity and to feel that they have earned the right to live again in society.

At this point, it should be noted that by granting these meetings effects from a penitentiary perspective (e.g. granting permits), their legal consequences emerged. Penitentiary Parole Board Judges request reports to the project coordinators on the restorative meetings but these requests cannot be satisfied for reasons of confidentiality. Eventually, the Parole Board Judges accept a formal statement from the project coordinator asserting that the meeting has taken place successfully and that it was not motivated by the possibility of obtaining penitentiary benefits. Nevertheless, as a result of the functioning of the penitentiary system, these reports start to have an impact on the granting of permits, the lowering of the penalty and the granting of probation. Following the debate held during the Seminar on Terrorism and Rewarding measures[55], Peñaranda Ramos pointed out the problems that the recognition of these effects may cause in the future given that once it is established that the meetings may have the cited effects, the door to its instrumental use in order to obtain those penitentiary benefits is opened.

Prior to the analysis of the institution of pardon[56], two speakers shared interesting thoughts from the victims' and victims' associations' perspectives towards rewarding measures[57]. Gómez Cuadrado expressed his concern towards the victim's new position[58] in the execution of the penalty and towards the inclusion of the possibility of appealing any resolution even if he has not been party to criminal proceedings previously, etc. Núñez Fernández highlighted the need of considering rewarding measures not only as a victim reparation mechanism but as an instrument to protect social order[59]; he also outlined the problem of victims associations when most part of the victims are not associated, and the problem of applying terrorist-specific rewarding measures to the new forms of terrorism without victims (offences in which the protection standard has been raised), where, especially following the en-

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[55] Seminar on *Terrorism and Rewarding measures: criminal and substantive aspects*.

[56] F. Molina Fernández, has coordinated a book titled *El indulto: pasado, presente y futuro* (Pardon: past, present and future), Argentina, B de F, 2019. There are very interesting chapters highlighting its special importance in Spain (F. Molina Fernández "El indulto y sus razones: justicia, utilidad, clemencia y cautela", pp. 251-332; A. Doval, "Las cifras del indulto en España: del cómputo de los datos de los decretos al primer informe oficial", pp. 333-381; M.P. Solar Calvo, "Teoría y práctica del indulto penitenciario", pp. 567-611).

[57] Some ideas about pardon and victim, in J.A. Díaz López, "La figura del indulto: una lectura victimológica", *El indulto: pasado, presente y futuro* (F. Molina López, coord.), Argentina, B de F, 2019, pp. 535-565.

[58] Following the Law No. 4/2015 of the 27th of April, on the Statute of the Victim of an Offence.

[59] Rewarding measures are often perceived to be contrary to the victims' interests. However, they incentivise behaviours with a great reparative potential, which implies that their justification are of a mixed nature: both pragmatic and of general positive prevention. Thus, advocating for the use of rewarding measures in the fight against terrorism should be conceived as compatible with the reparation of the victim's interest given that it does not advocate for impunity but for the lowering of the penalties for reasons beyond the culpability for the wrong. About the judicial determination of the penalty and its proportionality has recently be published, G.J. Basso, *La determinación judicial de la pena y proporcionalidad con el hecho*, Madrid, Marcial Pons, 2019.

actment of Organic Law No. 2/2015, the application of offence-specific rewarding measures to the convict's collaboration is replaced by the application by analogy of the qualifying mitigating circumstance of confession; in his opinion, a less demanding regulation in those cases could represent a solution.

Leaving aside the above, during the execution of the sentence, pardon[60] emerges as one of the last strictly rewarding ordinary measures from which a person convicted of terrorism could benefit. It is an extraordinary measure, granted by the King at the proposal of the Ministry of Justice, following the deliberation of the Council of Ministers, that may suspend totally or partially the penalties imposed by final judgement, to those convicted of any offence, terrorism included.

The figures regarding the granting of pardon in cases of terrorism sometimes vary depending on the source. This being said, the accessed data allows us to distinguish two different periods with respect to this phenomenon: a first period, between 1984-1994, which was characterized by an important number of pardons granted to those convicted of terrorism (over a hundred[61]) in line with the Government's reinsertion policy; and a second period, from 1996 onwards, marked by a significant drop of these pardons. During this period, as we have pointed out before, there was an important shift in the antiterrorist policies of the Spanish political parties. Coordination was replaced by a competition to show how unable and disloyal the adversary was, to the point of making accusations of complicity with ETA, in some cases. This competition led to another competition among political groups to enact the "toughest" legislation on this matter. Thus, over the last twenty-two years (1996-2018[62]), twenty pardons have been granted to convicts of offences of belonging to *terrorist groups and organisations* and to convicts of *felonies of terrorism*. The most relevant information concerning each of them is listed below. Some illustrative facts on the pardons granted between 1996-2019 include the following: all (twenty) of the convicts granted pardon were male; eighteen out of twenty were granted in 1996, one of them was granted in 2004 and another one in 2007; four of them were granted by a social-democratic Ministry of Justice, while twelve were granted by a conservative Ministry. The table below shows, in chronological order, the pardons granted between 1996-2019 and the crime(s) they were referred to.

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[60] Law of the 18th of June of 1870, establishing the rules for the granting of (the Grace of) pardon, which was modified by Law No. 1/1988, of the14th of January. Order of the 10th of September of 1993, of the Ministry of Justice whereby instructions on pardon applications are given.

[61] See between 107-300.

[62] Source: Civio-Pardonometer. The pardonometer is a ground-breaking journalistic project that relies on an important team and that has been created by Eva Belmonte and programmer Juan Elosúa. The tool collects, analyses and classifies all of the information regarding the pardons granted in Spain through Royal Decree-Laws published in the BOE. It is a simple and illustrative tool that enables the user to search and compare different parameters, i.e. type of offence, annual data, government granting the pardon, etc. Available at: *https://civio.es/el-indultometro/* On the pardon in Spain see E. Carracedo Carrasco, *Pena e indulto: una aproximación holística*, Navarra, Thomson Reuters, Aranzadi, 2018.

Date	Offence
8.3.1996[63]	Belonging to an armed gang, sentence of imprisonment of six years and one day and a fine of 1.000.000 pesetas; possession of explosives, sentence of imprisonment of six years and one day; terrorism, sentence of imprisonment of ten years and one day; four attempted terrorism offences, four sentences of imprisonment of one year; unlawful possession of weapons, sentence of imprisonment of one year; terrorism, sentence of imprisonment of ten years and one day, fifteen offences of grievous bodily harm, sentence of imprisonment of five years for each offence with the accessory penalties of suspension from public employment and office and special barring from the right to vote during the term of the sentence
8.3.1996[64]	Belonging to an armed gang, sentence of imprisonment of six years and one day and a fine of 500.000 pesetas; possession of explosives, sentence of imprisonment of six years and one day; attempted terrorism offence, sentence of imprisonment of one year; terrorism, sentence of imprisonment of ten years and one day, fifteen offences of grievous bodily harm, sentence of imprisonment of five years for each offence with the accessory penalties of suspension from public employment and office and special barring from the right to vote during the term of the sentence
28.6.1996[65]	Belonging to an armed gang, sentence of imprisonment of six years and one day and a fine of 500.000 pesetas with the accessory penalties of suspension from public employment and office and special barring from the right to vote during the term of the sentence
28.6.1996[66]	Collaborating with armed gangs, sentence of imprisonment of one year and unlawful possession of weapons, sentence of imprisonment of one year with the accessory penalties of suspension from public employment and office and special barring from the right to vote during the term of the sentence

[63] Royal Decree-Law No. 481/1996, of the 8th of March. BOE, March 29, 1996.
[64] Royal Decree-Law No. 482/1996, of the 8th of March. BOE, March 29, 1996.
[65] Royal Decree-Law No. 1611/1996, of the 28th of June. BOE, August 8, 1996.
[66] Royal Decree-Law No. 1613/1996, of the 28th of June. BOE, August 8, 1996.

28.6.1996[67]	Belonging to an armed gang, sentence of imprisonment of six years and one day and a fine of 500.000 pesetas and four terrorism offences, sentence of one year of imprisonment with the accessory penalties of suspension from public employment and office and special barring from the right to vote during the term of the sentence
28.6.1996[68]	Belonging to an armed gang, sentence of imprisonment of six years and one day and a fine of 500.000 pesetas, possession of explosives, sentence of imprisonment of six years and one day with the accessory penalties of suspension from public employment and office and special barring from the right to vote during the term of the sentence
28.6.1996[69]	Belonging to an armed gang, sentence of imprisonment of six years and one day and a fine of 500.000 pesetas, unlawful possession of weapons, sentence of imprisonment of one year, and terrorism, sentence of ten years of imprisonment with the accessory penalties of suspension from public employment and office and special barring from the right to vote during the term of the sentence
28.6.1996[70]	Belonging to an armed gang, sentence of imprisonment of six years and one day and a fine of 100.000 pesetas, unlawful possession of weapons, sentence of imprisonment of four months; possession of explosives, sentence of imprisonment of one year, and three attempted offences of terrorism, three sentences of imprisonment of one year with the accessory penalties of suspension from public employment and office and special barring from the right to vote during the term of the sentence
28.6.1996[71]	Belonging to an armed gang, sentence of imprisonment of six years and one day and a fine of 500.000 pesetas; possession of explosives, sentence of imprisonment of six years and one day; unlawful possession of weapons, sentence of imprisonment of on year with the accessory penalties of suspension from public employment and office and special barring from the right to vote during the term of the sentence

[67] Royal Decree-Law No. 1614/1996, of the 28th of June. BOE, August 8, 1996.
[68] Royal Decree-Law No. 1615/1996, of the 28th of June. BOE, August 8, 1996.
[69] Royal Decree-Law No. 1616/1996, of the 28th of June. BOE, August 8, 1996.
[70] Royal Decree-Law No. 1618/1996, of the 28th of June. BOE, August 8, 1996.
[71] Royal Decree-Law No. 1620/1996, of the 28th of June. BOE, August 8, 1996.

28.6.1996[72]	Belonging to an armed gang, sentence of imprisonment of six years and one day and a fine of 1.000.000 pesetas with the accessory penalties of suspension from public employment and office and special barring from the right to vote during the term of the sentence
28.6.1996[73]	Belonging to an armed gang, sentence of imprisonment of six years and one day with the accessory penalties of suspension from public employment and office and special barring from the right to vote during the term of the sentence
28.6.1996[74]	Belonging to an armed gang, sentence of imprisonment of six years and one day and a fine of 500.000 pesetas and four offences of terrorism, four sentences of imprisonment of one year with the accessory penalties of suspension from public employment and office and special barring from the right to vote during the term of the sentence
28.6.1996[75]	Belonging to an armed gang, sentence of imprisonment of one year and a fine of 100.000 pesetas; possession of explosives, sentence of imprisonment of one year, and two robberies, two sentences of imprisonment of one year with the accessory penalties of suspension from public employment and office and special barring from the right to vote during the term of the sentence
28.6.1996[76]	Belonging to an armed gang, sentence of imprisonment of one year and a fine of 100.000 pesetas; and terrorism, sentence of imprisonment of one year with accessory penalties of suspension from public employment and office and special barring from the right to vote during the term of the sentence
28.6.1996[77]	Belonging to an armed gang, sentence of imprisonment of one year; possession of explosives, sentence of imprisonment of one year, and two offences of terrorism, two sentences of imprisonment of one year with accessory penalties of suspension from public employment and office and special barring from the right to vote during the term of the sentence

[72] Royal Decree-Law No. 1621/1996, of the 28th of June. BOE, August 8, 1996.
[73] Royal Decree-Law No. 1622/1996, of the 28th of June. BOE, August 8, 1996.
[74] Royal Decree-Law No. 1623/1996, of the 28th of June. BOE, August 8, 1996.
[75] Royal Decree-Law No. 1624/1996, of the 28th of June. BOE, August 8, 1996.
[76] Royal Decree-Law No. 1625/1996, of the 28th of June. BOE, August 8, 1996.
[77] Royal Decree-Law No. 1626/1996, of the 28th of June. BOE, August 8, 1996.

28.6.1996[78]	Belonging to an armed gang, sentence of imprisonment of one year and a fine of 500.000 pesetas, and four offences of terrorism, four sentences of imprisonment of one year with accessory penalties of suspension from public employment and office and special barring from the right to vote during the term of the sentence
28.6.1996[79]	Belonging to an armed gang, sentence of imprisonment of one year; possession of explosives, sentence of imprisonment of one year, and three offences of terrorism, three sentences of imprisonment of one year with accessory penalties of suspension from public employment and office and special barring from the right to vote during the term of the sentence
23.8.1996[80]	Collaborating with armed gangs, sentence of imprisonment of four years and two months with accessory penalties of suspension from public employment and office and special barring from the right to vote during the term of the sentence
10.12.2004[81]	Collaborating with armed gangs, sentence of imprisonment of five years and fine of 18 months with a daily quota of three euros, and a continued offence of terrorism with respect to a terrorist-inspired offence of damage and fire, sentence of imprisonment of eight years and nine months with accessory penalties of suspension from public employment and office and special barring from the right to vote during the term of the sentence
27.4.2007[82]	Deposit of weapons and explosives, robbery with intimidation, three offences of havoc, two offences of participating in armed gangs, robbery, murder, terrorism, unlawful use of motor vehicle, grievous bodily harm, sentence of imprisonment of one hundred and three years, two months and five days, fine of 150.000 pesetas and deprivation of the right to drive motor vehicles or mopeds for eight years with accessory penalties of suspension from public employment and office and special barring from the right to vote during the term of the sentence. National High Court Order of the 11th of April of 2003 ordered the accumulation of these penalties in application of art. 70.2 Crim. Code, which establishes a maximum limit of serving of 30 years.

[78] Royal Decree-Law No. 1627/1996, of the 28th of June. BOE, August 8, 1996.
[79] Royal Decree-Law No. 1628/1996, of the 28th of June. BOE, August 8, 1996.
[80] Royal Decree-Law No. 1985/1996, of the 23rd of August. BOE, August 8, 1996.
[81] Royal Decree-Law No. 2309/2004, of the 10th of December. BOE, December 28, 2004.
[82] Royal Decree-Law No. 584/2007, of the 27th of April. BOE, April 28, 2007.

2.3. *Counterpart of rewarding measures: the obligations of the repentant*

The Spanish legislator does not foresee additional obligations so as to *compensate* the *repentant's*[83] rewarding measures for offences of terrorism. Art. 579-*bis* 3 Crim. Code, reproduced and analysed above, does not make the application of the rewarding measures dependant on the repentant's fulfilment of additional obligations. That said, perhaps its worth recalling that the legal configuration of this terrorism-specific rewarding measures foreseen in art. 579-*bis* 3 Crim. Code, is particularly demanding insofar it requires abandonment, confession and result-oriented active collaboration (see prevent/obtain) to concur cumulatively. In fact, as we have argued, the controversial nature of the cited legal provision is one of the factors determining its anecdotal application. If the Spanish legislator had also sought to impose complementary obligations to the repentant, its practical application would have been reduced to (almost) nothing.

2.4. *Revocation of rewarding measures*

Unlike the Italian Special Laws or the German StPO, the Spanish legal system does not foresee specific provisions regarding the revocation of benefits in the scope of terrorism. Hence, only those of an ordinary character envisaged in the Spanish Crim. Code may be considered here; see, for instance, the revocation of a suspension (art. 86 Crim. Code[84]), the revocation

[83] This question is answered using the terms that appear by default in the questionnaire. However, as we have already outlined, some authors disagree with the use of the term "rewarding measures". The same controversy would probably emerge during the debate with respect to the notions of *repentant* and *compensation*.

[84] Art. 86 Crim. Code foresees that: 1. The judge or court will revoke the suspension and order the execution of the sentence when the convicted person: *a*) Is convicted of a crime committed during the period of suspension and this shows that the expectation on which the suspension decision was based can no longer be maintained. *b*) Seriously or repeatedly breaches the prohibitions and duties that would have been imposed in accordance with article 83, or is subtracted from the control of the penalty management services and alternative measures of the Penitentiary Administration. *c*) Breaches serious conditions or repeatedly that, for the suspension, would have been imposed in accordance with article 84. *d*) provides inaccurate or insufficient information on the whereabouts of goods or objects whose confiscation had been agreed upon; does not comply with the commitment to pay civil liabilities to which he had been convicted, unless he lacked the economic capacity to do so; or provides inaccurate or insufficient information about his assets, in breach of the obligation imposed in article 589 of the Civil Procedure Act. 2. If the breach of the prohibitions, duties or conditions had not been serious or repeated, the judge or court may: *a*) Impose to the prisoner new prohibitions, duties or conditions, or modify those already imposed. *b*) Extend the period of suspension, without exceeding, in any case, half of the duration of what was initially set. 3. In the case of revocation of the suspension, the expenses incurred in by the prisoner to repair the damage caused by the crime in accordance with Article 84 (1) shall not be restored. However, the judge or court will deduct the payments and the work that would have been carried out or completed in accordance with the 2nd and 3rd measures. In all the above cases, the judge or court will decide after hearing the Prosecutor and the other parties. However, he may revoke the suspension of the execution of the sentence and issue a committal order when it is essential to avoid the risk of criminal reiteration, prison escape risk or ensure the protection of the victim. The judge or court may agree to carry out the necessary verification procedures and agree to hold an oral hearing when deemed necessary to issue a decision.

of probation (art. 92 Crim. Code[85]) or the regression of the degree) (art. 106 of the Penitentiary Rules[86]).

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[85] Art. 92 Crim Code: 1. The court will agree to suspend the execution of the reviewable permanent prison sentence when the following requirements are met: *a*) That the prisoner has served twenty-five years of his sentence, without prejudice to the provisions of article 78-*bis* for the cases regulated therein. *b*) That is classified in third grade. *c*) That the court, in view of the personality of the prisoner, his background, the circumstances of the crime committed, the relevance of the legal assets that could be affected by criminal reiteration, his conduct during the serving of the sentence, his familiar and social circumstances, and the effects that can be expected from the suspension of the execution and compliance with the measures that may be imposed, following an examination of the progress reports submitted by the prison and by those experts appointed by the court, may evaluate positively the possibility of the offender's social reintegration. In the event that the prisoner had been convicted of several crimes, the examination of the requirements referred to in letter *c*) shall be carried out assessing all the crimes committed. The court will decide on the suspension of the reviewable permanent prison sentence after a contradictory oral procedure in which the Prosecutor and the prosecutor will intervene, assisted by their lawyer. 2. In the case of crimes related to terrorist organizations and groups and terrorism offenses of Chapter VII of Title XXII of Book II of this Code, it will also be necessary for the prisoner to show unequivocal signs of having abandoned the ends and means of terrorist activity and to have actively collaborated with the authorities, either to prevent the perpetration of other crimes by the terrorist organization or group, or to mitigate the effects of his crime, or to identify, capture and prosecute those responsible for terrorist offenses, to obtain evidence or to prevent the action or development of the organizations or associations to which he has belonged or with which he has collaborated, which may be accredited by an express declaration of repudiation of its criminal activities and abandonment of violence and request for forgiveness to the victims of his crime, as well as by the technical reports that prove that the prisoner is really detached from the terrorist organization and the environment and the associations and illegal groups' activities that surround it and his collaboration with the authorities. 3. The suspension of execution will last from five to ten years. The period of suspension and probation shall be calculated from the date of release of the prisoner. The rules contained in the second paragraph of Article 80 (1) and Articles 83, 86, 87 and 91 apply. The judge or court, in view of the possible modification of the circumstances assessed, may modify the decision that it had previously adopted pursuant to Article 83, and agree on the imposition of new prohibitions, duties or benefits, the modification of those that had already been agreed on, or their suspension. Likewise, the Parole Board Judge will revoke the suspension of the execution of the rest of the sentence and the probation granted when a change in the circumstances that would have resulted in the suspension does no longer guarantee the lack of danger on which the decision adopted was based. 4. Once the part of the sentence referred to in letter *a*) of paragraph 1 of this article or, where appropriate, in article 78-*bis* has been extinguished, the court shall verify, at least every two years compliance with the other probation requirements. The court will also decide on the requests for the conditional release of the prisoner, but may set a term of up to one year within which, after a petition has been rejected, his new applications will not be examined.

[86] Royal Decree-Law No. 190/1996, of the 9th of February pursuant to which the Penitentiary Rules are enacted. BOE February 15, 1996. Art. 106 of the Rules foresees that 1. The evolution in the prison treatment will determine a new classification of the inmate, with the corresponding proposal of transfer to the appropriate penitentiary Centre or, within the same Centre, to another department with different lifestyle. 2.The progression in the degree of classification will depend on the positive modification of those factors directly related to criminal activity, will be evidenced in the overall conduct of the inmate and will imply an increased trust in him, which will allow the attribution of more important responsibilities that entail more freedom. 3. The regression of the degree will proceed when a negative evolution in the prognosis of social integration and in the personality or behaviour of the inmate is appreciated in relation to the treatment. 4. When the inmate does not participate in an individualized treatment program, the evaluation of his evolution will be carried out in the manner described in article 112.4, except when the Treatment Board has been able to make an assessment of the inmate's social integration by other legitimate means. 5. The same formalities, term and possible extension of the same formalities, terms and possible extension criteria foreseen in article 103 for the initial classification resolutions will be observed for the resolution of the proposals of progression and of regression of degree.

Once again, is should be noted that the 1973 Crim. Code enshrined a provision of this kind. Interestingly, revocation was only foreseen for those situations where the penalty was fully condoned in the cases of *especially relevant active collaboration*, not being thus applicable to cases of simple lowering of the penalty. Let us remind[87] that art. 57-*bis b*) 2 provided *in fine* that suspension would *always depend on the convict not offending again*.

2.5. *Conditions for the application of the measures (procedural aspects)*

No special rules apply.

2.6. *Conditions for the use of the declarations obtained (probative value of declarations)*

For the sake of brevity, the question will be answered *in extenso* in the following paragraphs; the reader should however take into account that Section 3 on the relevant case-law[88] lists the decisions in which these terrorism-specific rewarding measures have been applied. The legal question underlying an important part of them is precisely that of the probative value of the repentant co-defendant's statement[89].

For this reason, a broad attempt to narrate the way in which this issue has been tackled by the Spanish case-law will follow. This account will start off from the past, it will stop in the present and will most importantly point out the problems that, in our view, this issue will pose in the future.

From the 80s until the mid-90s, the criteria to establish the co-defendant statement's probative value was clearly inadequate because the examination was carried out in application of purely subjective standards (usually associated to the co-defendant's motivation), that would thus shift the burden of proof. Within this framework, the credibility of the repentant co-defendant ended up depending on questions posed to the accused on his possible spurious motives for delation.

By imposing the corroboration standard, Constitutional Court's judgement STC 153/1997, of the 29th of September triggered a change of paradigm in this context. During this period[90], also the ECtHR turned to this standard, pursuant to which, the information provided by the co-defendant must be corroborated by further evidence.

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[87] We have already referred to this provision in section 1.2. Legislative evolution.

[88] See *supra* on the evolution of the constitutional case-law.

[89] See I. Sánchez García de Paz, "El coimputado que colabora con la justicia penal. Con atención a las reformas introducidas en la regulación española por las Leyes Orgánicas 7/ y 15/2003", *Revista Electrónica de Ciencia Penal y Criminología*, RECPC 07-05(2005). M.P. Díaz Pita, "Declaración inculpatoria del coimputado en el proceso penal y derecho a la presunción de inocencia: examen de su tratamiento jurisprudencial en España en relación con la doctrina del TEDH", *Derecho constitucional para el siglo XXI: actas del VIII Congreso Iberoamericano de Derecho Constitucional* (M. Carrasco Durán, J. Pérez Royo, J. Urías Martínez, M.J. Terol Becerra, dirs.), vol. 1, 2006, p. 2041-2058. R. Alcacer Guirao, "El imputado que declara como testigo en otro procedimiento, ¿coimputado o testigo? Comentario a las SSTC 111/2011, 4 de julio y 126/2011, de 18 de julio", *La ley penal*, No. 94-95, p. 8.

[90] A little later than the Spanish Constitutional Court.

Despite the systematic application of the corroboration standard by Spanish judicial bodies, some issues have arisen because, according to some experts[91], in many occasions, tribunals have not been excessively demanding when requesting the cited corroboration. The external corroboration is requested (i.e. that the corroboration does not come from the other co-defendant's statement), but it is not a "strong" one. In this context, it is important to highlight that the corroboration may either refer to the core of the statement or to some circumstantial elements. This is precisely where the problem lies: the judicial bodies examine the co-defendant's statement despite the fact that the corroboration required to this effect should be referred to the statement's main points, and not to its circumstantial elements. In this case, we would be facing a weak corroboration.

Finally, in order to wrap up this section, we would like to raise some of the challenges posed by the functioning of the institution of repentance and its current practical operability within the criminal proceedings. In our opinion, these challenges will most certainly need to be tackled in the near future. Some of the questions that arise include: in what context does the repentance take place? does a formalised or deformalized context exist in this scenario?; or even if these can be of two kinds. According to the legal operators, including judges, there is no formalized context for the acquisition of the status of repentance; in other words, there are very few cases in which a repentance occurring in a normalized context emerges naturally later during the criminal proceedings. The decontextualized scenario[92] of the repentant obscures the whole criminal proceeding provoking an important conflict with the principle of contradiction[93] (principle that establishes that both parties to a lawsuit must be heard). The concurrence of an element of surprise resulting in a lost opportunity to react for the defense may amount to an illustrative example of what has just been outlined. It follows from the above that the format should certainly be more transparent. However, a lowering of the standards of protection has even been detected within the most recent ECtHR's case-law. Unfortunately, from the end of the 90s to the pre-

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[91] See J.J. López Ortega's presentation on the "Procedural aspects of the repentant's collaboration in the criminal proceedings" within the Seminar on *Terrorism and Rewarding measures: criminal and substantive aspects*.

[92] Recently J.E. Vargas Viancos, published a report (nº 40) *General Legal elements for the Development of Public Infrastructure projects* within the Chilean think tank *Espacio Público*, under the direction of the procedural expert Mauricio Duce where, among other issues, the topics of collaboration and delation are tackled within Latin America. More specifically, one of the points addressed refers to the "different scenarios or contexts, in which can appear" "development of the negotiation", "institutional coordination", "validation of the agreements" and, of course, its "validity and its introduction and validation during the proceedings". The protection, probative value and the revocation were also addressed, see especially p. 1-53. Available at: *https://www.espaciopublico.cl/wp-content/uploads/2019/06/Doc_Ref_3ElementosLegales.pdf*.

[93] J.J. López Ortega, "Contradicción y defensa. Cinco cuestiones sobre la prueba penal, precedidas de una introducción sobre la eficiencia del proceso penal", *Estudios de Derecho Judicial*, No. 128, 2007, p. 123-156. From the same author, "Elementos esenciales de la noción de proceso equitativo en el orden penal (panorama de la jurisprudencia del TEDH)", Estudios Jurídicos. Ministerio Fiscal, No. 5, 2000, pp. 303-352. "Garantías anudadas al principio acusatorio", *Comentarios a la Constitución española* (M. Pérez Manzano, I. Borrajo Iniesta, Coords.), vol. 1, Book 1, 2018, p. 803-813.

sent, the ECtHR has constantly threatened the guarantees deriving from a principle pursuant to which both parties to a lawsuit should be heard with regard to these cases; firstly, by admitting the anonymous witness' statement; then, by accepting, for the purpose of the trial, a witness declaration issued during the pre-trial phase; later, by accepting that some parts of the investigation proceedings remained secret to the defense…). In the light of the above, achieving transparency in this respect seems a mere illusion, especially when the domestic (Spanish) standard of human rights protection tends to relax[94] due to the influence of the European standard.

2.7. *Measures for the protection of the repentant*

When reflecting on protection measures for the repentant, it is advisable to examine briefly the only Act regulating this issue within the Spanish legal system. Organic Law No. 19/1994 of the 23rd of December on Protection[95] of Witnesses and Experts in Criminal Procedures (hereinafter LO 19/1994), is, and probably has always been, an insufficient law with important flaws. This may explain the fact that it has been rarely applied in practice.

Surprisingly enough, despite its deficiencies, it is one of the few procedural laws that has not been amended to date. And what is even worse, the regulatory development of the law required by Additional Provision 2[96] of the LO 19/1994 was never carried out; after a twenty-five years, academics and judicial bodies are no longer expecting a regulatory development but rather a new Organic Law[97].

The most important problems of this law may be summarized in the following points: firstly, LO 19/1994 only foresees the protection of the wit-

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[94] J.J. López Ortega presented data on the "bad influence" of the ECtHR's case-law on the Spanish judicial bodies. For instance, the ECtHR Judgment on Murray has been cited more than 100 times by the Spanish Supreme Court, 116 times by the National High Court and more than 150 times by a Provincial Court. This means that 3-4 times a week reference is made to the probative value of the right to silence foreseen in regimes different from that of terrorism. Opinions expressed during the presentation "Procedural aspects of the repentant's collaboration in the criminal proceedings" within the Seminar on *Terrorism and Rewarding measures: criminal and substantive aspects*.

[95] See V. Moreno Catena, "La protección de los testigos y peritos en el proceso penal español", *Revista penal*, No. 4, 1999, pp. 58-67; M. Ortells Ramos, "Comentario y desarrollo de la ley de protección de testigos y peritos", in *La protección de testigos y peritos en causas criminales: comunicaciones y ponencias* (J.A. Roblés Garzón, dir.), Málaga, Diputación de Málaga, Centro de ediciones de la Diputación de Málaga, pp. 163-178. N. Torres Rosell, "Sentencias españolas sobre la protección de testigos. Líneas jurisprudenciales", en *La protección de testigos y peritos en causas criminales: comunicaciones y ponencias* (J.A. Roblés Garzón, dir.), Málaga, Diputación de Málaga, Centro de ediciones de la Diputación de Málaga, 2001, p. 185-208. R. Zafra Espinosa de los Monteros, "Algunas cuestiones acerca de la protección de testigos en el proceso penal", *Diario La Ley*, No. 7260, 2009.

[96] Additional Provision Two of Organic Law No. 19/1994 provided then that: *The Government, within a year from the publication of the present Law, will enact the regulatory provisions required for its execution*.

[97] During the XIII Session (21st of May), the need of a new law has been highlighted by the Ministry of Justice, the Ombudsman and more recently by the Prosecutor General who, during the opening of the judicial year 2019/2020 referred to the need to "broaden the circumstances for its application, define the measures to guarantee its indemnity and centralize its management".

ness, but not that of the co-defendant. Fortunately, this did not prevent the National High Court in the 90s from carrying out a broad interpretation of the subjective scope, which resulted in the extension of its protection to the co-defendants. Secondly, protection measures are very limited and ineffective because they are part of a gradual protection system along the criminal proceeding. This system turns out to provide a very intense protection during the pre-trial phase, which becomes scarce once the hearing has been reached. In practice, the protection mechanism during the hearing is limited to testifying without being seen (i.e. screen, etc.). Lastly, the cost of an effective protection, not only in economic terms but also in personal terms (change of identity, moving out, etc.), amounts to a very important obstacle that cannot be overlooked. Hence, it cannot be concluded that an effective witness protection program exists in Spain. This fact is probably related to the scarce visibility of other instruments of the criminal investigation such as the cover agents, which in Spain amount to a very small number due to the impossibility of providing the security forces agents with an adequate protection. This assertion should actually be corrected because there is probably a big number of cover agents, the problem being that they do not come before the tribunals.

Some interesting thoughts that emerged throughout the debate held during the Seminar on Terrorism and Rewarding measures[98] shall be outlined hereunder. On one side, Ortega López suggests a change of paradigm within criminal law with regard to the increasing complexity of the investigations in the cases of organised criminality. This could be leading to a model whereby the efficiency of the criminal proceeding requires collaboration in exchange for immunity; immunity however is in conflict with the general principles of Criminal Law. According to professor Lascuraín Sánchez[99], the problem affecting the most serious cases is not the granting of immunity but its opacity and its effect in procedural terms; moreover, he suggests that the amendment of the protection system should consider increasing the protection standards in the later phase. Cuerda Arnau held that insufficiencies in protection measures (i.e. the exclusion of family members, the impossibility of an initial application at the police headquarters, etc.) may end up undermining the rewarding measures' effectiveness.

2.8. *Evaluation and control mechanisms of the rewarding measure*

Inexistent.

3. *Current relevant case-law*

This section contains a list of the decisions in which offence-specific rewarding measures previously studied have been applied either under former

[98] Seminar on *Terrorism and Rewarding measures: criminal and substantive aspects*.
[99] Full Professor of Criminal Law at Autonomous University of Madrid, participant at the discussion seminar.

1973 Crim. Code either 1995 Crim. Code in force. It is beyond the scope of this paper to carry out a full-fledged analysis of each single decision; thus, though listed in chronological order, those falling under the 1973 Crim. Code are separated from those falling under the Crim. Code in force. In some cases, a brief analysis of relevant extracts for the purpose of this *paper* will be carried out.

According to empirical expert research[100], former art. 174-*bis* of the 1973 Crim. Code, predecessor of art. 57-*bis b*) of 1973 Crim. Code (following its amendment by Organic Law No. 9/1941), was applied in six occasions.

National High Court, Criminal Chamber, Judgement No. 58/1984, of the 28th of September.

National High Court, Criminal Chamber, Judgement No. 11/1985, of the 11th of March.

National High Court, Criminal Chamber, Judgement No. 69/1985, of the 5th of November.

National High Court, Criminal Chamber, Judgement No. 58/1986, of the 30th of June.

Supreme Court, Criminal Chamber, Judgment No. 1358/1997, of the 5th of November[101].

In this decision, the Supreme Court's Criminal Chamber dismisses a cassation appeal filed by three private accusations against a decision issued by the National High Court's Criminal Chamber convicting an individual on a count of terrorist attack resulting in death, four counts of murder, eleven counts of attempted murder and one count of terrorism. The qualified mitigating circumstance enshrined in (former) art. 57-*bis b*) of the 1973 Crim. Code was applied to all the offences. The appellants hold that the Trial Chamber violated a substantive criminal provision by applying (inadequately, in their opinion) the qualified mitigating circumstance comprised in art. 57-*bis* to the accused, hence violating the victims of terrorism's right to an effective judicial protection through the compensation of the inflicted damage (art. 24 Spanish Constitution). The Criminal Chamber dismissed both arguments, highlighting, among other things, that notwithstanding the trial decision's flawed statement of the proven facts, there was an adequate application of art. 57-*bis b*) of the Crim. Code to the case: the accused was linked to the terrorist organisation ETA (more specifically, he belonged to the Madrid Command) and this link is voluntarily broken when the accused-convicted presents himself before the Spanish Consul General in the Dominican Republic, voluntarily returns to Spain to serve the corresponding sentence and confesses his participation in all of the relevant events in which he had participated, including those that were being judged within the criminal proceedings. On the other side, the Supreme Court has also es-

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[100] M.L. Cuerda Arnau, *Atenuación y remisión de la pena en los delitos de terrorismo*, Madrid, Centro de Publicaciones del Ministerio de Justicia e Interior, 1995. E. Mestre Delgado, *Delincuencia terrorista y Audiencia Nacional*, Madrid, Centro de Publicaciones del Ministerio de Justicia, 1987. J. Nuñez Fernández, *Sobre punibilidad, terrorismo, víctimas y pena, Navarra*, Thomson Reuters Aranzadi, 2017,

[101] Roj: STS 6575/1997 - ECLI: ES:TS:1997:6575.

tablished that the appellants (victims of the attack) cannot claim to be demanding justice when asserting that such a demand would be unsatisfied upon application of the cited mitigating circumstance because this position hides a vindictive motivation; the Court then stresses that the laws set out the preconditions for punishment, offence and circumstances but it is the judicial bodies' role to apply and interpret them. In this sense, the legislator may foresee moral but also utilitarian mitigation circumstances. Though the appellant may not share this perspective, the application of the cited provision does not infringe his right to an effective judicial protection because, as the Constitutional Court has repeatedly pointed out, this fundamental right includes, among other things, the right to access jurisdiction and the right for the decision to be complied with, the right that establishes that both parties to a lawsuit must be heard and the right to have judicial bodies deciding on demands on the basis of legal reasoning. This does not mean, however, that an effective judicial protection shall include a hypothetical right to the full satisfaction of claims or requests.

National High Court, Criminal Chamber, Judgement No. 24/2000, of the 8th of May[102].

Through this decision from the National High Court's Criminal Chamber, two men and a women were convicted of the perpetration of several offences[103]; for the purpose of this paper, it is important to note that, pursuant to art. 6 of the Organic Law on Armed Gangs, (former) art. 57-*bis b*) and art. 579 of the Crim. Code in force, the general mitigating circumstance[104] of abandonment of criminal activities and presentation before the authorities with confession was applied to one of the men, following the Prosecutor's request. The private prosecution rejected the application of the cited mitigation circumstance on the basis of the time lapse between the events and Serafin's presentation before the Spanish Consulate.

The terrorism-specific rewarding measures contained in the current Crim. Code has been applied to the following cases:

Supreme Court, Criminal Chamber, Judgment No. 2084/2001, of the 13th of December[105]

Supreme Court, Criminal Chamber, Judgment No. 878/2014, of the 23rd of December[106].

For the purpose of this chapter, the relevant motivations behind the convict's cassation appeal include: *i*) violation of the right to a fair trial and,

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[102] Roj: SAN 3050/2000 - ECLI: ES:AN:2000:3050.

[103] i.e. terrorist attack with an attempted crime of murder concurring the aggravating circumstance of premeditation; murder concurring the general aggravating circumstance of premeditation; attempted murder concurring the general aggravating circumstance of premeditation; havoc, unlawful use of motor vehicle, using violence and taking hostages to enable the execution.

[104] These mitigating circumstances, pursuant to legal ground No. 12, are applicable to the Serafín, who voluntarily renounced criminal activity, confessed and aided effectively to obtain decisive evidence to identify or capture the others who are responsible or to prevent the action or development of the terrorist organisations or groups.

[105] Roj: STS 9774/2001 - ECLI: ES:TS:2001:9774.

[106] Roj: STS 5752/2014 - ECLI: ES:TS:2014:5752.

more specifically, the evaluation of the evidence without hearing both parties to a lawsuit (see art. 24.2 Spanish Constitution and art. 6.3 ECHR); *ii*) violation of the right to be presumed innocent (art. 24.2 Spanish Constitution). The Supreme Court's Criminal Chamber upholds partially the latter. Reference shall be made to the reasoning behind the Supreme Court's rejection of the Trial Chamber's alleged violation of the principle which establishes that both parties to a lawsuit should be heard[107].

i) Though acknowledging the validity of the case-law presented to support the appellant's cassation appeal, the Supreme Court's Criminal Chamber considers it inapplicable to the case at stake. The ECtHR and Supreme Court's case-law refer to cases in which it has been impossible for the accused or his lawyer to cross-examine the witness attributing him the criminal acts, either because the co-defendant does not ratify his statement during the trial, either because he has decided to exercise his right to silence during the oral proceedings (art. 24.2 Spanish Constitution). As the Supreme Court's Criminal Chamber points out, this is not exactly the situation in the present case and thus, the alleged violation does not concur. The appellant holds that the questions that would have been formulated would have evidenced the contradictions between the previous statements and the one issued during the oral proceedings. However, the Court was able to carry out a first-hand verification of the contradictions between the appellant lawyer's questions, that were submitted for the record during the trial, and the co-defendant police and pre-trial statements. Moreover, the defense lawyer could have requested the Tribunal to read out the different statements during the trial, but decided not to. He did however, submit the questions addressed to the co-defendant for the record. The co-defendant did not refuse to answer the questions, nor did he exercise his right to silence. In fact, he answered the questions posed by the Prosecutor and by his defense lawyer. It should be further noted that, once the defense lawyer's questions had been submitted, the Prosecutor could have referred to some or all of them to the effects of establishing the statement's probative value. The co-defendant's statement on their membership to the terrorist organisation Resistencia Galega may thus be taken into consideration by the judicial body and may be granted probative effects insofar it is self-incriminating (the declarant is also convicted), and it is corroborated by the police agents' statements during the oral proceedings.

In short, the Constitutional Court has successfully addressed the question of the probative value of the statement of the co-defendant who does not answer the other co-defendant's questions. In general, no value will be granted to the co-defendant's statements when there has been a total refusal to answer the questions posed by the lawyer of the person against whom his statement was directed. This absolute position was gradually changed to admit a certain value to these statements because we are not strictly before a

[107] The reasons behind this appeal are in line with the Dissenting Opinion of the National High Court Judgment No. 25/2014, of the 28th of May hereunder examined.

problem of *useability* but of *reliability* of the evidence (statement). It would be ironic to be able to use the statement of a deceased co-defendant that may not be cross-examined during the oral proceedings and not be able to use the statement of a co-defendant that decided to remain silent during cross-examination. As the Criminal Chamber highlights, "asking without receiving an answer may amount to a *particular type of cross-examination*. Cross-examination may be requested "when possible" in "whatever possible way", and thus is not legally possible when the co-defendant exercises his fundamental right to silence. Besides, the submission of the questions that would have been formulated to the co-defendant, eventually highlighting the contradictions and using his silence to question his reliability may theoretically be considered a type of cross-examination. Some authors consider that there is a small compliance with right of both parties to a lawsuit to be heard when the questions are submitted in the oral proceedings but the co-defendant decides to remain silent. This right may be even more effectively guaranteed in these cases than in the case in which the co-defendant withdraws his initial statement during the oral proceedings. The accused's hetero-incriminating statement does not violate this right, the co-defendant's statements may still be partially used even if he refuses to answer the co-defendant lawyer's questions[108]. The right to cross-examine the witnesses against the accused provided in art. 6.3 of the ECHR requires an appropriate opportunity to counteract the statements issued against him cross-examining the author when he is issuing his statement or later. However, when the co-defendant's silence is not the result of "a reprehensible judicial action", the right of both parties to a lawsuit to be heard is not infringed because what the Spanish Constitution and the ECHR guarantee is not the effective right to be heard but the possibility of being heard, and there is no right to obtain an answer from the declarant who is legitimately exercising a fundamental right. The parties that may potentially be affected by the co-defendant's statement shall be summoned. However, through the inclusion of the questions in the oral proceeding's record, the cited right (to be heard) is guaranteed, despite the co-defendant's decision to remain silent or to answer some of the questions given the possibility of cross-examining the co-defendant, challenging the credibility of the statement's incriminatory content.

ii) Violation of the right to be presumed innocent (art. 24.2 Spanish Constitution). The Supreme Court's Criminal Chamber partially upholds this argument to the extent that the judicial body develops, modifies and assesses the evidence examination processes pursuant to logic, scientific and empirical rules, thus avoiding arbitrariness; however, from the evidence presented, and particularly from the vague police intelligence reports, the Court concludes that terrorist organisation membership has not been proved beyond reasonable doubt. The probative value granted to the aforementioned reports may only prove collaboration with the terrorist organisation.

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[108] Constitutional Court, Judgement No. 219/2009, of the 21st of December; and Judgement No. 142/2006, of the 8th of May; Supreme Court, Criminal Chamber Judgement No. 129/2014, of the 26th of December.

National High Court, Criminal Chamber, Judgement no 25/2014, of the 28th of May[109] (Trial judgement of the previous case)

The National High Court's Criminal Chamber convicts two men of various offences of terrorism organisation membership[110] and an offence of possession of explosives with terrorist aims. As highlighted by NUÑEZ FERNÁNDEZ[111] during his presentation, an offence-specific mitigating circumstance (that is, the special mitigating circumstance resulting from having quit violence as a means to achieve political goals, active and direct collaboration and confession) is applied to one of them (Ezequiel) by analogy. Judge Sáez Valcárcel's Dissenting Opinion is particularly interesting from a procedural perspective for the purpose of evaluating the co-defendant's statement. According to the dissenting judge, the Tribunal has failed to guarantee the procedural right to be heard by examining what he considers to be invalid evidence. In this sense, co-defendant's hetero-incriminatory statement is not only deemed to be invalid but insufficient to prove the accusation beyond reasonable doubt; plus, the existence of a terrorist organisation and the accused's membership have not been proved. For the purpose of this paper, the Dissenting Opinion is right to note that the co-defendant statement's evaluation does not take into account that during the oral proceedings he only answered the questions posed by the Public Prosecutor, refusing to answer the defense's questions (in fact his lawyer did not intervene). Consequently, the co-defendant could not be heard in respect of this statement issued against him, nor was his lawyer granted the possibility of cross-examining him. The constitutional standard to grant probative power to this kind of evidence requires guaranteeing the right to cross-examine the (prosecution and defense) witnesses, the right to a fair trial and the accused's right to an adequate defense. For these reasons, in his view, the co-defendant's hetero-incriminatory statement should not have been used to assert that the facts underlying the other co-defendant's accusation had been proved beyond reasonable doubt; furthermore, the co-defendant's decision to ratify his statement does not, per se, rehabilitate a statement in respect of which both parties to the lawsuit have not been heard. When including this statement among the evidence, the application of credibility and consistency filters would have evidenced its poor reliability, thus rejecting its probative value because: *i*) it was the result of an agreement with the Public Prosecutor who requested the application of the rewarding measures foreseen in art. 579.4 Crim. Code with its corresponding penalty reduction; and *ii*) the three different statements issued by the co-defendant are inconsistent.

National High Court, Criminal Chamber, Judgement No. 73/2007, of the 19th of December[112]

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[109] Roj: SAN 2375/2014 - ECLI: ES:AN:2014:2375.

[110] In this case, it concerned the group named Resistencia Galega.

[111] The expert criticises this heterodox technique because although the Crim. Code foresees the application by analogy of the general mitigating circumstances embodied in the Crim. Code's General Part (see Book I), analogy in respect of crime-specific mitigating circumstances, as this case seems to apply, is not foreseen in the Code.

[112] Roj: SAN 6248/2007 - ECLI: ES:AN:2007:6248.

National High Court, Criminal Chamber, Judgement No. 5/2018, of the 7th of March[113].

In this decision, the Chamber convicts the two men accused (upon conformity) on the counts of terrorism organisation membership[114] (DAESH), lowering the penalty in one or two degrees as provided by art. 579-*bis* 4 (in force) insofar, according to the Chamber, we are before "non-violent behaviours, whereby the facts have been acknowledged which objectively implies that the seriousness of the acts is smaller in proportion to other activities". (Legal reasoning 2).

4. *Consistency of the current rewarding legislation with art. 16 of Directive 541/2017 / UE*

To begin with, it should be recalled that art. 16 of Directive 541/2017/UE of the European Parliament and of the Council of 15 March 2017[115] on combating terrorism provides that:

"Member States may take the necessary measures to ensure that the penalties referred to in Article 15 may be reduced if the offender:

a) renounces terrorist activity, and

b) provides the administrative or judicial authorities with information which they would not otherwise have been able to obtain, helping them to:

i) prevent or mitigate the effects of the offence[116];

ii) identify or bring to justice other offenders;

iii) find evidence; or

iv) prevent further offences referred to in Articles 3 to 12 and 14".

On the 20th of February 2020, various provisions from the Crim. Code were amended by Organic Law[117] so as to transpose, among others[118], Di-

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[113] Roj: SAN 2468/2018 - ECLI: ES:AN:2018:2468.

[114] One of them is also convicted for a felony against public health.

[115] The title of the Directive is on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, OJEU, 31st of March 2017.

[116] It should be noted that the wording of art. 16 of the Directive was slightly modified on the 9th of April 2018 (more than a year after the enactment of the Directive and its publication in the OJEU). More specifically, the modification concerned one of the results that should be achieved by the information provided by the offender to the judicial or administrative authorities (see the second (cumulative) requirement listed in art. 16.b of the Directive); the original wording asserting that the *offender*, in addition to *renouncing to terrorist activity*, *providing the administrative or judicial authorities with information which they would not otherwise have been able to obtain, helping them (i) to prevent the offence or mitigate its effects*" is replaced by *(i)prevent or mitigate the effects of the offence*".

[117] Organic Law 1/2019, of the 20th of February, amending Organic Law 10/1995, de of the 23rd of November, on the Criminal Code, transposing European Union Directives in the scope of finance and terrorism and addressing international issues. BOE of the 20th of February 2020.

[118] In addition to the Directive under consideration (541/2017/UE of the European Parliament and of the Council of 15 March 2017, on combating terrorism), see Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse; Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means

rective 541/2017/UE of the European Parliament and of the Council of 15 March 2017 on combating terrorism. The provision on terrorism-specific rewarding measures, regulated in art. 579-*bis* 3 CP (see above) was not amended insofar it follows the Directive's pragmatic approach. Nevertheless, as highlighted above, the greatest obstacle for the applicability of the Spanish law lies in requiring, cumulatively, the concurrence of the positive effects both on prevention and criminal prosecution, while the European regulation foresees the concurrence of compatible alternatives.

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of criminal law; the improvement of the transposition of Directive 2014/62/EU of the European Parliament and of the Council of 15 May 2014 on the protection of the euro and other currencies against counterfeiting by criminal law. The legislator embraces this opportunity to adapt the Spanish legal system to the provisions on trafficking in human organs and corruption enshrined in international instruments; see respectively, the European Council Convention against Trafficking in Human Organs trafficking opened to signature precisely in Spain, in Santiago de Compostela four years earlier (see 25th of March, 2015), as well as the Guidelines of the State Group Against Corruption (GRECO).

SECTION II

EU LAW, CRIMINOLOGICAL AND COMPARATIVE RESULTS

CHAPTER 1

INTERPRETATIONS OF ARTICLE 16 OF THE DIRECTIVE OF 15 MARCH 2017

"A" FRENCH REPORT

CLÉMENCE QUENTIN, JEAN-YVES MARECHAL, JULIE ALIX

I. *Normative context*

1. *Historical background*

Focused on the economic development of Europe, the founding treaties "did not define any objectives in criminal matters and did not give the European Communities any competence in this area"[1]. Because criminal law is "closely linked to the exercise of law enforcement and sovereignty, it is territorial by nature"[2] and has for a long time been ignored in the normative developments of the European Communities[3]. In 1992, the Justice and Home Affairs pillar – the so-called third pillar – was established by the Maastricht Treaty, inaugurating the European Union's foray into criminal law. Although dominated by intergovernmentality, this beginnings of criminal competence were extended by the Treaty of Amsterdam, until it was enshrined in the

[1] E. RUBI-CAVAGNA, L'*essentiel du droit pénal de l'Union européenne*, Lextenso, coll. Les carrés, 2014, p.15.

[2] D. FLORE, *Droit pénal européen*: *Les enjeux d'une justice pénale européenne*, 2e éd., Larcier, 2014, p. 59.

[3] Even if the Communities did not have real competences in this area, European legislation had "positive" and "negative" effects on national legislation.

Treaty of Lisbon. « This Treaty conferred EU a real normative competence in criminal matters ». By paving the way for the Union's institutions to have legislative power in criminal matters, the Treaty "presents the approximation of the criminal law provisions of the Member States as a fundamental element of European construction and considerably increases the scope of the European Union's competence to harmonize criminal law provisions"[4].

It is within this legal framework that the directive of 15 March 2017 on combating terrorism was adopted.

2. *Indirect EU criminal competency*

Although the Treaty of Lisbon gives the EU competence to legislate in criminal matters, "the European legislator does not have a general competence to protect Europe's fundamental social values, but only a criminal competence to establish an Area of Freedom, Security and Justice (AFSJ) and to safeguard the effectiveness of its policies"[5].

On the one hand, the European Union only has special competence to legislate in areas restrictively listed in the TFEU. On the other hand, the EU's competence in criminal matters is an "indirect"[6] competence. It is therefore noted that "the criminal law of the European Union is not as complete as national criminal law may be"[7]. More specifically, while the European Union has a power of incrimination (*ius incriminandi*) – including the power to lay down minimum thresholds for maximum penalties – it does not have a repressive body and therefore, *strictly speaking*, no power of punishment (*ius puniendi*). This means that the EU's competence in criminal matters only allows it "to ask States to issue standards of criminal protection"[8] *through* the transposition process.

This particularity has certain consequences, in particular on the scope of the right not to punish Member States (negative law). Indeed, if the Union asks Member States to sanction in their internal order this or that behaviour, then Member States are obliged to do so *via* the transposition process. If they had previously opted not to penalize it, then they have no choice but to sanction this behaviour in order to comply with European legislation. Non-criminalization or 'decriminalization' would immediately violate the EU's obligation of *criminal* protection[9]. Member States would therefore "no

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[4] G. Giudicelli-Delage, C. Lazerges, "Avant-propos", in *Le droit pénal de l'Union européenne au lendemain du traité de Lisbonne*, Société de législation comparée, 2012, p. 15.

[5] P. Beauvais, "Chronique Droit pénal de l'Union européenne - Harmonisation des infractions et des peines en matière de délinquance sexuelle sur mineurs", *RTD Eur.*, 2012, p. 877.

[6] C. Sotis, "«Criminaliser sans punir», Réflexions sur le pouvoir d'incrimination (directe et indirecte) de l'Union européenne prévu par le traité de Lisbonne", *RSC*, 2010, p. 773.

[7] P. Beauvais, "Chronique Droit pénal de l'Union européenne - Harmonisation des infractions et des peines en matière de délinquance sexuelle sur mineurs", *RTD Eur.*, 2012, p. 877.

[8] C. Sotis, "«Criminaliser sans punir», Réflexions sur le pouvoir d'incrimination (directe et indirecte) de l'Union européenne prévu par le traité de Lisbonne", *RSC*, 2010, p. 773.

[9] C. Sotis, "«Criminaliser sans punir», Réflexions sur le pouvoir d'incrimination (directe et indirecte) de l'Union européenne prévu par le traité de Lisbonne", *RSC*, 2010, p. 773.

longer exercise the discretion to assess the need to criminalize once the choice of criminal response has been made at EU level"[10].

However, the criminal competence of the European Union does not directly influence the right to punish (positive law). Indeed, "the norm thus adopted does not therefore impose any decriminalization on the Member States"[11]. If a Member State has chosen to criminalize and punish a conduct, EU has no power to oblige the Member State to stop punishing it. *This is the issue at stake in the reflection on the development of a common statute for collaborators of justice.*

Consequently, "the Union can only lay down *minimum rules* on the definition of offences[12] and cannot, for example, decriminalize certain conduct[13]"[14].

3. *Union criminal law, a minimum right*

With the Treaty of Lisbon, "the choice that has been made in substantive criminal law […] is that of approximation of legislation through the enactment of 'minimum rules concerning the definition of criminal offences and sanctions' in specific areas"[15].

The directive of 15 March 2017 is part of this choice. It is based on Article 83.1 TFEU, which provides that "the European Parliament and the Council may […] establish *minimum rules* concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension"[16].

The criminal law of the Union can therefore be analyzed as a 'minimum law' since it is based on the mechanism of *harmonization* (3.1.) which only allows the EU to lay down *minimum rules* (3.2.).

3.1. *Harmonization*

Harmonization is a process of approximation of national criminal law provisions which "implies the provision of international normative standards to which national legislators are obliged to adapt, while retaining a margin of appreciation"[17]. The criminal law of the European Union is a law

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[10] E. Rubi-Cavagna, «Réflexions sur l'harmonisation des incriminations et des sanctions pénales prévues par le traité de Lisbonne», *RSC*, 2009, p. 501.

[11] E. Barbe, "L'influence du droit de l'Union européenne sur le droit pénal français: de l'ombre à la lumière", *AJ* Pénal, 2011, p. 438.

[12] See Art. 31, *e*) ex-TEU and Art. 83 TFEU.

[13] In spite of the bold theses defended by some authors, such as H.G. Nilsoon, "How to combine minimum rules with maximum legal certainty", *Europättslig tidskrift*, 2011, pp. 67 et seq. See also A. Klip, *European Criminal Law*, 2nd ed., Antwerp, Intersentia, 2012, p. 162.

[14] C. Briere, A. Weyembergh, "L'Union européenne et la traite des êtres humains", in D. Bernard, Y. Cartuyvels, *et al.*, *Fondements et objectifs des incriminations et des peines*, Limal, Anthemis, 2013, p. 82.

[15] E. Rubi-Cavagna, «Réflexions sur l'harmonisation des incriminations et des sanctions pénales prévues par le traité de Lisbonne», *RSC*, 2009, p. 501.

[16] Article 83.1, § 1, TFEU.

[17] S. Manacorda, J. Tricot, «Synthèse - La coopération en matière pénale», *JurisClasseur Droit international*, Lexis Nexis, 11 juillet 2016, pt. 8.

derived from harmonization standards. This method "consists of obliging Member States to criminalize at least certain types of behaviour. However, Member States remain free to criminalize more widely[18]. The supranational norm thus becomes the reference, but does not oblige Member States to adopt a strictly identical domestic norm. "The process leads to a convergence of national laws while taking into account national specificities[19].

Harmonization is different from unification. "Whereas harmonization only requires compatibility and hence proximity of the national legal orders involved, unification presupposes a relationship of conformity and identity, giving rise to uniform regulation in the legal area concerned. It follows that "unification implies, for its part, the substitution of a new common rule for pre-existing national rules and thus corresponds to the hypothesis of transfer of competence. "[20]"[21].

The aim of harmonization is to preserve national particularities while providing a common basis for cooperation. Thus, the enactment of minimum rules makes it possible to achieve this goal. They impose common minimum standards that strengthen mutual trust between the different Member States and thus promote the mutual recognition of judicial decisions, the "cornerstone"[22] of the AFSJ.

The approximation of legislation by the EU is based on minimum rules. Therefore, one must ask what the term "*minimum rules*" means and implies in the context of the development of a *favorable* status for the offender – and whether Article 16 of the Directive of 15 March 2017 on the fight against terrorism responds to this logic of minimum rules. Indeed, while the logic of the minimum rules is fairly easy to understand for sentences and incriminations, one must ask how this logic should be understood for provisions that introduce reward measures for collaborators of justice. The thinking differs significantly from the classic repressive logic of drawing up incriminations and penalties: the aim here is not to define the common boundaries of what is illegal, but to identify ways of dealing with a phenomenon that has been identified as illegal[23].

3.2. *Minimum rules*

This term is generally found in Article 83.1[24] TFEU and, more specifically, in Article 1 of the Directive of 15 March 2017 on the subject-matter of

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[18] E. Barbe, "L'influence du droit de l'Union européenne sur le droit pénal français: de l'ombre à la lumière", *AJ Pénal*, 2011, p. 438.

[19] E. Rubi-Cavagna, «Réflexions sur l'harmonisation des incriminations et des sanctions pénales prévues par le traité de Lisbonne», *RSC*, 2009, p. 501.

[20] A. Weyembergh, "Fasc. 2700: Coopération judiciaire et rapprochement des législations en matière pénale au sein de l'UE", *JurisClasseur Europe Traité*, Lexis Nexis, 31 octobre 2017, pt. 72.

[21] S. Manacorda, J. Tricot, «Synthèse - La coopération en matière pénale», *JurisClasseur Droit international*, Lexis Nexis, 11 juillet 2016, pt. 10.

[22] EU, Tampere European Council, 15 and 16 October 1999, point 33.

[23] Cf. below, reflections on the basis of a European statute for collaborators with the judiciary.

[24] Art. 83.1 TFEU, "The European Parliament and the Council may, […], establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension".

this one. This text states: "This Directive lays down *minimum rules* concerning the definition of criminal offences and sanctions in the area of terrorist offences, offences related to a terrorist group and offences related to terrorist activities, as well as measures of protection of, and support and assistance to, victims of terrorism"[25].

The European Union therefore has the competence to establish incriminations and minimum sentences. The provisions contained in the directives "are thresholds below which national legislators cannot go, but beyond which they are free to go"[26]. In other words, the Member States are always free to exceed these thresholds when transposing the directive into their domestic law.

This logic is easy to grasp for penalties. Before the Treaty of Amsterdam, the Union required Member States to impose effective, dissuasive and proportionate penalties. But since the entry into force of the Treaty, framework decisions and then directives have set "minimum of maximum thresholds[27]. For example, the directive of 15 March 2017 on the combating terrorism provides that "Member States shall take the necessary measures to ensure that offences listed in Article 4 are punishable by custodial sentences, with a maximum sentence of not less than 15 years for the offence referred to in point (*a*) of Article 4, and for the offences listed in point (*b*) of Article 4 a maximum sentence of not less than 8 years"[28]. Thus, Member States are obliged to provide for a custodial sentence of at least 15 years as a penalty for directing a terrorist group, but may well provide for a longer sentence. So Member States are free to set a more severe penalty than the one provided for by a directive to punish a conduct, and thus go beyond the minimum rules set by the European text.

However, this logic of minimum criminal law is less understandable with regard to the other provisions contained in the Directive. And this is the issue that concerns us here. On the one hand, is the dismissal of the case or/and the non-punishment of a collaborator of justice in conformity with Article 16 of the Directive when the latter only refers to a reduction of the sentence? On the other hand, can Member States provide for other (either additional or more precise) requirements than those laid down in the Directive in order to grant the person the status of repentant?

Strictly speaking, according to Article 83.1 TFEU, the establishment of minimum rules concerns only sanctions and incriminations. But, Article 16 of the Directive of 15 March 2017 on combating terrorism does not lay down either a sanction or an incrimination.

However, this limitation "has not prevented the European legislator […] from considering these concepts very broadly, as encompassing a range of is-

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[25] Art. 1, Directive (EU) 2017/541, 15 March 2017, on combating terrorism.

[26] D. Flore, *Droit pénal européen*: *Les enjeux d'une justice pénale européenne*, 2e éd., Larcier, 2014, p. 268. In French: «des minima de seuils minimaux».

[27] D. Flore, *Droit pénal européen*: *Les enjeux d'une justice pénale européenne*, 2e éd., Larcier, 2014, p. 268.

[28] Art. 15. 3, Directive (EU) 2017/541, 15 March 2017, on combating terrorism.

sues of general criminal law"[29]. As was already the case before the entry into force of the Treaty of Lisbon, European legislation in criminal matters has gone beyond the 'mere' enactment of incriminations and sanctions. The directives lay down rules on the liability of legal persons, participation in the offence, aid and assistance to victims, etc., taking a truly holistic approach to the criminal phenomenon dealt with. This limitation of 'minimum rules' then seems to apply to all the provisions of the Directives and in our case, in particular, to Article 16 of the Directive.

II. *Questionnaire*

1.1. *Are the requirements of Article 16 exhaustive?*

In this context, the requirements of Article 16 would not be exhaustive. In line with the logic of the minimum rules, Member States *may* (the clause in Article 16 is optional) provide in their internal order *at least* for compliance with the requirements contained in Article 16 (i.e. a reduction of sentence for the collaborator of justice meeting the conditions laid down), but they may go "beyond" this.

The question is what can be understood by "beyond". Can Member States be stricter in the conditions of application of the article? In other words, can they add additional conditions without which the repentant person would not be able to benefit from sentence reduction measures? Conversely, to what extent can a Member State take more extensive, broader measures and going beyond the retributive measures described in the Directive? Can a Member State provide for a system of exemption from punishment in addition to sentence reduction without being in non-conformity with European Union law?

1.1.1. *If the Article 16 requirements are not exhaustive, to what extent can EU Member States derogate from them?*

1.1.1.1. *Are stricter requirements allowed?*

As a preliminary point, the term "*stricter*" must be agreed upon, as it is open to two conflicting interpretations. A stricter requirement may be a requirement that leads to more repression (heavier penalty, broader criminalization). Conversely, a stricter requirement may be a more precise requirement – and then it limits the scope of repression.

Some directives give Member States the possibility to adopt or maintain stricter measures[30]. This possibility can work with the elaboration of a

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[29] D. Flore, *Droit pénal européen*: *Les enjeux d'une justice pénale européenne*, 2e éd., Larcier, 2014, p. 123.

[30] Sometimes the possibility of being more precise is formally provided for and sometimes it is not. E.g. Directive (EU) 2018/1673 on combating money laundering by criminal law, 23 October 2018 which provides, (13): "Member States are free to adopt or maintain more stringent criminal law rules in this area".

minimum threshold of sanctions or with the definition of a core of offences but seems difficult to be compatible with the spirit of Article 16.

First of all, Member States may provide for or maintain higher levels of sanctions than those provided for in the Directive. In this case, the penalties would be heavier and the response more repressive (and therefore stricter).

Secondly, as far as incriminations are concerned, the logic of harmonization and the room for manoeuvre in the transposition exercise should enable States to adopt stricter, more precise definitions. However, since the provisions contained in the directives are already very precise, a State that would further specify the scope of an incrimination would quickly find itself in contradiction with European legislation. Thus, while in theory the Member States have a margin of discretion in transposing directives, in reality this margin of appreciation is rather small, since it would have the effect of reducing the scope of the punishment.

Conversely, the minimum rule offers States the possibility of introducing greater repression than the minimum required by the directive. Moreover, "many Member States take the opportunity of the transposition of European instruments to be stricter and more repressive than the texts of the European Union and to go beyond the incriminations required by them"[31]. Thus, for example, the French transposition of the terrorist organization requires not three but at least two participants (Article 421-2-1 of the French Penal Code), which is much more repressive than European and international law. Finally, 'minimum harmonization may lead to increased criminalization by setting a minimum level of penalties 'without ever defining where these States must stop and what cannot be punished[32,33].

With regard to Article 16, the possibility of providing for or maintaining stricter requirements would amount to adding cumulative conditions or tightening the conditions – making them more precise – for benefiting from the status of collaborator of justice. In that case, Member States would reduce the possibility of being granted the status of collaborator of justice and would risk running counter to the logic of the minimum rules. For example, Spain provides in Article 579-*bis* 3 of its Penal Code the conditions to benefit from a reduction of sentence in case of collaboration with the judiciary in cases of terrorism. It should be noted that the Spanish Criminal Code includes all the conditions provided for in Article 16 of the Directive. Thus, in order to benefit from a reduction in sentence, the collaborator with the judicial authorities must have voluntarily abandoned his criminal activity, must demonstrate active collaboration with the judicial authorities for pur-

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[31] C. Briere, A. Weyembergh, "L'Union européenne et la traite des êtres humains", in D. Bernard, Y. Cartuyvels, *et al*., *Fondements et objectifs des incriminations et des peines*, Limal, Anthemis, 2013, p. 82.

[32] A. Weyembergh, «L'espace pénal européen: 'épée' des droits fondamentaux dans l'Union européenne», in Y. Cartuyvels, H. Dumont, F. Ost, M. van de Kerchove et S. van Drooghenbroeck (dir.), *Les droits de l'homme, bouclier ou épée du droit pénal?*, Bruxelles, Publication des Facultés universitaires Saint-Louis, 2007, pp. 175-209.

[33] P. Simon, *La compétence d'incrimination de l'Union européenne. Recherche sur le pouvoir pénal européen*, Bruxelles, Bruylant, coll. des thèses en droit de l'Union, 2019, p. 111.

poses similar to those provided for in the Directive, but in addition, a confession from the collaborator is required. As this condition is not provided for in the Directive, it can be said that Spain goes "beyond" what is provided for in the European text. In this context, Spanish legislation, by adding a condition to the granting of the status, reduces the number of people who can benefit from it, even though all the conditions laid down in the European text are included.

It may therefore have to be concluded that States, once engaged in legislation to reward collaborators of justice, should at the very least allow for reductions in sentences under the conditions set out in Article 16.

1.1.1.2. *Are broader requirements allowed?*

The answer to this question implies continuing with questions 1.2.

1.2. *Are EU Member States only allowed to mitigate criminal sanctions?*

1.2.1. *Is non-punishment as a reward for cooperation with police and judicial authorities in line with Article 16?*

1.2.2. *What about the closure of the case (before the suspect is charged/accused)?*

While only the reduction of sentence was envisaged by the Directive, the hypothesis of no prosecution (at the pre-sentence stage) or exemption from sentence is not formally excluded and does not seem to have been envisaged by the writers. Are they to be considered excluded? Or, on the contrary, does silence not prohibit them?

It can be argued that there is nothing to prevent the Member State from providing for more situations and mechanisms favoring the collaborator of justice, as long as the conditions envisaged by the Directive are at least provided for in national legislation. Under these conditions, any pre-sentence benefit (e.g. absence of prosecution), granted at the sentencing stage (exemption and reduction of sentence) or at the post-sentencing stage (reduction of sentence, promise of assignment to penal institutions), would be in conformity with the Directive provided that it is additional to the hypothesis provided for in Article 16 (reduction of sentence for those who renounce terrorist activities and collaborate with institutions). There would therefore appear to be nothing to prevent going "beyond" the reduction of sentence, for example by providing for consequences other than a reduction of sentence, or a wider scope of application to the mechanism. This interpretation would make it possible to validate the existing national mechanisms.

Thus, Belgium provides for broader cases than those envisaged by the Directive, where the collaborator of justice can benefit from an extenuating circumstance: "Belgian law allows collaboration in one case which is not listed by Article 16 of the Directive: a promise on prosecution can be made in the case that the collaborator is involved in terrorist activities and the third party accused by the collaborator is involved in activities not linked to ter-

rorism"[34]. This corresponds, for example, to the case where an employee has received terrorist training and the person reported has committed a murder that is not linked to terrorist activities. This possibility is therefore far removed from the objective of the Directive, which is to combat terrorism, but does not seem to undermine the logic of the minimum rule. In France, the principle of discretionary prosecution (Article 40 of the Code of Criminal Procedure) allows the Public Prosecutor to decide whether or not to initiate public action when he is aware of an offence. This principle paves the way for an invisible practice of not prosecuting collaborators of justice. This way of doing is not without question, because, on the one hand, it is not part of an assumed criminal policy and, on the other hand, it deprives the system of any publicity and therefore of any capacity to encourage collaboration[35].

In addition, French law also provides for an exemption from punishment for collaborators who prevented the offence from being committed. Here too, it is tempting to think that this alternative is in line with Article 16 in so far as it is in addition to the hypothesis of a reduced sentence. However, the situation could hinder the strengthening of mutual trust between Member States (hypothesis of one State granting a total exemption from sentence while the others only grant reductions).

At the end of the trial, Belgium or Italy[36] go beyond the directive in that their legislation provides for promises as to the execution of the sentence and the place of detention, whereas the directive only refers to the possibility of a reduction in the quantum of the sentence.

What about States such as France and Luxembourg which do not require one of the conditions of Article 16? For example, neither French nor Luxembourg legislation requires the offender to renounce his terrorist activities in order to be granted a reduction in his sentence[37]. By not taking up the first condition of Article 16, these legislations are broader than the Directive since more individuals could theoretically benefit from the status[38].

If it seems difficult to question legal and cultural choices to offer wider benefits to the collaborator of justice, *a fortiori* when these choices have been made for a long time by some Member States, the logic of the minimum rule could lead to interpreting Article 16 as, on the one hand, the minimum obligation (if the choice to adhere to the optional clause of Art. 16 is made) to provide for a possibility of a reduction in sentence meeting the conditions of Article 16 (with the obligation to establish that violence has been renounced), on the other hand, the possibility of providing for other types of rewards.

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[34] Belgian First Report, p. 47, point 4.1.

[35] Thus, the recent trial of the January 2015 attacks in France brought to light the hypothesis of individuals protected by the judicial institution, who were not prosecuted in this case: H. Seckel, "Au procès des attentats de janvier 2015; l'indic, les armes et le chaînon manquant", Le Monde, 2 October 2020. The indicator and the collaborator of justice are two distinct figures, but their boundaries are not always well defined, especially in the pre-trial phase where the collaborator of justice has no legal existence.

[36] Belgian First Report, p. 48, point 4.2; Italian First Report, point 2.3.

[37] In France, however, this abandonment of violence is a requirement for access to the repentant protection programme.

[38] Luxembourg First Report, points 1.2.2. and 5.

It can be seen here that the logic of the "minimum rule" is difficult to interpret when it comes to creating not a repressive regime but a preferential regime.

Conclusion on point 1

Optional transposition, implementation and application of Article 16 at national level: do EU Member States have absolute or relative discretion?

The special feature of Article 16 is that it is optional[39]. Member States are not obliged to provide for it, but it would appear that when they choose to do so, they must comply at *least* with the requirements of the article. Their discretion would then be absolute in so far as Member States have the choice whether or not to transpose this article but they would have only relative discretion in the application of the conditions once the choice is made to transpose it. Indeed, if the Member State did not comply with the minimum conditions, this would run counter to the principle of primacy[40] and would not be in conformity with European legislation. The Member State would then risk an action for failure to fulfil obligations before the CJEU.

This leads to the conclusion that, if the reduction of sentence under the conditions of Article 16 is introduced, national legislation may, in addition, provide for other mechanisms to reward collaborators of justice at the pre-sentencing stage (decision on prosecution), at the sentencing stage (exemption from sentence / modalities of execution of sentences) and at the post-sentencing stage (idem).

III. *Perspectives*

1. *On the optional or mandatory nature of a reward mechanism for collaborators of justice*

On the one hand, the logic of harmonization argues for a compulsory rather than an optional mechanism. Indeed, the optional nature of the clause maintains disparities and could be analyzed as an obstacle to trust and a danger for cooperation mechanisms based on mutual recognition.

On the other hand, the research shows that there is already a broad consensus on the admission of the status of collaborator of justice «criminal laws». Disparities do not relate to the principle but to the modalities. This is the whole issue of harmonization, which must aim at approximating legislation in order to facilitate mutual trust and judicial cooperation.

In these circumstances, an amendment to the Directive could remove the optional nature of Article 16.

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[39] Art. 16, Directive (EU) 2017/541, 15 March 2017, on combating terrorism, "Member States *may* take".

[40] ECJ, Costa v. ENEL, 15 July 1964, Case C-6/64.

2. *On the legal basis of a European statute for collaborators of justice*

Once the principle of a reward system for collaborator of justice has been accepted, the question arises as to its legal basis. What is the most appropriate legal basis for a European statute for collaborators of justice? Article 16 of the Directive on the fight against terrorism is indeed part of a substantive law directive based on Article 83.1 TFEU and within the defined framework of the fight against a single crime: terrorism.

– A first possibility is to organize a genuine European statute for collaborators of justice within the strict framework of the fight against terrorism, and therefore to propose an amendment to Article 16 of the Directive. In this perspective, the amendment work should decide on the compulsory or optional nature of the clause as well as on its scope of application (which procedural stages? what consequences? what modalities?).

– A second possibility would be to propose a procedural directive based on Article 82 TFEU which would organize an autonomous status of collaborator of justice.

The stakes of this choice are not neutral in terms of criminal policy.

A general directive on the status of collaborator of justice would make it possible to detach this status from the sole question of the prevention of terrorism and to open it up to the fight against either all forms of crime or serious crimes with a cross-border dimension. However, in many States, the status of collaborator of justice has a scope of application that goes far beyond the fight against terrorism – this status has moreover largely emerged in the fight against organised crime. In France, the reward of collaborators of justice is possible in terrorism matters but is not used there to be reserved for the fight against organised crime. The Focus Group organised with competent practitioners has indeed revealed a real reluctance of magistrates to use this status with regard to jihadist terrorists presented as systematically using taqîya (a concealment technique) and untrustworthy in a commitment to renounce terrorist violence.

3. *On the meaning of the construction of a European statute for collaborators of justice*

The question being asked is criminological and political. In Italy, Red Brigades terrorism has been largely defeated thanks to the reintegration of repentant and dissociated people[41]. On the contrary, the fight against the jihadist terrorism that Europe is currently facing, develop mechanisms that reflect the dehumanization of the terrorist and assume a form of separatism of the national community. That could explain the reluctance to exploit the mechanism of the collaborator of justice in the field of the prevention of terrorism (do we really want to reintegrate the jihadist?)[42].

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[41] I. Sommier, «Repentir et dissociation: la fin des "années de plomb" en Italie?», *Cultures et Conflits* n° 40 (4/200), p. 43 et s.

[42] J. Alix, «Radicalisation et droit pénal», *Rev. Sc. crim.*, 2020 p. 769.

The challenge of the European incentive to develop a European statute for collaborators of justice is perhaps to get around this political resistance, as all systems that make use of collaboration of justice seem convinced of its effectiveness in the field of the fight against organised crime.

What should be the *ratio legis of* such a mechanism?

Are these extenuating circumstances? Or is it a mode of proof? Adopting a general directive on criminal procedure makes it possible to place collaboration with the judiciary in what it appears to be fundamentally: a legal tool for gathering evidence, before being an individual means of benefiting from criminal rewards. A general directive about a European model of rewarding measures would focus on the probative dimension of the rewarding measures rather than the sentencing dimension.

Is it a repressive or preventive tool? One of the interests of FIGHTER is to take a clear criminal policy stance: it is no longer possible to reduce the contrivance of criminal law in the fight against terrorism to a purely repressive contribution. Criminal law must be conceived and mobilized, beyond its repressive dimension, as a tool for prevention and, beyond that, for reintegration into society: this is the meaning of criminal responsibility and punishment.

"B"
GERMAN REPORT

HELMUT SATZGER, PATRICK BORN

1. *Introduction*

With the adoption of Directive (EU) 2017/541 (Terrorism) of 15 March 2017[1], based on Art. 83 para. 1 TFEU, the EU legislator has taken a further

[1] O.J. 2017 L 88/6.

step in the harmonisation of national criminal law provisions in the field of terrorism. The Directive replaces Framework Decision 2002/475/JI (Terrorism) of 13 June 2002[2] (amended by the Framework Decision 2008/919/JI (Terrorism) of 28 November 2008)[3] and thus responds to newly emerging forms of terrorist threat – particularly as a result of the increased appearance of the Islamic State ("IS") as from 2014[4].

The Directive and previous Framework Decisions reflect the EU's approach to the harmonisation of national criminal law: Harmonisation focusses primarily on repressive elements and is only permitted in certain areas of (cross-border) crime[5]. The legal bases enabling the harmonisation of material criminal law in these certain areas of crime only refer to the possible creation of criminal offences and the definition of minimum rules on penalties[6]. As a result, one may speak of the concept of "punitivity of criminal law in Europe"[7].

Nevertheless, Art. 16 of Directive (EU) 2017/541 (Terrorism) – as well as Art. 6 of the previous Framework Decision – contain a provision which allows (but does not obligate) the Member States to adopt provisions which provide for a reduction of penalty if the offender cooperates with the criminal prosecution authorities and thus contributes to solving crimes or preventing the commission of further offences ("rewarding measures"). The EU legislator has apparently identified the cooperation of offenders in the field of terrorism as a mechanism for infiltrating the usually isolated and conspiratorially acting terrorist structures and generating successes in investigations[8]. As a consequence, the punitive character of European criminal law has been softened in this respect.

Art. 16 of Directive (EU) 2017/541 (Terrorism) forms the approach of the project "*FIGHTER: Fight against international terrorism. Discovering European Models of Rewarding Measures to Prevent Terrorism*" and raises a number of questions which the Munich Unit will address in the context of this paper.

Firstly, due to its voluntary nature, it is evident that Art. 16 of Directive (EU) 2017/541 (Terrorism) does not obligate the Member States to provide for rewarding measures for terrorist offenders[9]. Nevertheless, many Member States already provide for such provisions. Therefore, it shall be examined how Art. 16 of the Directive should be interpreted with regard to a possible

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[2] O.J. 2002 L 164/3.
[3] O.J. 2008 L 330/21.
[4] *Zywietz*, Propaganda des „Islamischen Staats", p. 1.
[5] *Satzger*, International and European Criminal Law, § 7 para. 42; *Satzger*, ZIS 4 (2009), 691, 692.
[6] Until the entry into force of the Lisbon Treaty on 1 December 2009: Art. 31 para. 1 point (*e*), 34 para. 2 point (*b*) TEU; since then: 83 TFEU.
[7] *Satzger*, International and European Criminal Law, § 7 para. 42; *Satzger*, ZIS 4 (2009), 691, 692; *Schünemann* ZIS 2 (2007), 528, 529 et seq.
[8] For the first time explicitly formulated with regard to organised crime, cf. Council Resolution of 20 December 1996 "*on individuals who cooperate with the judicial process in the fight against international organized crime*", O.J.C 10/1.
[9] *Zimmermann*, in: Satzger (ed.), Harmonisation of Criminal Sanctions in the European Union, 577 (602).

binding effect on rewarding measures applicable under national law in the field of terrorism, in terms of their conditions and their legal consequences, if Member States provide or wish to provide for such provisions.

In addition, the question shall be investigated as to which problems do or may arise as a result of the non-mandatory and thus non-harmonised adoption of rewarding measures under national criminal law of the Member States in the fight against terrorism and under which conditions a binding harmonisation of rewarding measures appears feasible and reasonable. In addition to rewarding measures, the analysis shall, as a systematic approach, also concern provisions that provide for a positive effect on the penalty (e.g. mitigation) of a criminal offender ("beneficial provisions") in general.

In order to achieve the research goals, first of all, a general assessment regarding the binding effect of beneficial provisions on national criminal law shall be made, taking into account the EU legislator's general policy with regard to the harmonisation of sanctions (2. General assessment on binding effect of beneficial provisions taking into account the general policy of harmonising sanctions).

The results of the analysis will be applied to the concrete interpretation of Art. 16 of Directive (EU) 2017/541 (Terrorism) de lege lata, with regard to its binding effect on rewarding measures under national law (3. Transposition to concrete analysis of Art. 16).

Furthermore, the results shall be used to consider the possibilities of a future mandatory harmonisation of rewarding measures in the field of terrorism as well as beneficial provisions in general and to identify the possible need for additional legal steps at the European Union level. (4. Future options to introduce binding rewarding legislation at a European level).

2. *General assessment on binding effect of beneficial provisions taking into account the general policy of harmonising sanctions*

2.1. *Legal basis for harmonising substantial national criminal law*

Ever since the Treaty of Amsterdam of 2 October 1997 came into force on 1 Mai 1999[10], the EU legislator has had the competence, on the basis of Art. 31 para. 1 point (*e*), 34 para. 2 point (*b*) TEU, to adopt minimum rules for the approximation of the national criminal law of the Member States in certain areas of crime by means of Framework Decisions[11]. This competence was consolidated when the Treaty of Lisbon came into force on December 1, 2009[12]. Since then, the EU legislator has basically had two legal instruments at its disposal which give it the competence to harmonise the national criminal law of the Member States by issuing Directives.

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[10] O.J. 1997 C 340/1.

[11] *Hecker*, Europäisches Strafrecht, § 11 pt. 1.

[12] Further details can, for example, be found in: *Hecker*, Europäisches Strafrecht, § 11 pt. 2; For the question to be addressed in the context of this Paper, the statements made on Directives can be transferred to Framework Decisions correspondingly; a differentiated display is therefore widely abstained from.

While Art. 82 TFEU refers – with respect to the competence of legal harmonisation – mainly to the law of criminal procedure[13], Art. 83 TFEU regulates the competence to harmonise substantive criminal law[14]. The legislator has so far – including Directive (EU) 2017/541 (Terrorism) – based his enacted beneficial provisions and minimum rules on sanctions on Art. 83 TFEU[15].

According to Art. 83 para. 1 TFEU, the legislator may "*establish* minimum rules *concerning the definition of* criminal offences *and* sanctions in *the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis*" by means of Directives. This reflects the punitive nature of the harmonisation of criminal law by the European legislator as mentioned above[16]. The legislator is only entitled to determine the minimum requirements for criminal offences on the one hand and the minimum level of sanctions for the respective offences on the other[17]. In addition, the wording of Art. 83 para. 1 phrase 1 TFEU does not explicitly provide for the harmonisation of criminal law to the effect that certain types of conduct are decriminalised by the EU legislator, and neither for the introduction of beneficial provisions having a positive effect (i.e. which favour the offender in view of his criminal liability or the level of the penalty) on the offender of a criminal offence[18].

Moreover, the competence for harmonisation does not extend to the area of the entire criminal law of the Member States but is limited to those fields of crime listed in Art. 83 para. 1 phrase 2 and para. 2 TFEU, including particularly the field of terrorist crime.

As a result, it can be stated that the harmonisation of the criminal law of the Member States by the EU legislator is subject to narrow limits, both in terms of content (= only minimum requirements) and scope (only special fields of crime)[19].

2.2. *Systematic approach to beneficial provisions in EU legislation*

Despite the narrow limits within which the EU legislator has the competence to harmonise national law based on Art. 83 TFEU (and preceding Framework Decisions) and in addition to the definition of minimum re-

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[13] Frankfurter Kommentar EUV/GRC/AEUV/*Hochmayr*, AEUV, Art. 82 pt. 1.

[14] Streinz/*Satzger*, EUV/AEUV, Art. 83 pt. 1; Frankfurter Kommentar EUV/GRC/AEUV/*Hochmayr*, AEUV, Art. 82 pt. 1.

[15] An overview can be found in: *Zimmermann*, in: Satzger (ed.), Harmonisation of Criminal Sanctions in the European Union, 577 (605 et seqq.); Here, Art. 7 para. 4 of Directive (EU) 2016/343 "*on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings*", O.J. 2016 L 65/1, is listed being actually based on Art. 82 para. 2 point (*b*) TFEU. However, Art. 7 para. 4 of Directive (EU) 2016/343 contains only general statements and may therefore not be called a concrete beneficial provision in the context of this Paper.

[16] *Satzger*, ZIS 4 (2009), 691, 692; *Schünemann* ZIS 2 (2007), 528, 529 et seq.

[17] *Hecker*, Europäisches Strafrecht, § 11 pt. 4 et seqq.

[18] *Satzger*, International and European Criminal Law, § 7 pt. 42; *Schünemann* ZIS 2 (2007), 528, 529 et seq.

[19] Frankfurter Kommentar EUV/GRC/AEUV/*Hochmayr*, AEUV, Art. 83 pt. 1 et seqq.

quirements for criminal offences and minimum rules for sanctions, in some Directives there can also be found provisions which allow Member States to provide for a reduction of the offender's sentence, so-called beneficial provisions[20]. With a view to the policy the EU legislator follows when introducing beneficial provisions, the system applied here does not seem very consistent[21]: The beneficial provisions inserted in the Directives based on Art. 83 TFEU often name different legal situations or place different requirements on the offender for the respective applicability of beneficial provisions:

– Art. 16 of Directive (EU) 2017/541 (Terrorism) provides for a possible sentence reduction as reward for cooperation with the authorities

– Art. 5 Directive (EU) 2014/62 (Counterfeiting)[22] provides for possible lower minimum-maximum level of penalty if counterfeit currency was received without knowledge

– Art. 8 Directive (EU) 2011/36 (Human trafficking)[23] provides for non-prosecution or non-application of penalties for offenders themselves victims of human trafficking

– At the same time, other Directives and Framework Decisions, e g. Directive (EU) 2018/1673 (Money laundering)[24], do not foresee the possible adoption and application of beneficial provisions under national law at all.

As a consequence of the inconsistent introduction of beneficial provisions, the question arises as to how such provisions can be compatible with the legal basis of Art. 83 TFEU and what binding effect they impose on the national criminal law of the Member States.

2.2.1. *Beneficial provisions as regulations on minimum penalties*

The first interpretative approach assumes that from the obligation of the Member States to comply with the minimum penalties laid down by the EU legislator, conclusions can also be drawn with regard to the binding effect of beneficial provisions on national criminal law.

2.2.1.1. *Binding effect on national law in the absence of EU legal acts permitting beneficial provisions*

When EU legislation provides for minimum penalties, the presence and absence of beneficial provisions in Directives based on Art. 83 TFEU (and preceding Framework Decisions) could be interpreted as follows:

The Member States cannot apply any form of beneficial provision/measure[25] under national law to those fields of crime for which the EU legislator

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[20] An overview can be found in: *Zimmermann*, in: Satzger (ed.), Harmonisation of Criminal Sanctions in the European Union, 577 (605 et seqq.).

[21] *Zimmermann*, in: Satzger (ed.), Harmonisation of Criminal Sanctions in the European Union, 577 (605 et seqq.).

[22] O.J. 2014 L 151/1.

[23] O.J. 2011 L 101/1.

[24] O.J. 2018 L 284/22.

[25] The addition "beneficial measure" with regard to national law results from the fact that not all Member States may provide for codified rules in the sense of a "provision".

has introduced minimum rules on criminal penalties, if such option is not explicitly provided for in a Directive.

2.2.1.1.1. *Compatibility with the legal basis, Art. 83 TFEU*

Although the EU legislator – at least on the basis of harmonisation of substantive criminal law – is not explicitly authorised to harmonise beneficial provisions/measures under Art. 83 TFEU, there could be a way to interpret the harmonisation of beneficial provision/measures in accordance with the legal basis.

The EU legislator has the competence to establish minimum rules on criminal sanctions. If he only provides for possibilities for impunity or mitigation of punishment in certain cases in some Directives and precisely not in others, then this could be understood as regulation of minimum provisions on sanctions in such a way that only in these cases the level of punishment may be reduced below the minimum level provided for in a Directive. In any case, the mostly voluntary formulation ("*Member States may…*")[26] of beneficial provisions for adoption in national law fits in with this approach. If it is a matter of regulation of minimum penalties, the Member States must be permitted to impose more severe penalties by not adopting a beneficial provision.

2.2.1.1.2. *Incompatibility with the existing policy on the harmonisation of sanctions*

The interpretation presented above sounds reasonable at first in that the EU legislator is competent to set minimum penalties. If beneficial provisions/measures under national law lead to these minimum penalties not being respected, this would lead to a breach of the principle of primacy of EU law[27]. Thus, Member States would only be allowed to deviate if a deviation is explicitly stipulated. However, the current policy of the EU legislator to harmonise sanctions does not allow such an interpretation. The Directive (EU) 2017/541 (Terrorism) can be used as an example to illustrate which minimum sanctions are usually imposed by the legislator:

"*Member States shall take the necessary measures to ensure that*

– the offences referred to in Articles 3 to 12 and 14 are punishable by effective, proportionate and dissuasive *criminal penalties (…)*[28], [so called "minimum triad"]

– the terrorist offences referred to in Article 3 (…), insofar as they relate to terrorist offences, are punishable by custodial sentences heavier than those im-

[26] E.g. Art. 7 para. 4 of Directive 2017/1371 (Financial Interests), O.J. 2017 L 198/29; Art. 16 of Directive (EU) 2017/541 (Terrorism); an exception can only be found in Art. 8 of Directive (EU) 2011/36 (Human trafficking) according to which beneficial provisions *shall* be provided. According to the view presented in this Paper, it is difficult to reconcile such a provision with the current EU's competence for harmonisation.

[27] Cf. for an overview on EU competences: *Satzger*, International and European Criminal Law, § 8 pt. 18 et seqq.

[28] Here, however, the Directive additionally requires that the penalties may entail surrender or extradition. Still, this has no effect on the lower level of the penalty, since the conditions of the EAW are also only linked to minimum sentences, cf. Art. 2 para. 1, 2 Framework Decision 2002/584/JI, O.J. 2002 L 190/1.

posable under national law for such offences in the absence of the special intent *required pursuant to Article 3.*

– that offences listed in Article 4 are punishable by custodial sentences, with a maximum sentence of not less than 15 years *for the offence referred to in point (a) of Article 4"*

This shows that the EU legislator is not setting strict minimum levels of punishment[29]. The minimum triad is a rule relating to the level of penalties to be provided for on a general basis. It does not, however, specify in a concrete way how a Member State should (at least) punish an offender in each individual case[30].

The same applies to the minimum maximum penalties and the condition of relatively more severe punishment. The Member States must generally provide that such a minimum maximum penalty can be imposed in principle, but there is no obligation to do so in individual cases[31]. Moreover, in order to establish or maintain a coherent system of sanctions, the Member States must be entitled to regulate the different levels of penalties to be imposed. In this respect, they must also be able to provide for rules in individual cases according to which the offender is to be punished more leniently or even not punished at all, as long as this does not result in the minimum and maximum penalty being generally considered no longer applicable.

This result would probably have to be assessed differently if the legislator were to provide for a concrete lower limit of penalty, e.g. 6 months to 15 years. In this case, the legislator would have provided for a rule on how even the mildest case of committing such an offence in the Member States should be punished. Consequently, it can be assumed that there would no longer be any room for the MS to disregard the specific minimum level of penalties in specific individual cases.

Although the introduction of such strict minimum penalties has already been proposed and discussed in a very concrete way, it was ultimately rejected[32]. The reason for this was the problematic issue that the introduction of such strict lower penalty limits only in those or only in one field of crime for which the EU has the competence to harmonise sanctions according to Art. 83 para. 1 TFEU may disturb the coherence of national criminal law systems in general[33].

In summary, it can be concluded that the absence of beneficial provisions in EU directives cannot have a binding effect on the Member States with regard to the application of beneficial provisions/measures, provided that this does not mean that the EU minimum requirements are no longer met on a general basis (e.g. if each offender is granted a reduced penalty

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[29] Cf. *Satzger*, Harmonisation of Criminal Sanctions in the European Union, p. 670 et seqq.

[30] *Zimmermann*, in: Satzger (ed.), Harmonisation of Criminal Sanctions in the European Union, 577 (602 et seq.).

[31] Cf. *Satzger*, Harmonisation of Criminal Sanctions in the European Union, p. 672.

[32] See Proposal for Directive 2014/62 (Counterfeiting), COM 2013 42 final.

[33] Detailed: *ECPI*, ZIS 2009, 697 (706).

without further conditions). Provided this is ensured, it is therefore left to the Member States to introduce and apply such rules in the absence of beneficial provisions in EU legal acts.

2.2.1.2. *Partial binding effect of the presence of beneficial provisions*

However, assuming that in the absence of beneficial provisions in EU legislation, the provisions/measures existing in national law remain applicable (as long as they do not lead to a general breach of the required minimum penalties) the question arises as to the legal binding effects of the presence of such provisions on national law.

The fact that, as shown above, the legislator is entitled to lay down minimum rules on penalties is an indication that the effect is not purely declaratory. If it introduces a beneficial provision for a specific legal situation, this can be interpreted as meaning the legislator in these cases provides for a special rule on minimum penalties:

Beneficial provisions/measures addressing the specific legal situation defined in a Directive (e.g. rewarding measures) shall only be applied under national law if the offender at least complies with the requirements set forth by the legislator. At the same time, the legal consequences mentioned in a beneficial provision (e.g. mitigation) bind the Member States to the effect that they may not go beyond those legal consequences (e.g. by providing for impunity)[34].

Since the Member States are not obliged to adopt beneficial provisions, this interpretation leaves a margin of discretion between non-adoption and the literal adoption of the EU-beneficial provision in the system of sanctioning under national law. Seen as regulation on minimum penalties, stricter conditions or less extensive legal consequences can therefore be provided for under national law.

Yet, the question remains as to how the presence of a beneficial provision for a certain legal situation (rewarding measure) and its application to a certain field of crime (e. g. terrorism) affects the application of beneficial provisions/measures under national law that deal with other legal situations than the one being set forth in a Directive. As stated above (see 2.2.1.1.2. "*Incompatibility with the existing policy on the harmonisation of sanctions*"), it cannot be assumed that the absence of beneficial provisions will have binding effects on national law. This approach can also be applied to this situation. Beneficial provisions only affect the legal situation they cover but have no effect on beneficial provisions/measures in national law that apply to other legal situations:

Beneficial provisions/measures of national law that are aimed at other legal situations must therefore remain unaffected.

This result can be seen as supported by the fact that, in its proposal for Framework Decision 2004/757/JHA (Illicit drug trafficking)[35] of 25 October

[34] With the same result regarding the effect of Art. 6 of Framework Decision (EU) 2002/475/JI (Terrorism): Sieber/Satzger/v. Heintschel-Heinegg/*Kreß/Gazeas*, Europäisches Strafrecht, § 19 pt. 48.

[35] COM 2001 259 final.

2004 concerning the introduction of rewarding measures, the legislator stated: "Without prejudice to any other mitigating circumstances defined in their national legislation, *Member States shall take the necessary measures to ensure that the penalties referred to in Article 4 can be reduced (…)"*.This specific wording of the proposal indicates that the legislator does not have the intention to generally affect beneficial provisions/measures under national law by the partial introduction of such provisions for certain legal situations.

The advantage of the interpretation presented here consists in the fact that it is compatible with the legal basis of Art. 83 TFEU, but also takes into account the interests of the EU legislator and the Member States. If the explicitly created beneficial provisions in EU legal acts are conceded a partial binding effect for the legal situations and the field of crime they cover, beneficial provisions/measures in the Member States that are considered particularly relevant by the EU legislator can at least be approximated. At the same time, the coherence of national law is enhanced by the fact that the Member States must, if necessary, only adopt a more repressive approach to the conditions or legal consequences for particularly serious areas of crime, since the EU's competence is limited in this respect (see Art. 83 para. 1 TFEU *"particularly serious crime with a cross-border dimension*".).

According to the legal bases and the legal system currently available at the level of the European Union, this interpretation – although it does not allow for comprehensive harmonisation – shall therefore be considered preferable.

2.2.1.3. *Follow-up questions of partial binding effect*

The assumption of a partial binding effect of beneficial provisions in EU legal acts on national law leads to the subsequent question under which conditions Member States might be allowed to deviate from the EU minimum requirements despite the binding effect in principle. As stated above, the view taken here is that stricter requirements are always possible. In this respect, stricter means – since it concerns rules on minimum penalties – higher requirements for the offender or less extensive legal consequences.

It remains to be clarified to what extent the Member States can provide for more extensive conditions or more extensive legal consequences. Here, the state of opinion on minimum rules for sanctions and criminal provisions can be transferred mutatis mutandis. According to this, the Member States are only allowed to deviate from the minimum rules if this would otherwise violate fundamental principles of national criminal law or constitutional law[36]. However, before refusing to implement them, it should first be examined whether an increase in conditions of application also in other areas of crime could restore coherence. Only if such option is deemed not possible, a Member States may deviate from minimum rules set out by the EU legislator.

[36] Cf. Judgment BVerfG (German Federal Constitutional Court), NJW 2009, 2267 (2274, 2287).

2.2.2. *Reverse interpretative approach: Genuine harmonisation of beneficial provisions by EU-Legislation*

A different result would be obtained by seeing beneficial provisions defined in EU legal acts – just as in the area of criminal offences and sanctions – as "genuine" minimum requirements for beneficial provisions.

This would mean that the Member States would at least have to comply with the conditions and legal consequences of a beneficial provision as required by the EU, but could also go beyond this. Illustrated by Art. 16, this would mean that the Member States – if they decide to implement rewarding measures at all – would have to provide at least for the conditions and legal consequences mentioned there. However, it would also be possible to introduce more far-reaching regulations/measures. In the case of rewarding measures or beneficial provisions/measures in general, this would mean that it would then be made easier for the offender to benefit from a rewarding measure or that he could be granted greater advantages – e.g. exemption from punishment instead of mitigation of punishment.

However, this seems debatable – at least on the basis of Art. 83 TFEU. According to At. 83 TFEU, the EU legislator only possesses the competence to harmonise criminal offences and sanctions by establishing minimum rules. As a matter of fact, the EU has been exercising its limited competence to an extensive extent and, for example, has also issued regulations on the criminal liability of legal persons[37] or questions regarding general principles of national criminal law such as the criminal liability of attempts of a criminal offence[38].

The mere fact that the EU exercises its competence extensively does not mean that one may assume such a de facto existing competence. In addition, the criminal liability of the attempt and of legal persons must at least still be placed within the framework of the definition of minimum rules on criminal offences or sanctions. On the other hand, beneficial provisions – if not seen as special regulations on minimum penalties – are the exact opposite.

Furthermore, there are other reasons contesting such an interpretation. On the one hand, the interpretation would have the consequence that a Member State that decides not to implement the beneficial provisions formulated optionally by the EU as a whole would be in conformity with EU law. On the other hand, a Member State that implements beneficial provisions/measures but provides for stricter conditions (benefit harder to accomplish) or legal consequences (e.g. only mitigation instead of impunity) for the offender would be in breach of EU law.

There might also be conflicts with regard to the coherence of national law. As has been shown, the EU legislator only has competence to adopt minimum rules in certain areas of crime. These are types of offences in the area of serious crime. However, if a Member State provides for beneficial provisions/measures which place higher demands on the offender or entail

[37] E.g. in Art. 18 of Directive (EU) 2017/541 (Terrorism).
[38] E.g. in Art. 14 para. 3 of Directive (EU) 2017/541 (Terrorism).

less benefit than those provided for by EU law, it would have to lower these particularly in the area of serious crime, while they could remain in place for lighter areas of crime where the EU has no competence for defining minimum rules.

As a consequence, although an interpretation in the sense of a genuine harmonisation might be a desirable solution from a harmonisation point of view (still without being able to remove all differences between Member States), it does not seem compatible with Art. 83 TFEU.

2.3. *Summary*

In our view, it is thus preferable on the basis of the existing legal basis, Art. 83 TFEU, to regard beneficial provisions in EU Directives as minimum rules on criminal penalties for the specific legal situation they cover.

Accordingly, Member States can decide for these legal situations whether they allow the application of beneficial provisions/measures at all. However, if they do so, they can only extend the application to the maximum extent provided for by the EU legislator. The same applies to the legal consequences, so that the Member States may at any time provide for lower benefits but may not go beyond the minimum level defined in a directive (e.g. mitigation).

With regard to all other legal situations not explicitly regulated by the EU legislator, the Member States remain free to regulate the nature and scope of the applicable beneficial provisions/measures, as long as this does not generally lead to non-compliance with the minimum requirements on penalties provided for by a Directive – in particular the minimum triad.

Deviations from explicitly regulated beneficial provisions are only possible on the basis of fundamental principles of national criminal or constitutional law.

3. *Transposition to Art. 16 - in-depth analysis*

The principles developed on the basis of the general policy of the EU legislator can now be applied in concreto to the question of how the binding effect of Art. 16 Directive (EU) 2017/541 (Terrorism) for rewarding measures under national law should be interpreted. First, the requirements of application and then the legal consequences will be considered.

3.1. *Binding effect of requirements set forth in Art. 16*

3.1.1. *Exhaustive effect of requirements set forth in Art. 16*

It should be noted in advance that Art. 16 does not oblige the Member States to introduce rewarding measures for the offences defined in Art. 3 - 12 and 14 (“may take the necessary measures”). In this respect, the question of exhaustive effect refers (only) to the situation that rewarding measures already exist or are to be introduced in the criminal law of the Member States.

However, based on the model developed on the basis of the general policy of the EU legislator on the harmonisation of sanctions and beneficial provisions, it emerges that the application requirements of Art. 16 cannot have an explicit exhaustive effect. The EU legislator is according to Art. 83 para. 1 TFEU only competent to define minimum rules.

3.1.2. *Resulting scope of discretion of the Member States*

3.1.2.1. *Theoretical interpretation*

Following the approach presented in this paper, the conditions of application of Art. 16 on the basis of Art. 83 TFEU represent minimum rules on penalties. As a result, with respect to the legal situation of the application of rewarding measures, the Member States have to ensure that they are only applied under national law if the offender fulfils at least the conditions laid down in Art. 16. Consequently, the Member States are not prevented from introducing stricter conditions of application, i.e. to place higher demands on the offender with regard to the applicability of a rewarding provision. Due to the voluntary nature of the implementation of Art. 16, this opens up a margin of discretion for the Member States ranging between the literal transposition of Art. 16 and no implementation at all. On the other hand, broader requirements can only be provided for in exceptional cases, namely when fundamental principles of national law would otherwise be violated.

3.1.2.2. *Concrete application of theoretical approach on the individual requirements*

According to the result on the theoretical level, the concrete impact of the partial binding effect of the requirements of Art. 16 on national law shall be examined.

3.1.2.2.1. *Renunciation of terrorist activity, Art. 16 point (*a*)*

Art. 16 point (*a*) requires the terrorist offender to renounce his or her terrorist activity, providing a relatively definite minimum requirement. Accordingly, the Member States may not grant the terrorist offender access to rewarding measures without the latter at least promising not to engage in further terrorist activities. If – as is currently the case, for example, in German criminal law – rewarding measures are applied in the national criminal law system on terrorist offences that do not provide for a renunciation[39], these would have to be adapted according to the approach presented here. Otherwise, it would lead to broader access for terrorist offenders to rewarding measures. However, the Member States are at liberty – which can also be useful in practice – to impose certain additional requirements on the renunciation in order to ensure its seriousness[40].

[39] Cf. Section 46b German Criminal Code ("StGB").

[40] For example, by specifying concrete actions that the offender must take or refrain from taking.

3.1.2.2.2. *Disclosure of information and causal success in detection or prevention, Art. 16 point (*b*)*

Unlike in the case of Art. 16 point (*a*), the conditions listed in Art. 16 point (*b*) sub-points (*i*) - (*iv*) are significantly less clear in terms of their meaning.

3.1.2.2.2.1. *Basic requirement: Disclosure of not otherwise obtainable information*

The basic requirement mentioned in Art. 16 point (*b*) is that the offender must disclose information to the law enforcement authorities that they could not have obtained in any other way. If one were to interpret this basic requirement narrowly, the Member States would have to implement measures into national law or already provide for an assessment of whether the authorities could have also obtained the disclosed information by other means. Accordingly, it would not represent a sufficient requirement under national law if the disclosed information merely provided the authorities with new findings, i.e. such information that was previously unknown.

However, it must be pointed out that the wording in this case must be described as of a rather impractical nature. The obligation of the Member States to introduce a prognosis as to whether the information could have been obtained in any other way appears hardly feasible under practical aspects. If the authorities receive new information through the statements of the offender, it will presumably in most cases not be assurable that the information could not have been obtained in any other way at some future point in time through investigations, e.g. telecommunications surveillance.

Consequently, based on a corresponding application of the principle of "effet utile"[41]. an interpretation should be considered here that allows a more practical implementation of rewarding measures. It is an endeavour of the EU legislator to promote the introduction of rewarding measures in the Member States in order to enhance judicial cooperation and effectiveness of law enforcement in Europe[42]. Therefore, it cannot be an aspiration of the legislator to introduce a minimum requirement that would prove to be a hindrance in practice.

Accordingly, an interpretation of this requirement is proposed to the effect that Member States must at least ensure that not every form of information disclosure leads to the applicability of rewarding measures, but that the information provides new insights of a certain significance. Such interpretation stays relatively close to the current wording but does not require a prognosis decision being difficult to implement in practice. If this suggestion were not followed, the wording of the basic requirement would probably have to be transposed exactly into national law, since a compliant deviation by means of a different form of wording seems difficult to imagine.

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[41] With regard to this principle comprehensively: *Potacs*, EUR 2009, 465.

[42] Council Resolution of 20 December 1996 "on individuals who cooperate with the judicial process in the fight against international organized crime", O.J. C 10/1.

3.1.2.2.2.2. *Requirement of a causal success in detection or prevention*

A further requirement is that it is not sufficient if national rewarding measures reward the disclosure of new information alone. The wording of Art. 16 point (*b*) suggests that the information must also have had a certain effect, namely to help the authorities in one of the avenues listed in sub-points (*i*)-(*iv*). Thus, the connection of the information with a causal detection or prevention success is to be provided for under national law.

As far as the exact implementation is concerned, however, the Member States seem to be granted wide discretion. If the Member States only provide for one of the avenues set forth in sub-points (*i*)-(*iv*), they already impose stricter requirements on the offender and therefore act in compliance with the minimum rules set forth in Art. 16. In addition, the avenues mentioned in sub-points (*i*)-(*iv*) are worded so broadly that it can hardly be assumed that a conflict of national rewarding measures will arise as long as the necessary connection between information and causal success is maintained.

According to sub-point (*i*), it is sufficient if the offender mitigates the effects of his own offence by disclosing information. In the absence of additional requirements, any mitigation, however minimal, would be in compliance with Art. 16 point (*b*) sub-point (*i*). At first sight, however, sub-point (*iv*) represents a narrower criterion. According to this, the Member States may not apply rewarding measures if the offender has only contributed to mitigating and not to preventing further offences pursuant to Articles 3-12 and 14.

However, when mitigating the effects of offences committed by third parties, the offender will generally contribute to obtaining evidence in accordance with sub-point (*iii*) or help to identify other offenders or bring them to court according to sub-point (*ii*). It remains questionable how the formulation "the other *offenders*" in sub-point (*ii*) is to be understood. The conclusion could be drawn that here a connection between the offence of the informing offender and the offenses of the offenders determined on the basis of this information is necessary. This interpretation is, however, negated by the fact that in sub-point (*iii*) the finding of evidence in any form and not restricted to terrorist offences is deemed a sufficient minimum requirement for application.

This shows that the requirements under sub-points (*i*)-(*iv*) have very little, if any, concrete binding effect on national law. Rather, it seems to be left to the Member States in a very far-reaching way to decide how to define their national provisions with regard to the effect that the information has to provide.

3.1.2.2.3. *Summary*

In summary, the Member States must ensure in any case that the offender at least renounces terrorist activities. In addition, it is necessary – in accordance with the proposed broader interpretation of the requirement – that the information passed on provides the authorities with not merely insignificant new findings. The disclosure of information must also be linked to at least some success in the investigation. However, the concrete form of

this success is largely left to the Member States, since the requirements set forth in this respect are of a very broad nature.

3.2. *Binding effect of legal consequences referred to in Art. 16*

3.2.1. *Interpretation of reference to Art. 15*

Art. 16, regarding the legal consequences, stipulates that, if its conditions are met, the minimum penalties laid down in Art. 15 may be *reduced*. The reference in Art. 16 to the minimum penalties defined in Art. 15 could be understood to mean that each of the numbers in Art. 15 must be considered separately with a view to reducing the penalties. This would result in a multi-stage system, whereby for the offences mentioned in Art. 15 No. 1 – if the offender has fulfilled the conditions of the rewarding measure – compliance with the minimum triad would no longer be necessary. Consequently, the penalties under No. 2 could be set milder for the terrorist offender than for the offender without terrorist intent and the minimum-maximum level under No. 3 could be set gradually lower (e.g. 10 instead of 15 years).

However, such a differentiation does not seem convincing. First, Art. 15 No. 2 and 3 only concern the upper level of punishment to be provided for. In individual cases, a milder penalty can be imposed even without rewarding measures[43]. The minimum lower limit of the punishment is also here determined by the minimum triad. If Art. 16 stipulates that a reduction can take place, the Member States do not have to adhere to the minimum upper or lower limit to be provided. Another argument against the assumption of a multi-stage system is that it remains unclear how the possible reduction would affect Art. 15 No. 4, which, unlike the other numbers, does not provide for a terrorist but for another reason for aggravation of punishment with regard to the involvement of children in terrorist activities. Finally, also the EU legislator himself has explicitly spoken out against the introduction of such a system[44].

Thus, the reference of Art. 16 to the penalties set forth in Art. 15 should rather be interpreted in a general way meaning that only if at least the requirements of Art. 16 are met, the legal consequence of the reduction of penalty shall be made available to the Member States.

3.2.2. *Interpretation of the term "reduction" with regard to the possible admission of non-punishment as reward*

However, the previously developed principles still leave unanswered the question of whether the legislator's formulation that the penalties can be "reduced" is also to be understood to mean that the offender can remain exempt from punishment altogether as a result of the application of rewarding measures. In the sense of a rule on minimum penalties, the opposite could

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[43] Cf. *Satzger*, Harmonisation of Criminal Sanctions in the European Union, p. 672.

[44] Cf. Proposal for Framework Decision (EU) 2004/757/JI (Illicit drug trafficking) COM 2001 259 final.

also be assumed, i.e. that reduction is to be understood as meaning that the offender must be punished, albeit more leniently, but in any case.

A limitation to mitigation has to be assumed if the EU legislator wished to explicitly exclude the possibility of non-punishment. This would result in Art. 16 actually being a negative provision for the offender. As shown in the context of the considerations on the general system of harmonisation of beneficial provisions, without the existence of Art. 16 it would be possible for the Member States to allow non-punishment as a legal consequence of a rewarding provision. This is still the case in some Member States, including Germany[45].

Nevertheless, a systematic consideration speaks for such an interpretation. The formulation of Art. 16 has its origin in Art. 6 of Framework Decision 2002/475/JHA (Terrorism) and has principally been adopted word-for-word. Art. 6 of Framework Decision 2002/475/JHA (Terrorism) also referred merely to the possibility of reducing the penalty. On October 24, 2008, Framework Decision 2008/841/JHA (Organised Crime)[46] was passed, which also provided for a rewarding measure in Art. 4. Here, however, although the wording was otherwise very similar, there was an explicit possibility "that the offender may be exempted from penalties". In Framework Decision 2008/919/JHA (Terrorism), which supplemented Framework Decision 2002/475/JHA (Terrorism), the difference in wording was not corrected. As a result, some see this as an argument that the Member States shall not be permitted to provide for the exemption of penalty in the context of terrorism[47].

The better arguments, however, suggest that exemption of penalty in the rewarding measures of the Member States can (still) be granted under Article 16. First of all, the wording "reduction" does not preclude reduction to "zero"[48]. The exemption of penalty can therefore be included in the wording without further effort. Even if the legislative materials of the legal acts on terrorism and organised crime do not reveal any concrete intention on this point, it may be possible to do so taking into account the Proposal for Framework Decision 2004/757/JHA (Illicit Drug Trafficking). The wording of the rewarding measure – as suggested in Art. 6 of the Proposal – also merely provided for the penalties to be "reduced". However, in the Proposal, it says: "*It is for the competent authorities to define the criteria for determining what constitutes valuable information and to decide the amount by which the sentence will be reduced or even, depending on the circumstances, to waive the punishment altogether*"[49]. Even if this may only be an indication, it still speaks for the admissibility of exemption of penalty.

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[45] E.g. Section 46b StGB.

[46] O.J. 2008 L 300/42.

[47] Sieber/Satzger/v. Heintschel-Heinegg/*Kreß/Gazeas*, Europäisches Strafrecht, § 19 pt. 48.

[48] Admittedly, the German version "mildern" suggests a different interpretation at first glance, since German criminal law explicitly distinguishes between grounds for mitigation ("mildern") and exemption from punishment ("absehen"). In principle, however, the German wording also permits a corresponding interpretation.

[49] Cf. Proposal for Framework Decision (EU) 2004/757/JI (Illicit drug trafficking) COM 2001 259 final.

Overall, it can also be assumed that the explicit non-admission of exemption of penalty could also impair the effectiveness of rewarding measures under national law. This would contradict the legislator's explicitly stated goal of promoting the application of such regulations in national law[50].

3.2.3. *What about dismissal of the case (before the suspect is charged/indicted)?*

The dismissal of the case is a component of the criminal procedural law. On the basis of Art. 83 para. 1 TFEU, the EU legislator can therefore basically not regulate to what extent a state can or cannot decide to dismiss a case[51]. Since, however, according to the interpretation presented in this paper, exemption of penalty is also possible, the ratio of Art. 16 does not imply any fundamental considerations against a dismissal of the case, to the effect that otherwise there would be the threat of a circumvention of Art. 16[52].

4. *Future options to introduce binding rewarding legislation at a European level*

4.1. *Necessity of increased harmonisation of rewarding measures at European level*

As the research presented above has shown, the existing rewarding measures can strongly be affected by the specific legal system of each Member State due to the relatively wide scope of discretion of the Member States. This heterogeneous scenario risks to significantly decrease the effectiveness of judicial cooperation on the one hand, and to favour the emergence of forum shopping on the other[53].

From the first point of view, relevant issues are doomed to affect the cooperation between judicial authorities that request an EAW to authorities of a Member State that does not provide for any sort of mitigation for the disclosing offender, which could therefore deny the delivery in the name of the "just punishment", or vice versa, a Member State able and willing to exploit the rewarding measures in order to obtain useful information in order to prevent further attacks may refuse a EAW requested by a Member State only able to punish the arrested, as it would frustrate any preventive activity[54].

From the second point of view, terrorists willing to recruit other members may choose to settle in Member States that do not provide for any mit-

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[50] Council Resolution 97/C 10/01 of 20 December 1996, "on individuals who cooperate with the judicial process in the fight against internationally organised crime".

[51] Since this competence is set forth in Art. 82 TFEU, cf. Frankfurter Kommentar EUV/GRC/AEUV/*Hochmayr*, AEUV, Art. 82 pt. 1.

[52] If the member states threatened to circumvent the minimum requirements of Art. 16 at the procedural level, this could constitute a breach of TEU concerning the obligation of loyalty resulting from Art. 4 para. 3 TEU.

[53] Cf. Proposal SEP-210523548 "FIGHTER", Part B, p. 5.

[54] Cf. Proposal SEP-210523548 "FIGHTER", Part B, p. 5.

igation, in order to discourage the recruited to cooperate once arrested; and terrorists willing to prepare an attack may choose those Member States where rewarding measures are more favourable in case of failure. Overall, different rewarding measures in the Member States – as well as different beneficial provisions in general – thus contribute to a weakening of mutual trust. Consequently, an increased harmonisation is highly desirable in this respect[55].

4.2. *Possible cross-fertilisation: Compliance of terrorism-related rewarding measures under German law with Art. 16*

4.2.1. *General rewarding measure, Section 46b StGB*

In German national criminal law, Section 46b StGB is the most relevant rewarding measure. Although Section 46b StGB is not limited to application in the terrorist field alone, it has been inserted specifically with a view to application to terrorist offences[56].

4.2.1.1. *Compliance of legal consequences with Art. 16*

Section 46b StGB provides that the penalty of the offender – if he has fulfilled the conditions for application – can be reduced and in certain cases also exempted. With regard to the minimum requirements which Article 16 imposes on national law, the assumption is made that both mitigation and non-punishment should be permissible. Consequently, according to the interpretation presented in this paper, the legal consequences provided for by Art. 46b StGB are compliant with Art. 16.

4.2.1.2. *Compliance of requirements with Art. 16*

Section 46b StGB provides for two situations in which an application can be carried out.

According to Section 46b para. 1 phrase 1 No. 1 StGB, it can be applied if the offender

"*has, by voluntarily disclosing what he or she knows, contributed substantially to the detection of one of the offences under section 100a (2) of the Code of Criminal Procedure (Strafprozessordnung) which is related to his or her own offence*";

while according to Section 46b para. 1 phrase 1 No. 2 StGB it is applicable if the offender

"*voluntarily discloses what he or she knows to an authority in time to prevent the completion of one of the offences under section 100a (2) of the Code of Criminal Procedure which is related to his or her own offence, the planning of which the perpetrator is aware of*".

In accordance with the interpretation and binding effect of Art. 16 represented in this paper, stricter conditions of application are always permissible, while further conditions are only possible in exceptional cases.

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[55] Cf. Proposal SEP-210523548 "FIGHTER", Part B, p. 6.
[56] BT-Drs. 16/6268, p. 1.

First of all, it can be noted that Section 46b StGB – in contrast to Art. 16 – does not require the offender to renounce his criminal acts[57]. In this respect, Section 46b StGB causes easier access for the offender to benefit from an application and therefore does not comply with Art. 16. Consequently, an adjustment of the requirement for application should be considered here. Something different could only result if such an adjustment conflicted with fundamental principles of national criminal or constitutional law[58]. This is not the case here, however. Especially with regard to the Principle of Guilt, prompted in Art. 1 para. 1 GG[59], the absence of such a requirement is often criticised in German criminal law scholarship[60]. An adjustment – also beyond the field of terrorism – would thus not violate the principles of national law but would even accommodate them.

Art. 16 further requires that the offender provides the *"authorities with information which they would not otherwise have been able to obtain"*. In contrast, Section 46b StGB merely requires the voluntary disclosure of substantial information (No. 1) or the voluntary disclosure of information in good time (No. 2). This constitutes a deviation from the wording of Article 16, as German law does not require the information to be examined to see whether it could have been obtained by other means. Under national law there only is an examination of whether the information was essential for the required success of the investigation or decisive for the required prevention of an offence[61]. If one were to assume that Art. 16 is to be understood literally here, it would appear questionable whether Section 46b StGB would be compliant in this respect. However, in accordance with the proposed interpretation of this basic requirement of Art. 16 due to its practical weaknesses, we assume that Art. 16 is to be understood in such a way that the offender is at least obliged to pass on not merely insignificant new information to the authorities. Consequently, it can be assumed that Section 46b StGB does not violate Art. 16 with regard to this requirement.

Finally, Article 16 also requires at least the connection of the information with a success in terms of detecting or preventing further offences. Here, Section 46b StGB is much stricter in its requirements. No. 1 presupposes a significant contribution to the clarification of a criminal offence[62]. This goes well beyond the formulation of Art. 16 point (*b*) sub-point (*iii*), "find evidence". Since a connection between the offender's offence and the offence about which he provides information is also required[63], there is also no conflict with sub-point (*ii*), "identify or bring to justice the other offenders". Furthermore, Section 46b para. 1 phrase 1 No. 2 StGB explicitly requires that another offence must have been prevented or at least the possi-

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[57] MüKoStGB/*Maier*, § 46b pt. 28.

[58] Cf. Judgment BVerfG (German Federal Constitutional Court), NJW 2009, 2267 (2274, 2287).

[59] Cf. *Adam/Schmidt/Schumacher*, NStZ 2017, 7 et seqq.

[60] For a detailed analysis cf. *Christoph*, Der Kronzeuge im Strafgesetzbuch, 2019, p. 195 et seqq.

[61] NK-StGB/*Streng*, § 46b pt. 10; MüKo-StGB/Maier, § 46b pt. 140.

[62] NK-StGB/*Streng*, § 46b pt. 9.

[63] BeckOK-StGB/*Heintschel-Heinegg*, § 46b pt. 13 et seqq.

bility of doing so must have existed if the authorities had acted in accordance with their duties[64]. According to Art. 16 point (*b*) sub-point (*i*) it is sufficient for the offender to merely mitigate the effects of his own offence. Consequently, no conflict is to be feared in this respect.

4.2.2. *Other rewarding measures applicable in the field of terrorism under national law*

Under German law, further rewarding measures are also applicable with regard to terrorist offences. However, as was confirmed in particular by the Focus Group, these are in principle of very little practical relevance in German criminal law. Therefore, only a few remarks are made in this respect, as they are presumably not very suitable for cross-fertilisation.

Section 129a para. 7 in conjunction with Section 129 para. 7 StGB is only applicable to offences under section 129a StGB ("Forming terrorist organisations"). Although the wording of the rewarding measure differs slightly from Section 46b StGB, the statements set out there can in principle be applied[65].

Sections 89a[66] para. 7 and 89c[67] para. 7 StGB reward the offender for "*voluntarily giving up further preparation of the offence and averting or substantially reducing a danger, caused and recognised by him, that others will continue to prepare or carry out the offence, or if he voluntarily prevents the completion of the offence*". His voluntary and sincere effort to achieve that objective is sufficient if, without his intervention, the "*designated danger is averted or substantially reduced or the completion of the offence is prevented*".

It is already questionable whether Art. 16 is applicable at all in this respect. According to the principles presented in this paper, Art. 16 applies only to the legal situations it describes. In this case this would be the situation of reward for cooperation with the authorities. In contrast, Section 89a para. 7 and 89c para. 7 StGB are basically only concerned with the offender voluntarily counteracting the effects of his own offence[68], while cooperation with the authorities is not the legal situation covered. However, if an offender cooperates with the authorities in order to counter the effects of his offence in accordance with Section 89a para. 7 or 89c para. 7 StGB and this would result in the assumption of Art. 16 being applicable, no conflict with the minimum requirements of Article 16 would be expected. Since the offender voluntarily gives up his offence and does not, as in the case of Section 46b StGB, only pass on information voluntarily after committing his offence, one may assume that also here a renunciation of his terrorist activities is introduced in the sense of a requirement for the reward of the offender.

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[64] BeckOK-StGB/*Heintschel-Heinegg*, § 46b pt. 13 et seqq.

[65] A detailed analysis of the requirements of Section 129a para. 7 in conjunction with Section 129 para. 7 StGB was carried out in the context of the WP-1-Questionnaire, cf. p. 45 et seqq.

[66] "Preparation of serious violent offence endangering the state".

[67] „Financing of terrorism".

[68] BeckOK-StGB/*Heintschel-Heinegg*, § 89a pt. 44.

4.3. *Adequacy of current non-binding EU minimum provisions with a view to further harmonisation of national rewarding legislation*

The policy currently applied by the EU – concerning both the harmonisation of sanctions and beneficial provisions – is, as has been shown, merely a very slight intervention in the national criminal law systems of the Member States.

This low binding effect indirectly leads to the fact that also the beneficial provisions hardly need to be uniformly implemented in the national criminal law systems of the Member States.

A more consistent system in the area of beneficial provisions might at first view be achievable by the means of the EU legislator setting true minimum rules on penalties within its sphere of competence, and this to a large extent. This would bind Member States as regards the lower limit of criminal liability and would not – or at least not to the current extent – allow them to deviate from these minimum penalties. However, since the application of beneficial provisions is both a necessary and regular instrument of national criminal law systems, the EU legislator would then also have to react adequately by dealing with the introduction of beneficial provisions in a comprehensive and systematic way. If this was undertaken, it would allow, at least with regard to the EU's area of competence, for the type of beneficial provisions applicable in the Member States to be harmonised.

At the same time, however, the EU legislator would still not have the competence to oblige the Member States to adopt beneficial provisions at all. At present, its competence in substantive criminal law only relates to the area of minimum penalties. Therefore, there would always remain a margin of discretion between non-application and the literal adoption of the beneficial provisions. Moreover, harmonisation would again only take place in some sub-areas of national law, which could massively disrupt its general coherence[69]. Consequently, also the introduction of strict minimum rules and corresponding more binding beneficial provisions seems to be no viable path for the EU legislator in the area of substantive criminal law. In addition, the effectiveness of such kind of minimum harmonisation would still appear at least questionable with regard to beneficial provisions/measures under national law.

As the papers of the other project participants have also shown, there is no really automatic harmonisation in the specific area of rewarding measures undertaken by the Member States. As harmonisation of national rewarding measures has to be seen as a highly desirable objective, the current approach chosen by the EU legislator when harmonising national law by non-binding minimum rules – which also applies to sanctions and beneficial provisions in general – can not be described as adequate.

4.4. *Feasibility and advisability of binding harmonization*

According to the view presented in this paper, binding harmonisation

[69] *Satzger*, Harmonisation of Criminal Sanctions in the European Union, p. 667.

following the current approach of the legislator on the basis of Art. 83 para. 1 TFEU is not a feasible and also not advisable option. Consequently, more attention should be paid to alternatives.

4.4.1. *Harmonisation of rewarding measures based on Art. 82 TFEU*

Art. 82 TFEU concerns judicial cooperation between the Member States in criminal matters and also includes the approximation of the criminal law of the Member States in the areas mentioned in Art. 82 para. 2 and 83 TFEU[70]. Accordingly, in the cases referred to in Art. 82 para. 1, Regulations and Directives, and in the cases referred to in para. 2, only Directives can be issued to promote mutual recognition of the Member States (para. 1) and to approximate criminal procedural law (para. 2)[71].

Harmonisation on the basis of Art. 82 para. 1 TFEU appears to be difficult to implement due to its focus on general aspects of mutual recognition[72]. It has been shown that the different existence of rewarding measures and thus the different legal status of the collaborator of justice may have negative effects on mutual recognition between the Member States. However, Art. 82 para. 1 TFEU only covers cross-border cooperation (mutual legal assistance), not the competence to harmonise criminal procedures under national law[73].

Thus, only the harmonisation of criminal procedural law based on Art. 82 para. 2 TFEU appears to be a conceivable avenue to follow. An implementation of the rules on the offender's cooperation with the authorities in national criminal procedural law and not – as at least the EU legislation has done so far – in substantive criminal law does not appear to be an option excluded from the outset. On the contrary, this is – if one considers, for example, the regulations in Belgium[74] and Austria[75] – even a rather common way to go, which can therefore be described as promising. However, this presupposes that a harmonisation of the rules on the cooperation of the offender with the public authorities would also be compatible with the requirements of Art. 82 para. 2 TFEU.

4.4.1.1. *Usefulness of Art. 82 para. 2 phrase 2 point (*b*) TFEU as legal basis*

One conceivable avenue to follow could be to define regulations on the nature and manner of cooperation with the judicial authorities as a right of the individual accused in criminal procedure in the sense of Art. 82 para. 2 phrase 2 point (*b*) TFEU, and hence this being a possible legal basis for corresponding Directives on minimum rules. Admittedly, harmonisation would not be conclusively possible here either. But unlike on the basis of Art. 83 TFEU, rewarding measures could be defined positively and not be limited to only some areas of crime, with the consequence that a minimum standard of

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[70] von der Groeben/Schwarze/*Meyer*, AEUV, Art. 82 pt. 1.
[71] Streinz/*Satzger*, EUV/AEUV, Art. 82 pt. 1 et seqq.
[72] Frankfurter Kommentar EUV/GRC/AEUV/*Hochmayr*, AEUV, Art. 82 pt. 5 f.
[73] Frankfurter Kommentar EUV/GRC/AEUV/*Hochmayr*, AEUV, Art. 82 pt. 15.
[74] Art. 216/1 - 216/8 Belgian Code of Criminal Procedure.
[75] Sections 209a, 209b Austrian Code of Criminal Procedure.

rules could be achieved at European level in this field. This would certainly strengthen mutual trust between the Member States and reduce the risk of forum shopping. Consequently, the basic requirements for the adoption of a corresponding Directive would presumably be in place as Art. 82 para. 2 TFEU requires that Directives be issued only *"to the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension"*[76].

Although the wording of Art. 82 para. 2 phrase 2 point (*b*) TFEU does not exclude from the very beginning such a definition as procedural right, such an approach has so far at least not found its way into the considerations of the EU. The issues addressed in the Resolution of the Council of 30 November 2009 *"on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings"*[77] show that the focus here is mainly on other aspects of criminal procedural law, such as the right to legal advice or the right of communication with relatives, employers and consular authorities. Against this background, the compatibility of general standards on the collaborator of justice with the wording seems doubtable[78].

4.4.1.2. *Usefulness of Art. 82 para. 2 phrase 2 point (*d*) TFEU as legal basis*

According to Art. 82 para. 2 phrase 2 point (*d*) TFEU *"any other specific aspects of criminal procedure"* can be covered and approximated by means of directives. Accordingly, an excessively extensive intervention in national procedural law is not possible, as is shown in particular by the limitation of the wording to "specific aspects"[79]. However, the legal status of the collaborator of justice is to be seen as only a partial criterion of national criminal law. It can be compared, for example, with the establishment of minimum rules on the reopening of criminal proceedings, which is considered to be permissible[80]. Consequently, it can be assumed that the adoption of a Directive to this effect would in principle be possible.

However, the basic prerequisite here is that a unanimous decision of the Council, with the consent of the European Parliament, must be taken in order to classify the legal status of the collaborator of justice as an aspect of criminal procedure that requires regulation[81].

That there is such a need for regulation or at least an interest in the existence of such regulations on a national level was already confirmed by the Council itself in 1996 in a Council Resolution in which the Member States were called upon to provide for such regulations in national law[82]. Conse-

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[76] Frankfurter Kommentar EUV/GRC/AEUV/*Hochmayr*, AEUV, Art. 82 pt. 24.

[77] O.J. 2009 C 295/1.

[78] Nevertheless, Art. 7 para. 4 of Directive (EU) 2016/343 issued on the basis of Art. 82 para. 2 phrase 2 point (*b*) TFEU already contains – albeit superficial – statements on mitigating factors.

[79] Council Resolution of 20 December 1996 *"on individuals who cooperate with the judicial process in the fight against international organized crime"*, O.J. C 10/1.

[80] *Streinz/Satzger*, EUV/AEUV, Art. 82 pt. 65.

[81] Frankfurter Kommentar EUV/GRC/AEUV/*Hochmayr*, AEUV, Art. 82 pt. 30.

[82] Council Resolution of 20 December 1996 *"on individuals who cooperate with the judicial process in the fight against international organized crime"*, O.J. C 10/1.

quently, Art. 82 para. 2 phrase 2 point (*d*) TFEU appears not only as a possible, but also as a promising basis upon which at least improved harmonisation of provisions on the legal status of the collaborator of justice could be achieved.

4.4.2. *General revision of the system of defining minimum rules on sanctions based on Art. 83 TFEU*

Another much more far-reaching variant of harmonising rewarding measures and beneficial provisions in general would be to begin by fundamentally changing EU policy and measures on the harmonisation of sanctions. One conceivable example could be the institution of a Category Model for the Harmonisation of Criminal Sanctions in Europe, as proposed by a group of European legal scholars, the European Criminal Policy Initiative ("ECPI"). The ECPI's proposal will therefore be described in broad terms with regard to its possible harmonising effect on rewarding measures and beneficial provisions as a whole[83].

The ECPI has proposed to move away from the current policy of the European legislator to provide for concrete, but ultimately non-harmonising minimum penalties. Rather, harmonisation is to be achieved by means of a category model which obliges the Member States to divide the sanctioning options under national law into five categories according to their severity. The EU legislator would then specify in its Directives, when determining the minimum penalties for each of the offences defined, the minimum category into which an offence shall be placed under national law.

On this basis, it would also be possible to harmonise the beneficial provisions in national law – at least in those areas of law in which the EU has the competence to do so. In particular, the approach proposed here was to give the Member States the possibility of changing the category of penalties to a lower (or in the case of aggravating circumstances a higher) category for a specific legal situation:

"*The Member States stipulate category IV sanctions for [the specific offences]. In presence of [a specific mitigating or aggravating circumstance] they stipulate a category III/V sanction*".

If one assumes, as argued in the context of this paper, that the introduction of beneficial provisions on the basis of Art. 83 TFEU can only be understood as regulations on minimum penalties, the proposal made by ECPI is also compatible in this respect. If the Member States have to provide for at least category IV as a penalty for a criminal offence, a downward deviation is no longer possible, unless the EU legislator explicitly allows this. The category model could therefore be used to regulate both the minimum requirement of a beneficial provision and the minimum penalty that the Member State must provide for if the conditions for a beneficial provision are met.

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[83] For a detailed description of the following cf. *Satzger*, Harmonisation of Criminal Sanctions in the European Union, p. 707 et seqq.

This would still leave the Member State free to make use of the introduction of a beneficial provision or to provide for a higher penalty. However, the category model could offer the opportunity to define beneficial provisions on a broader basis with regard to their minimum requirements, and also to achieve a binding harmonisation of the minimum legal consequences, which would not be possible or not possible to the same extent on the basis of the currently pursued EU policy. Moreover, taking into account the coherence of national law, it would probably be expected that at least some of the legal consequences of beneficial provisions would actually be adopted directly and that there would be less need for deviations.

5. *Conclusion*

The research conducted in this paper has shown on a general level that the measures pursued by the EU legislator in harmonising beneficial provisions and sanctions have so far only allowed for minimum harmonisation in the cases specifically provided for.

At the same time, the Member States have a wide margin of manoeuvre in the actual implementation in national law and are also at liberty to apply beneficial provisions for every legal situation not explicitly regulated by EU law. Since the harmonisation of beneficial provisions on the basis of Art. 83 TFEU can only be understood as a regulation of minimum penalties, even in the presence of a beneficial provision in EU law, the Member States have a discretionary scope not to implement such provisions at all or to provide for stricter conditions or legal consequences.

The concrete analysis of Art. 16 of the Directive with regard to its binding effect on national law has pointed out, however, that at least the possibility of setting minimum conditions for its application can – depending of the wording of a condition – have a certain harmonising effect in national law when the Member States decide to adopt or to apply rewarding measures. In accordance with the view presented in this paper and with regard to the extent of the legal consequences to be granted, the Member States remain completely unbound.

The remaining possibilities for deviation in the Member States concerning the application of rewarding measures in the field of terrorism and moreover the remaining scope for the application of beneficial provisions in legal situations not yet covered by EU law can, among other factors, lead to problems with regard to mutual trust between the Member States and judicial cooperation in criminal matters.

In order to improve this, the establishment of genuine minimum conditions for the legal status of the collaborator of justice on the basis of Art. 82 TFEU in national procedural law could be a conceivable solution. This would also achieve minimum harmonisation irrespective of the type of crime field concerned. At the same time, this would only cover the legal situation of the collaborator of justice, but not other cases. It would also be conceivable to comprehensively change the policy of the EU legislator when introducing sanctions by means of a category model. In this respect, not

only rewarding measures but also beneficial provisions in general could be further approximated. At the same time, however, this would be limited to certain fields of crime.

In conclusion, a combination of both possible measures could be a viable option for the future in order to approximate rewarding measures and beneficial provisions in general to the furthest extent possible on the basis of the regulatory competences currently attributed to the European Union by the treaties.

"C"
INTERMEDIATE CONCLUSIONS

Francesco Rossi

1. *Introduction and methodology*

This paper provides a brief overview and draws conclusions about the research carried out by the French and German units in the second section, which looked into the EU criminal law competence, the meaning of Article 16 of Directive (EU) 2017/541 and its effects at the national level. Not only this Article provides for the possibility to issue more lenient criminal sanctions in a field of law where punishment has prevailed over the last decades, but also *entitles* the Member States to transpose and enforce rewarding rules. Article 16 grants the national legislators the choice whether or not to mitigate criminal sentences for terrorist offences[1], provided that the perpetrator has cooperated with administrative and judicial authorities in a remarkably fruitful fashion during the criminal proceeding brought against him/her. Article 16 is set forth by a *directive* which aims to *harmonise* national criminal legislations and is *binding* upon the Member States as to the (punitive and) *preventive result* to achieve.

The French and German units firstly addressed the topic of the legislative powers enshrined under the criminal law competence of the EU. The shared goal was to analyse the EU minimum norms on rewarding measures, in order to understand their scope, meaning and effects, as well as their interplay with national legislations. Against this background, the French unit (coordinated by Prof. Julie Alix) focused the analysis on the understanding of *minimum norms* under the EU criminal law competence, whereas the German Unit (coordinated by Prof. Helmut Satzger) addressed the same topic providing also insights on the features (and shortcomings) of the EU harmonisation policy in the field of criminal sanctions.

The University of Ferrara, which coordinated the French and German units, proposed a methodology based on a questionnaire that reads[2]:

[1] In this paper, the terms 'offence' and 'crime' are used interchangeably.

[2] On their part, the research units provided insightful remarks to fine-tune the first draft of the questionnaire.

1. If Member States choose to transpose (and then implement) Article 16, do they enjoy absolute or relative appreciation?

1.1. Are *requirements* provided for by Article 16 exhaustive?

1.1.1. If the answer is in the negative, to what extent can EU Member States derogate from them?

1.1.1.1. Are *stricter* requirements allowed?

1.1.1.2. Are *broader* requirements allowed?

1.2. Are EU Member States only allowed to *mitigate* criminal sanctions?

1.2.1. Does *non-punishment* as a reward for cooperation comply with Article 16?

1.2.2. Does *dismissal of the case* (before the suspect is charged/indicted) comply with Article 16?

The questionnaire asked the two research groups to address two couples of alternative hypotheses:

i) *Stricter requirements at the national level are allowed*. According to this hypothesis, for instance, national rewarding laws would be entitled to add further clauses or specify those already set forth under Article 16, in order to make the issuing of rewarding measures *less likely*.

ii) *Broader requirements at the national level are allowed*. In line with this stance, national rewarding laws would be entitled to depart from the minimum rules provided for by Article 16, so as to make the implementation of rewarding measures *easier*.

a) *Dismissal of the case and non-punishment do not comply with Article 16*. From this standpoint, mitigating circumstances would be the only rewarding measure that complies with the EU minimum rules in force.

b) *Dismissal of the case and non-punishment comply with Article 16*. In this event, conversely, the transposition (and implementation) of Article 16 at the national level would not be limited to mitigating circumstances.

Along with the comparative analysis of the national rewarding laws, this phase of the research laid the ground for an assessment of the state of play and the way forward of the harmonisation of rewarding legislations in the EU. The assessment also includes the choice of the most suitable legal basis in the Lisbon Treaty to this effect.

2. *The substantive criminal law competence of the EU: an overview of Article 83 TFEU*

Article 16 has been adopted on the legal basis of Article 83.1 TFEU, which has been comprehensively analysed by the Croatian unit[3]. Both the French and the German research units provided a contextual analysis of the provisions of Article 16 in light of the EU criminal law competence en-

[3] Zlata Durdevic, Mirta Kuštan, *EU Criminal Law Competences With Special Regards On Terrorist Offences* (Section II, Chapter 3).

shrined therein. Article 83.1 TFEU empowers the EU legislator to 'establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis' (the *shared*, *sector-based* and *indirect* criminal law competence of the EU). Against the background of the non- (or quasi-) federal structure of the EU and its Area of Freedom, Security and Justice (hereinafter AFSJ), the EU legislator can establish minimum definitions of offences and sanctions in listed fields of crime (among which, terrorism) that must be transposed at the national level, in compliance with the principle of legality[4]. The exercise of the EU criminal law competence envisages harmonising the criminal legislations of the Member States. At the end of a long way (from the Maastricht Treaty to the Lisbon Treaty), the EU is legally competent to narrow the differences between the (in this case, substantive) criminal laws of the Member States[5]. The rationale behind the harmonisation of national criminal laws is manifold. In this paper, for the sake of simplicity, we shall refer to the distinction between

> 'at least six possible justifications for the EU enacting a harmonized definition of crimes: the criminalization rationale; the cooperation rationale; the free movement rationale; the justice rationale; the socializing rationale; and the regulatory rationale'[6].

Up to now, the approximation of national criminal legislations has been pursued mostly from a punitive standpoint[7]. Conversely, non-criminalisation (here understood in a broad sense, meaning the legislative and/or judicial choice not to punish) and decriminalisation (i.e., downgrading criminal offences into administrative offences or at least less serious types of crime) have largely been ignored at the EU level. Therefore, the resort to criminal law at the EU level has proved one-way thus far. Moreover, after a certain conduct is criminalised at the EU level, decriminalisation by the national legislators is prohibited[8].

Against this background, on the one hand, by adopting directives the EU legislator bridges the gaps between the criminal laws of the Member States. On the other hand, national legislators retain a leeway for appreciation. Harmonisation does not amount to unification (which would imply that no difference among legislations could be maintained), but rather to a shared 'minimum law' that needs to be transposed (and, to some extent, adapted) in each national criminal justice system[9]. This holds true especially

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[4] See Christina Peristeridou, *The principle of legality in European criminal law*, Cambridge, 2015.

[5] See Valsamis Mitsilegas, *EU Criminal Law after Lisbon: Rights, Trust and the Transformation of Justice in Europe*, Hart, 2016.

[6] Irene Wieczorek, *The Legitimacy of EU Criminal Law*, Hart, 2020, 83.

[7] M. Donini, *Introduction To A European Project For «Rewarding Measures» To Prevent Terrorism*, *supra*, 1 ff.

[8] Clémence Quentin, Jean-Yves Maréchal, Julie Alix, *French Report* (Section II, Chapter 1-A), § 2.

[9] *Ivi*, § 3.

with respect to EU minimum rules crossing also general rules of national criminal laws (provided that no general rules of EU criminal law have been provided for yet)[10] and, as far as the topic of this paper is concerned, to the rewarding rules set forth by Article 16.

For the purpose of EU harmonisation of national legislations, 'minimum norms' are understood as the essential content of the definition of crimes and sanctions, 'which shall *bind* Member States under threat of sanctions in the event of failure of incorporation into the domestic legal order'[11]. In particular, as regards EU minimum rules on criminal sanctions,

> 'the sanction to be imposed need not be determined by the European legislator; that latter task could indeed be performed more aptly on a domestic level, in accordance with the principle of proportionality and the particularities of each criminal justice system'[12].

Undoubtedly, the appreciation and adaptation of EU minimum rules at the national level can bring about wider transpositions, this meaning that more (or broader) conducts than those listed by the EU legislator can be punished. Likewise, whenever criminal sanctions (that must always be adequate, that is to say *effective*, *proportionate* and *dissuasive*) are defined by EU minimum rules in their 'minimum maximum', the Member States are free to opt for higher penalties[13], according to the general rules on criminal sanctions in force at the national level.

3. *Article 16 of Directive (EU) 2017/541*

Whereas the above-mentioned assumptions are well-grounded and established, the issues raised by *optional and lenient* provisions of a (*binding*) *directive* have not been addressed extensively. Article 16 is a paradigmatic case study to analyse: how must the concept of 'minimum norms' be understood, in the presence of a provision leaving the Member States with the option to establish mitigating circumstances as rewarding measures for terrorist offenders who cooperate with law enforcement authorities, listing the requirements thereof? Does the aforementioned optional nature create an area which is safe from primacy claims, irrespective of what content the national laws lay down, or rather does this nature refer only to the initial choice whether to transpose or not the Article at hand at the national level?

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[10] See André Klip, *Towards a General Part of Criminal Law for the European Union*, in A. Klip (ed.), *Substantive Criminal Law of the European Union*, Antwerpen, 2011; Jeroen Blomsma, & Christina Peristeridou, *The way forward: a general part of European Criminal Law*, in Anne Weyembergh, & Francesca Galli (eds.), *Approximation of substantive criminal law in the EU: the way forward*, Brussels, 2013; Sakari Melander, *Effectiveness in EU Criminal Law and its Effects on the General Part of Criminal Law*, NJECL, 5, 3, 2014; Eliette Rubi-Cavagna, *Un droit pénal général de l'Union Européenne?*, in Julie Alix, *et al.* (eds.), *Humanisme et Justice. Mélanges en l'honneur de Geneviéve Giudicelli-Delage*, Paris, 2016.

[11] European Criminal Policy Initiative, *The Manifesto on European Criminal Policy in 2011*, *EuCLR*, No. 1/2011, 27.

[12] *Ibidem.*

[13] In this paper, the terms 'criminal sanction' and 'penalty' are used interchangeably.

Article 16 reads:

> «Member States may take the necessary measures to ensure that the penalties referred to in Article 15 may be reduced if the offender:
> (*a*) renounces terrorist activity; and
> (*b*) provides the administrative or judicial authorities with information which they would not otherwise have been able to obtain, helping them to:
> (*i*) prevent or mitigate the effects of the offence;
> (*ii*) identify or bring to justice the other offenders;
> (*iii*) find evidence; or
> (*iv*) prevent further offences referred to in Articles 3 to 12 and 14».

Undoubtedly, Article 16 is a beneficial provision in that it grants the possibility to *mitigate* criminal sanctions at the national level, provided that the offender gave up carrying out terrorist activities and cooperated with law enforcement authorities for (totally or partly) preventive, investigative (and/)or prosecuting purposes. The first requirement laid down by Article 16 is *renouncing terrorist activity* (*a*). As such, it does not raise significant issues. Arguably, this requirement seems reasonable from both a legal and practical perspective. Not only its objective understanding – not requiring necessarily inner regret, but rather material discontinuance of terrorist activity – seems preferable, but also consistent (if not with the rules in force at the national level) with shared judicial practices[14]. To fulfil the requirement of renouncing terrorist activity, at least the offender's promise to surrender is necessary[15]. Moreover, the minimum rule at hand grants sufficient leeway to impose certain additional requirements on the renunciation[16].

The second requirement is providing the administrative or judicial authorities with information which they would not otherwise have been able to obtain (*b*). Competent authorities are defined broadly, as administrative authorities are expressly included. Conversely, the relevance of the information required is defined in the much narrower fashion of a complex prognosis. According to Article 16 (*b*),

> 'it would not represent a sufficient requirement under national law if the disclosed information merely provided the authorities with new findings, i.e. such information that was previously unknown'[17].

Interestingly, although the proposal seems hardly compatible with the text of Article 16 (*b*), the German unit suggests that the rule be interpreted differently, allowing for cooperation that provides *new and considerably important* information. Otherwise, the *effet utile* of rewarding measures would be jeopardised[18]. Under Article 16, the importance of the information is re-

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[14] Arguably, what might look rather questionable is the lack of express rules on revocation of rewarding measures in some national legislations.
[15] Helmut Satzger, Patrick Born, *German Report* (Section II, Chapter 1-B), § 3.1.2.2.1.
[16] *Ibidem*.
[17] *Ivi*, 3.1.2.2.2.1.
[18] *Ibidem*.

lated to its 'causal connection' towards the engagement in the listed range of four law enforcement activities (*i-iv*). Their transposition at the national level is only possibly cumulative, in that

> '[i]f the Member States only provide for one of the avenues set forth in sub-points (*i*) – (iv), they already impose stricter requirements on the offender and therefore act in compliance with the minimum rules set forth in Art. 16'[19].

With respect to Article 16 (*i-iv*), more interpretative issues arise. According to Article 16 (*i*), the information provided must be useful to 'prevent or mitigate the effects of the offence'. As the German unit pinpoints, considering the requirements to apply rewarding measures satisfied in the presence of a mere *mitigation* of the effects of the offence might pave the way to rewards for marginal results[20]. Article 16 (*ii*) requires that the information rendered helps law enforcement authorities to 'identify or bring to justice the other offenders'. This task is paramount in practice, especially for the aforementioned purpose to prevent or mitigate the effects of terrorist offences. The same holds for finding evidence (*iii*), whose ideal connection with the identification or surrender of terrorist offenders to justice (original step) and the prevention or mitigation of the effects of the offence (final goal) is apparent. The requirement under Article 16 (*iii*) is not further specified and as such does not oblige to establish any type of connection between the committed and the reported offence[21]. Conversely, Article 16 (*iv*) states that the information given must help law enforcement authorities to prevent (and not just to mitigate) further terrorist offences. Therefore, only the identity of legal qualification of the crimes as terrorists is required. Considering also the alternative nature of the requirements established from (*i*) to (*iv*), the room for manoeuvre left to the Member States is yet large. The *fil rouge* is that 'the disclosure of information must also be linked to at least some success in the investigation'[22].

4. *The German Unit research findings*

a) The effects of Article 16 at the national level

By adopting a systematic approach that puts the EU and the national criminal justice systems together, the German unit addressed the topic of minimum beneficial provisions under EU criminal law, in order to provide guidance on the assessment of whether the national rewarding legislations of the Member States involved in this research comply or not with Article 16. Maintaining a first hypothesis, Member States could not provide for (and implement) special mitigations of criminal sanctions or waive punishment,

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[19] *Ivi*, 3.1.2.2.2.2.
[20] *Ibidem*.
[21] *Ibidem*.
[22] *Ibidem*.

if no express rule with this regard is set forth at the EU level. EU rules on rewarding measures such as those laid down by Article 16 would comply with Article 83.1 TFEU as long as their adoption at the national level remains optional. Maintaining a second hypothesis, EU obligations to criminalise require the Member States to adopt minimum maximum criminal sanctions for EU crimes only *as a general rule*. If no EU (optional) beneficial provision is provided for (be it mitigating or waiving the penalty, of a rewarding nature or not), the EU policy on the harmonisation of criminal sanctions does not affect the individualisation of punishment, which is not only a fundamental right of the defendant but also a matter of internal coherence of the criminal law which is retained, as such, in the national criminal justice systems[23].

Conversely, if EU (optional) beneficial provisions are provided for[24], the scenario is twofold: *i*) if Member States choose not to transpose, no binding effect is produced at the national level; *ii*) if Member States choose to transpose EU beneficial provisions,

> '[b]eneficial provisions/measures addressing the specific legal situation defined in a Directive (e.g. rewarding measures) shall only be applied under national law if the offender at least complies with the requirements set forth by the legislator. At the same time, the legal consequences mentioned in a beneficial provision (e.g. mitigation) bind the Member States to the effect that they may not go beyond those legal consequences'[25].

Moreover,

> '[b]eneficial provisions only affect the legal situation they cover but have no effect on beneficial provisions/measures in national law that apply to other legal situations'[26].

that is to say outside the field of counter-terrorism criminal law (*general rewarding measures*).

Against this background, narrower rewarding rules (i.e., higher requirements for the offender to meet or less beneficial legal consequence to apply) than those set out by Article 16 are always allowed at the national level:

> 'the Member States have to ensure that they are only applied under national law if the offender fulfils *at least* the conditions laid down in Art. 16'[27].

Conversely, in principle, national rewarding legislation laying down broader requirements or more favourable legal consequences is prohibited

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[23] *Ivi*, § 2.4.1 ff.

[24] Irrespective of the date when the rules were adopted, that is to say either before or after the entry into force of counterterrorism rewarding legislations of the Member States. Hence, also those that date back from the 70s onwards also fall within this hypothesis.

[25] Helmut Satzger, Patrick Born, *op. cit*., § 2.4.1.2.

[26] *Ibidem*.

[27] *Ivi*, § 3.1.2.1.

under Article 16. As the German unit pinpoints, the violation of fundamental principles enshrined in the national Constitutions and the internal coherence of the criminal law are to be considered the only possible exceptions. Another argument in favour of a non-absolute limitation of 'reduction' of criminal sanctions under Article 16 to mitigating circumstances only would be that "reduction' does not preclude reduction to 'zero"[28]. Again, the means available to support this argument are to be found in the *systematic*, *constitutional* and *functional* interpretation of Article 16. Finally, the German unit argues that discontinuance of criminal proceedings (pretrial dismissal of the case) does not raise issues, in that criminal procedural matters fall outside the legal basis of Directive 2017/541/UE (Article 83.1 TFEU).

b) The harmonisation of rewarding legislations: critical assessment and proposals

On the basis of the results of the previous part of the research, in which the national laws on rewarding measures to counter terrorism have been analysed, the German unit concluded that 'an increased harmonisation is highly desirable'[29]. Maintaining both an inconsistent approach at the EU level and large legal differences at the national level undermines mutual trust and mutual recognition in the Area of Freedom, Security and Justice. Moreover, such a state of art risks favouring forum shopping[30].

The German unit argued that non-optional and binding EU harmonisation is needed. Consistent with the narrow interpretation of the material scope of EU minimum rules on the definition of criminal sanctions and with the necessary coherence of the criminal law[31], the German unit rejects the competence of the EU legislator to resort to Article 83.1 TFEU. Conversely, the way forward could be represented by the exercise of the EU competence in criminal procedural law enshrined in Article 82.2 *b*) TFEU. The latter reads:

> 'To the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and

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[28] Albeit hardly, as it is confirmed by the translations of the text of Article 16 in languages other than English: with reference to the German version, *ivi*, § 3.2.2. The same holds, for instance, to the Italian translation, in that the title '*Circostanze attenuanti*' (mitigating circumstances) refers to reduction of criminal sanctions at the sentencing phase, whereas the non-punishment at hand belongs to the legal category of '*cause di non punibilità*' (also known as '*cause di esclusione della punibilità*'). Furthermore, in the absence of any soft or hard principle or rule of general criminal law at the EU level, to infer that waiving punishment as a rewarding measure complies with Article 16 by reading other clearer EU criminal law texts adopted in other areas of cross-border serious crime does not seem unquestionable. To this end, the German unit mentions Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime and the Proposal for Framework Decision 2004/757/JHA in the field of illicit drug trafficking (*ibidem*).

[29] *Ivi*, § 4.1

[30] *Ibidem.*

[31] See *supra*, *sub a*), "The effect of Article 16 at the national level".

the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States.
They shall concern:
[…] *b*) the rights of individuals in criminal procedure'.
[…] *d*) any other specific aspects of criminal procedure which the Council has identified in advance by a decision; for the adoption of such a decision, the Council shall act unanimously after obtaining the consent of the European Parliament'.

The choice of Article 82.2 TFEU (namely, most likely, under let. *d*) would imply, among other effects, a threefold shift. Firstly, the EU harmonisation of rewarding legislations of the Member States would be attached to mutual trust and mutual recognition. Secondly, this harmonisation would not be narrowed to the sole area of counterterrorism[32]. Thirdly, the EU criminal law on rewarding measures would adopt a major rights-friendly approach[33]. However, admittedly, the choice of Article 82.2 *d*) TFEU would need an unanimous decision of the Council to be adopted, 'after obtaining the consent of the European Parliament'[34].

Alternatively, the German unit proposes to distinguish ranges of criminal sanctions at the EU level. This even more far-reaching proposal, that would represent a major breakthrough in the EU criminal policy, would allow to both establish mandatory minimum sanctions and set more precise (albeit yet flexible) penalty scales[35].

5. *The French Unit research findings*

a) The effect of Article 16 at the national level

The analysis from the French unit of the effect of Article 16 at the national level is grounded on the same basic assumption that EU minimum rules on the definition of crimes and criminal sanctions only set lower limits. Notably, national transpositions of these rules can (and often do) overdefine the criminalised conducts and/or exceed the minimum maximum of penalties established by EU Framework Decisions and Directives[36]. Like the German unit did[37], the French unit maintained, more generally, that transposing in an overly narrower manner the EU minimum rules on rewarding

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[32] Helmut Satzger, Patrick Born, *op. cit*., § 4.4.1 ff.
[33] For further insights, see L. Bin, *A Model of Reward Measures* (Section III, Chapter 1).
[34] The last sign of a political will to enact EU rules on rewarding measures dates back to the Council Resolution of 20 December 1996 on individuals who cooperate with the judicial process in the fight against international organized crime.
[35] Helmut Satzger, Patrick Born, *op. cit*., § 4.4.1.2.
[36] Clémence Quentin, Jean-Yves Maréchal, Julie Alix, *op. cit*., § 3.1.
[37] With respect to the aforementioned prognosis of the impossibility to gather the information otherwise (laid down by Article 16 (*b*)), but also to the interpretative issue regarding the compatibility of non-punishment of terrorist offenders as rewarding measure with EU law: Helmut Satzger, Patrick Born, *op. cit*., § 3.2 ff.

measures to counter terrorism 'would reduce the possibility of being granted the status of collaborator of justice' and that this 'would risk running counter to the logic of the minimum rules'[38]. However, unlike the German unit, the French unit argued that whichever additional requirements or rewarding measure complies with Directive 2017/541/EU, 'as long as the conditions envisaged by the Directive are at least provided for' at the national level[9].

This assumption pursues a twofold goal. The first is to ensure greater effectiveness to national rewarding legislation. The second is admittedly to 'validate the existing national mechanisms'[40], which consist of a broader spectrum of rewarding measures. This includes not only mitigating circumstances, but also pre-trial discontinuance of the criminal proceeding (dismissal of the case)[41], non-punishment at the trial phase and post-trial rewards, as well as crown witnesses and similar measures to ensure that testimony against a third party is provided.

Admittedly, the French stance – which is in favour of largely flexible interpretations of Article 16 and assessments of the compliance of national rewarding legislations with the same Article – acknowledges that harmonisation in the field at hand is unsatisfactory[42] and that mutual trust and mutual recognition are jeopardised[43]. Arguably, the French unit based its argument on a bottom-up approach to the extent that the state of play across Europe, which is deemed unsatisfactory with a view to EU harmonisation and judicial cooperation, is said to mirror long standing 'legal and cultural choices to offer wider benefits to the collaborator of justice'[44].

Be that as it may, the French unit acknowledges that

> 'if the Member State did not comply with the minimum conditions [set forth under Article 16], this would run counter to the principle of primacy and would not be in conformity with European legislation. The Member State would then risk an action for failure to fulfil obligations before the CJEU'[45].

b) The harmonisation of rewarding legislations: critical assessment and proposals

The arguments and findings of the research carried out by the French unit picture the inconsistent coordination of the evolution of rewarding leg-

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[38] Clémence Quentin, Jean-Yves Maréchal, Julie Alix, *op. cit.*, 10. See also Helmut Satzger, Patrick Born, *op. cit.*, § 1.1.1.1.

[39] *Ivi*, § 1.2.2.

[40] *Ibidem.*

[41] Which 'paves the way for an invisible practice of not prosecuting collaborators of justice': *ibidem*.

[42] Arguably, the point upon which the French and the German unit agree (albeit with different arguments) is that national non-specific beneficial provisions that apply to other legal situations are not affected.

[43] Clémence Quentin, Jean-Yves Maréchal, Julie Alix, *op. cit.*, § 1.2.2. See also Helmut Satzger, Patrick Born, *op. cit.*, § 4.1.

[44] Clémence Quentin, Jean-Yves Maréchal, Julie Alix, *op. cit.*, § 1.2.2.

[45] *Ivi*, *sub* 'Conclusion on point 1'.

islations across Europe. This inconsistency can be seen also with respect to other areas of the fight against serious crime in which rewarding measures have been adopted. The French unit argues that 'an amendment to the Directive could remove the optional nature of Article 16' and/or possibly add other minimum rules 'on its scope of application (which procedural stages? what consequences? what modalities?)'[46]. Admittedly, this thesis and that of the German unit does not match, in that this amendment would question the narrow understanding of Article 83.1 TFEU as a competence to lay down minimum harmonisation to define criminal sanctions. Nonetheless, broadly speaking, such a *de facto* exercise of the EU criminal law competence is not prohibited *a priori*. Alternatively, the French unit recalls Article 82 TFEU, whose resort would make sense of the large use of rewarding measures that is made beyond the fight against terrorism[47].

6. *Conclusion: remarks and first guidelines towards the comparative analysis of rewarding legislations*

a) Article 16 and national rewarding legislations: interpretation and room for manoeuvre

The French and the German unit provided their view on the interpretation of Article 16 of Directive 2017/541/EU. Albeit with different arguments, two conclusions are shared. Firstly, notwithstanding that the transposition of Article 16 is optional, the leeway for discretion at the national level is not absolute. In principle, in the event that legislations on rewarding measures to counter terrorism are (or have been) enacted, the national law cannot provide for broader requirements and/or more lenient legal consequences than those set forth by the minimum rules under Article 16.

More in detail, according to the perspective adopted by the German unit, reward measures cannot be considered as provisions directly referred to by art. 83.1 TFEU, but only as somehow "internal limits" to such norms, i.e. to the provisions defining criminal offences and sanctions. Conversely, the French unit adopted the opposite perspective, stressing out that beneficial dispositions such as Article 16 fall indeed within the scope of Art. 83 TFEU.

In the first scenario, the reward measures embodied in Art. 16 are to be viewed as the only cases in which the EU legislator enables the national legislators to waive from the minimum criminal provisions contained in the Directive 2017/541/EU. In the second scenario, these reward measures are to be considered themselves as minimum provisions provided for by the EU legislator: therefore, they only bind the national legislator insofar as it chooses to introduce some reward measures; and in such case, the latter is bound to implement at least the reward measures provided for by art. 16, being free to adjoin other reward measures to such "minimum reward measures".

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[46] *Ivi*, § 2.
[47] *Ivi*, § 3.

Both units share therefore the view that, notwithstanding the "optionality" of Article 16 transposition, the leeway for discretion at the national level is not absolute if such path is chosen. At this regard, however, the two units walk opposite ways. According to the French unit, in fact, only broader requirements would be admissible compared to those enshrined in Art. 16: Directive 2017/541 sets some requirements under which the terrorist must be accorded with the reward measure, while the national legislator cannot restrict such requirements or add further ones. Spanish law (art. 579-bis.3 of the Spanish *Criminal Code*) provides for a clear example of not-complying stricter requirements, inasmuch as it currently requires also a confession from the repentant, a condition which is not listed by Art. 16.

Two main consequences seem to derive from such approach:

i) once the measures described by Art. 16 are transposed, there are no limits for national legislator to add further and more far-reaching reward measures;

ii) the rewards enclosed in Art. 16 – in such States that decide to implement them – look like an actual "right" for the repentant.

Undoubtedly, the first consequence would amount to a valuable result – even more considering the grounds and the aims of the present research – that would allow a wide space for reward measures, way beyond those already mentioned in Art. 16.

However, whereas it may be argued that Art. 16 enshrines an actual right for the repentant – which would incoherently produce a large disparity between States that decide to implement it and States that do not, with immediate relapses on judicial cooperation – interpreting the beneficial measures contained in Art. 16 as minimum standards directly identifiable with those referred to in art. 83 TFEU seems nonetheless to reveal some difficulties. As stressed out by the German unit – and apart from the issues related to the wording of Art. 83 – such an insightful point of view seems to clash with the facultative nature of art. 16: it would in fact be hard to explain under which reasons only Member States that do precisely implement Art. 16 and those that do not at all would be in conformity with the EU law, while Member States that decide to add stricter requirements – such as the confession of the repentant – would infringe it. We cannot find sufficient reasons or convincing principles able to sustain such a setting, which would thus result in arbitrary discrepancies. Hence, we rather interpret Art. 16 as a derogation conceded by the EU legislator to the minimum criminal provisions embraced by Directive 2017/541.

b) Shortcomings of Article 16 with a view to harmonisation and judicial cooperation and grounds to justify derogations at the national level

Both units maintained that exceptions to Art. 16 might be justified on specific grounds. Admittedly, the latter can be manifold from a theoretical perspective. Whereas the German unit highlighted the fundamental principles of the national Constitutions and the internal coherence of the criminal law, the French unit emphasised the rather settled traditions of the Member

States in this field, which embody both the law and legal practice. Arguably, the bottom-up angle of the relationship between Article 16 and national rewarding legislations sponsored by the French unit would apply a broad reach filter, which would justify a large variety of national derogations. Conversely, the constitutional and systematic view proposed by the German unit would perhaps enable to preserve less extensive 'safe havens' in the national rewarding laws. Ultimately, only the national principles and rules that fall outside the EU criminal competence and the primacy of EU law would be retained, in light of respectively the *ultra vires* and counter-limits doctrine and case law.

Following the view sponsored by the German and the Croatian units, it is at first arguable that national legislators cannot provide for broader requirements and/or more lenient legal consequences than those set forth by Art. 16. Nonetheless, some exceptions might be justified. As the German unit pointed out, if Art. 16 is interpreted in such a way as to list the only cases in which the EU legislator allows the Member States to "go below" the minimum criminal law standards, i.e. the only cases in which the criminalization obligation may be implemented in a less severe way than it should according to the other dispositions of the Directive, it is also true that this is restricted to the specific matter object of the Directive, that is the counter-terrorism criminal law response. In other words, Art. 16 only binds the legislator willing to introduce reward measures specifically connected to the offences that fall within the scope of the Directive, while all the provisions that are not specifically drawn up for this matter are not subject to the limits of Art. 16. Consequently, Directive 2017/541 does not automatically put all the national dispositions that may lead to a lesser penalty than the one fixed as minimum standard by the Directive out of compliance with the EU law: only measures specifically "attached" to terrorist offences are subject to the conditions set forth by Art. 16.

At the very least, the national judge will have to evaluate if such dispositions do lead to infringe the general obligation to respect the "minimum triad", i.e. if the criminal response may still be considered effective, proportionate and dissuasive. In such a case, should a consistent interpretation not be deemed sufficient, the principle of legality would most likely prevent the judge from "disapplying" the national provision. Therefore, the national judge would have to ask for the intervention of the Constitutional Court – whose eventual declaration of unconstitutionality could only have *pro-futuro* effects.

Accordingly, the most advisable way to introduce reward measures exceeding the strict limits of Art. 16 (that does not allow other kinds of and rules on counter-terrorism reward measures) seems to be the resort to general provisions on repentance. However, as the German unit argued, there are some other grounds upon which broader reward measures specifically designed for terrorists may be maintained as legitim. In fact, although Art. 16 traces a strict limit to the implementation of such measures, it must nonetheless be noted that this limit must always be consistent with funda-

mental principles and rights. Otherwise, that limit could not reasonably be held still.

In this perspective, there are some cases in which EU law itself seems to suggest the overcoming of such a limit. Considering in fact that many Member States already provide for general reward measures (whereas others do not) and especially that in some Member State the justice system even allows the prosecutor to directly terminate the proceeding after a successful "negotiation" with the repentant, one may conclude that remarkable disparities on the matter are currently already existing. As long as general comprehensive reforms of national criminal law and criminal procedure law fall outside the scope of the EU competences (or at least its de facto exercise), this evidently raises manifold issues. The inconsistent approach of the EU legislator towards the harmonisation in the field at hand risks fostering forum shopping and jeopardising the purposes of punishment, along with undermining judicial cooperation.

This is indeed one of the main reasons that justified this whole research. In order to tackle all these issues, the limit set forth by Art. 16 should be maintained as legitimately waivable. Otherwise, an EU Directive would result in hindering judicial cooperation, which is one of the main goals of the EU's AFSJ itself. In order to boost judicial cooperation, while the best solution would probably be the adoption of a specific Directive aimed at harmonising the reward measures making the most rewarding ones already existing in the Member States the binding standard in the EU, national legislators willing to introduce rewarding measures for terrorist offenders beyond the requirements provided for by Art. 16 should already be deemed as free to do so. It is barely necessary to specify that such measures should be shaped already in *abstracto* in such a way as to be applicable only to transnational cases, as their legitimacy resides in this very condition.

Upon conclusion, while Art. 16 seems to contain strict limits to the national legislator willing to implement (already existing or new) reward measures as a tool for countering terrorism, it must be noted that:

i) reward measures not specifically targeted to terrorist offenders do not fall within the scope of Directive 2017/541/EU and therefore may also provide for broader requirements than those listed by Art. 16;

ii) reward measures specifically targeted to terrorist offenders which exceed the limits set forth by Art. 16 shall be deemed lawful if they correspond to a general model of reward legislation as developed by the present research.

Be that as it may, one shall bear in mind that as long as the optional nature of Article 16 is maintained, by its very nature the Article itself does not approximate the rewarding legislations of the Member States. This means that justifying derogations from the requirements and legal effects set forth by Article 16 at the national level would not achieve the goal of improving judicial cooperation between national authorities. Indeed, the state of play across the EU shows that, to a large extent, forms of spontaneous harmoni-

sation (such as 'migration'[48] and/or 'cross-fertilisation'[49] of rewarding models) have so far not ensured enough convergence of laws on the matter[50].

c) The way forward the EU harmonisation of rewarding legislations: legal basis, issues and perspectives

Both the French and the German research unit agree on the unsatisfactory state of play of the harmonisation of national rewarding legislations and on the inadequacy of Article 16 to this effect. The fragmented and unsuitably coordinated evolution of rules on rewarding measures at the national and EU levels should drive the Member States and the EU institutions to pursue far-reaching harmonisation. Therefore, new binding rules should be laid down at the EU level, in order to accomplish a more comprehensive harmonisation of rewarding legislations. Notwithstanding, further debate on the topic at hand ought to also address the issue regarding the choice of legal basis for new rules on rewarding measures at the EU level.

The research units explained the meaningful differences between Article 82 and 83 TFEU. Admittedly, the perspective of EU harmonisation based on Article 83 TFEU has been ruled out by the German unit, which sponsored a narrow view of the EU substantive criminal law competence. Alternatively, the whole EU policy on criminal sanctions should change its settled fashion, thus shifting to the establishment of binding penalties scales to apply at the national level. Conversely, the French unit considers resort to Article 83 TFEU to be possible as a necessary (albeit minimum) clarification of the scope, effects and limits of Article 16. Conversely, the choice of Article 82 TFEU has been suggested by both units. With this respect, whilst the French highlighted the importance of extending EU rewarding rules beyond the fight against terrorism from a criminal law and policy angle, the German emphasised also the angles of judicial cooperation and procedural rights protection. Notably, in the event that a new Directive based on Article 82.2 *b*) be adopted, the EU regulation on rewarding measures would be centred around minimum common standards of fundamental rights in the EU for the purpose of ensuring smooth judicial cooperation. To this effect, although Article 83 TFEU cannot be excluded a priori (and neither can a joint use of Articles 82 and 83 TFEU), Article 82 TFEU might be the suitable legal basis, in light also of the recent accomplishment of the 'ABC Directives' in the field of criminal procedure.

To this effect, also the conclusions of the Croatian unit shall be borne in mind. Both Article 83 and 82 TFEU are viewed as possible legal basis towards the EU harmonisation of rewarding measures. The Croatian unit shares the opinion that resorting to Article 83 would pave the way to an amendment of Article 16, which would thus be limited to the field of

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[48] See Kent. Roach, *The migration and derivation of counter-terrorism*, in Genevieve Lennon, Clive Walker (eds.), *Routledge Handbook of Law and Terrorism*, Routledge, 2015.

[49] Colin King, & Clive Walker, 'Counter Terrorism Financing: A Redundant Fragmentation?' (2015) 6(3) NJECL.

[50] See M. Cancio Meliá, S. Oubiña Barbolla, *Substantial Law Issues: Selected Problems* (Section II, Chapter 5); S. Allegrezza, V. Covolo, E. Militello, L. Romano, *Comparative Approach To Criminal Procedure Aspects* (Section II, Chapter 4).

counter-terrorism. Conversely, choosing Article 82 TFEU would mean that 'a new directive with a general scope' would be adopted: 'all the offences would be included and rewarding measures would be harmonised for the main purpose of preventing any criminal act. This would have a general dimension applicable not only to the crimes related to terrorism, but it would instead open up a way to deal with a wider scope of perpetrators of other serious crimes'[51]. Either one legal basis or the other can be chosen, although admittedly '[i]f the enactment of the new rules is limited only to the rewarding measures for the perpetrators of the terrorist offences the consensus will be easier to reach'[52].

[51] Zlata Durdevic, Mirta Kuštan, *op. cit.*, § 6.
[52] *Ibidem.*

CHAPTER 2

TERRORIST TRAJECTORIES: FROM AN ATTEMPT TO EXPLAIN TO THE PROSPECTS OF COLLABORATION

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Summary: Introduction. – (I) Terrorism in Europe: characteristics and evolution. – 1. Terrorism: between a controversial notion and a plural reality. – 1.1. Lack of a consensual legal definition. – 1.2. The characteristics of a terrorist offence. – 2. A genealogy of terrorism in Western Europe (1960-2020). – 2.1. Terrorism during the Years of Lead: political polarisation and autonomist claims. – 2.2. The transformation of terrorism in Europe in the 21st century. – (II) Understanding the terrorist trajectories: from socio-political factors to individual paths. – 1. The contextual dimension: clash of cultures, geopolitical power relations, social exclusion and racial discrimination. – 1.1. The "clash of civilisations": a culturalist argument. – 1.2. The geopolitical issue: an asymmetric relationship between the West and the Arab-Muslim world. – 1.3. The duplication of a relationship of domination within the Western world: exclusion and discrimination. – 2. The individual dimension: subjectivity: cognitive encounter and procedural engagement. – 2.1. The importance of elements related to subjectivity in the radicalisation trajectory. – 2.2. The cognitive dimension or the encounter between an individual and the terrorist discourse. – 2.2.1. Diverse acculturation channels in the jihadist discourse. – 2.2.2. The prior existence of a favourable cultural breeding ground. – 2.3. Violent engagement, the result of a gradual process. – 2.3.1. Entering the "violent career": diversity and stages. – 2.3.2. The functioning of the violent group, a reinforcing factor. – 3. Conclusion. – (III) The challenges of cooperating with the judiciary in matters of terrorism. – 1. Capability of collaborating with the judiciary. – 2. Collaboration is a form of treason. – 3. Some hypotheses on the elements influencing the acceptance or refusal to collaborate. – 3.1. The purpose and the cost of terrorist action. – 3.2. The weight of the religious dimension. – 3.3. The weight of the political dimension. – 3.4. The role of material gains or the chances of a possible bargaining. – 3.5. The role of symbolic gains or recognition offered by the judiciary. – 3.6. The impact of group bonding. – Conclusion.

Introduction

Questioning the relevance of a collaboration policy with "reformed" perpetrators of terrorist offences includes a three-dimensional reflection: understanding the terrorist phenomenon and its meaning in our contemporary societies; studying the explanatory elements that allow an understanding of the path led by some perpetrators in committing so-called "terrorist" actions; and questioning the issues of "collaboration" with the justice system, a key element in the framework of this research.

The literature is vast on these different questions. Without in any way claiming to be exhaustive, on the basis of a recent study of the literature[1], our proposal is to proceed in three stages: firstly, to clarify the concept of "terrorism" itself, a widely controversial notion and prone to multiple interpretations as well as its genealogy in Europe. The aim is to better understand the framework in which terrorism exists today and the answers that we are trying to give to it, including collaboration with the judiciary (I). Secondly, to provide a summary of the major categories explaining the involvement in a terrorist trajectory. The understanding of collective and environmental, individual and procedural elements which lead a person to engage in a terrorist "career" is central in order to assess the relevance (or lack thereof) of the use of collaboration mechanisms with the justice system in the fight against terrorism today (II). Finally, a reflection on the issues of collaboration with the justice system will conclude the analysis. The question that arises is the chances of success of a collaborative process marked by negotiation and denunciation dimensions in the specific field of terrorism (III).

I. *Terrorism in Europe: characteristics and evolution*

Terrorism is not a new phenomenon – the origin of the term can be found at the end of the 18th century and references to it can be found well before that[2]; its contemporary expression responds to two specific concerns and shows specific characteristics. In order to better understand the terrorism that is currently hitting Europe, it is useful to go back to the notion of terrorism first (1), before presenting a summary of the main developments of terrorism in Europe in the past years, on the basis of a classical distinction between the political terrorism of the 1960s, sometimes qualified as "traditional terrorism"[3] and "contemporary terrorism"[4] marked by a jihadist reference (2).

1. *Terrorism: between a controversial notion and a plural reality*

Even though terrorism is a widely-used concept in the political, legal

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[1] In the framework of this project, it is impossible to provide a "bibliographic update" that covers the countries involved in the project. We thus decided to focus on the literature in English and French, whose contributions were compared with the results of a similar study based on Italian and Spanish sources (F. Rossi, *The multifactorial process of radicalisation to «jihadi» fundamentalism*, 2020, available at *www.criminaljusticenetwork.eu*; F. Rossi, "Brevi note sul processo multifattoriale di radicalizzazione", *Rassegna italiana di criminologia*, 2021, 2, p. 122 to 129). This position highlights significant convergence of the key readings used in the different languages, especially the multifactorial and procedural dimensions of the trajectories leading to a terrorist action.

[2] Terrorism was defined for the first time in the French Academy Dictionary of 1798 ("Système, régime de la terreur", Dictionnaire de l'Académie française de 1798, Supplément, 1798 p. 775.) Certain authors have pointed out its existence in Roman times with the "sicaires", an organization fighting against Roman occupation in Judea (V. Flavius, *La guerre des Juifs*, éd. De Minuit, 1988).

[3] T. Delpech, *Le terrorisme international and l'Europe*, 2002, Paris, Institut d'Études de Sécurité, 2002, p. 7; D. Benjamin, "Le terrorisme en perspective", *Politique étrangère*, 2006, p. 894.

[4] R. Letschert and A. Pemberton, "Addressing the needs of victims of terrorism in the OSCE region", *Security and Human Rights*, 2008, 19, 4, p. 299.

and media fields, its definition is still controversial[5] (1.1). Particularly at the international level, consensus on a legal definition of terrorism is proving difficult to find. At a doctrinal level, however, a number of characteristics seem to be accepted to qualify and action as a "terrorist" one (1.2).

1.1. *Lack of a consensual legal definition*

From a legal perspective, there is no comprehensive, complete and universally accepted legal definition by all States[6]. At the international level, years of debate have not led to a consensual definition. Three draft definitions focusing on the traits generally associated with terrorism by the international community will be presented in this paper. The first one is the result of the United Nations Security Council Resolution 1566 from 8th October 2004 whereby States are called to define as terrorists the criminal offences targeted at civilians with the intention to cause death or serious injuries, or with the aim of spreading terror among the population, in a group of people or by individuals, to intimidate a population or to constrain a government or an international organisation to perform or abstain from performing acts[7]. In 2005, the Organisation of the United Nations (UNO) in turn proposed a draft definition at the General Convention on International Terrorism in 2005; emphasis was placed on offences which caused the death of others or serious physical damage to others, offences which caused serious damage to public or private goods of various kinds and whose aim is to intimidate a population or put pressure on authorities to perform or abstain from performing any act[8]. Finally, in the European Union (EU), the framework decision of 13th June 2002 relating to the fight against terrorism defines more clearly in article 1 terrorist offences as deliberate acts aimed at points *a*) to *i*)[9], "as defined as offences under national law which, given their

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[5] M.-H. Gozzi, *Le terrorisme*, Paris, Ellipses, 2003 p. 39; J.-F. Gayraud, "Définir le terrorisme, est-ce possible, est-ce souhaitable?", *Revue internationale de criminologie and de police technique*, 1988, 2, p. 190 to 193.

[6] A. Masset, "Terrorisme", *Postal Mémorialis*, 2017, p. 1 to 27; H. L'Heuillet, *Aux sources du terrorisme*: *de la petite guerre aux attentats-suicides*, Paris, Fayard, 2009.

[7] Resolution 1566 (2004) adopted by the UN Security Council at its 5053th meeting on 8th October 2004, available at *https://www.un.org/ruleoflaw/blog/document/security-council-resolution-1566-2004-on-threats-to-international-peace-and-security-caused-by-terrorist-acts/*.

[8] The draft general convention on international terrorism proposed for the first time by the special committee of the United Nations on terrorism, 29th July 2005, art. 2. The latest version of the draft is available at *http://www.un.org/ga/search/view_doc.asp?symbol=A/C.6/65/L.10&Lang=F*.

[9] (*a*) attacks upon a person's life which may cause death;

(*b*) attacks upon the physical integrity of a person;

(*c*) kidnapping or hostage taking;

(*d*) causing extensive destruction to a Government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property likely to endanger human life or result in major economic loss;

(*e*) seizure of aircraft, ships or other means of public or goods transport;

(*f*) manufacture, possession, acquisition, transport, supply or use of weapons, explosives or of nuclear, biological or chemical weapons, as well as research into, and development of, biological and chemical weapons;

nature or context may seriously damage a country or an international organisation, were committed with the aim of seriously intimidating a population, or unduly compelling a Government or international organisation to perform or abstain from performing any act, or seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation"[10].

The three broad definitions emphasise two elements specific to terrorist actions which are largely shared by the international community[11]: the commission of a "criminal" material act damaging the life or body of persons or causing material damage of a certain intensity, and the presence of a specific moral or intentional element (intimidating a population or spreading terror, destabilising of putting pressure on a state or an international organization.)

From the perspective of national law, the content of these definitions will have to be transposed and specified in the national laws, as many countries have adopted specific legislation in recent years specifying the types of "terrorist" offences and their scope[12]. It follows that, in practice, the legal classification of an act as a terrorist act and its penal construction remain variable and protean, depending on the cultural context and legal traditions specific to each country, but also on the interpretation of the events in which the act takes place and the geopolitical interests it raises for each State concerned[13].

1.2. *The characteristics of a terrorist offence*

From a political perspective, the terrorist offence undoubtedly underlines in an exemplary manner the socially constructed nature of any criminal offence, the result of conflicts of values and interests[14]. An act perceived and incriminated by one individual as a "terrorist act" will be interpreted by

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(*g*) release of dangerous substances, or causing fires, floods or explosions the effect of which is to endanger human life;

(*h*) interfering with or disrupting the supply of water, power or any other fundamental natural resource the effect of which is to endanger human life;

(*i*) threatening to commit any of the acts listed in (*a*) to (*h*).

[10] Framework Decision 2002/475/JAI of 13 June 2002 on combating terrorism.

[11] R. Letschert and A. Pemberton, "Victims of terrorism in the OSCE (Organization for Security and Co-operation in Europe) region. Analysis of a questionnaire on the practice of OSCE participating states on solidarity with the victims of terrorism", Report commissioned by the OSCE Office for Democratic Institutions and Human Rights, 2009, Poland. See also on this topic: R. Letschert and A. Pemberton, "Addressing the needs of victims of terrorism in the OSCE region", Security and Human Rights, 2008, 19, 4, p. 298 to 311.

[12] As an example, Belgium adopted by an act of 19th December 2003, a specific chapter to the penal code entitled "terrorist offences" articles 137 to 141-*ter* of the Penal Code).

[13] H. L'Heuillet, *op. cit.*, 2009, p. 69; A. Conte, *Human Rights in the Prevention and Punishment of Terrorism*, Heidelberg, Springer, 2010, p. 11 and 12; A. Pemberton, "Needs of Victims of Terrorism", *Assisting Victims of Terrorism. Towards a European Standard of Justice*, R. Letschert, I. Staiger and A. Pemberton (eds.), Dordrecht, Springer, 2010, p. 127.

[14] On this topic, see D. Duez, "De la définition à la labellisation: le terrorisme comme construction sociale", K. Bannelier, Th. Christakis, O. Corten and B. Delcourst (eds.), *Le droit international face au terrorisme. Après le 11 septembre 2001*, Paris, Pedone, 2004, p. 105 to 118.

another as an act of resistance or a legitimate act of liberation[15]. An act condemned by a State as a terrorist offence in one context will be supported by the same State in another context[16]. Likewise, the line between terrorist offence and other forms of political violence, such as acts of insurrection, guerrilla warfare or even civil disobedience, is not always easy to draw[17].

To consensually define terrorism, to agree on the scope of this concept and the acts that could qualify it as a "terrorist" offence remains an arduous task, as the semantic field in question gives rise to diverse and contextual interpretations. If need be, this is evidenced in that the proposal of integrating the crime of terrorism on the list of crimes included in the Statute of the International Criminal Court resulted in failure, given the lack of a political consensus on its definition[18]. Through the literature, there is nonetheless room for drawing a series of characteristics that are relatively consensual in the Western world around the notion of a terrorist act. Compared to other criminal acts or forms of social or political protest, terrorism will be distinguished by the following features.

The first one is *committing or repeating material acts of violence* against people or goods, generally incriminated by national laws. This violence can be "blind"[19], aimed at indeterminate and arbitrary targets, or otherwise "targeted", aimed at specific figures with a high symbolic content[20]. However, some believe that an act of violence is not a requirement and that the mere "threat" of such an act might suffice, provided that other criteria of an intentional nature are present[21].

The second one is the will to *create a situation of lasting fear and terror* within a targeted community[22], using a *communication strategy* that turns the terrorist act into a message to society. Besides its instrumental dimension, terrorist violence has a strong symbolic dimension: the act is part of a "psychological warfare"[23], aimed at creating a state of emotional shock within the targeted group, with a view to making them aware of a situation,

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[15] R. Drake, *The Revolutionary Mystique and Terrorism in Contemporary Italy*, Bloomington, Indiana University Press, 1989, p. xiv; A. Pemberton, *op. cit.*, 2010, p. 127; P.C. Kratcoski, *and al.*, "Terrorist Victimization: Prevention, Control and Recovery", *International Review of Victimology*, 2001, 8, 3, p. 257.

[16] Islamist terrorism, widely condemned nowadays, was supported by the West when it came to finding against the expansion of the USSR in Afghanistan (D. Souchon, "Quand les djihadistes étaient nos amis", *Monde diplomatique*, février 2016, p. 14 and 15).

[17] L. Weinberg, A. Pedahzur and S. Hirsch-Hoefler, "The Challenges of Conceptualizing Terrorism", *Terrorism and Political Violence*, 2004, 16, p. 777 to 794.

[18] M.-H. Gozzi, *op. cit.*, 2003, p. 53.

[19] P. Gueniffey, "Généalogie du terrorisme contemporain", *Le Débat*, 2003, 126, p. 160 and 161.

[20] R. Letschert and A. Pemberton, *op. cit.*, 2008, p. 299.

[21] L. Weinberg, A. Pedahzur and S. Hirsch-Hoefler, *op. cit.*, 2004, p. 786.

[22] A.P. Schmid, J. Albert and A.J. Jongman, *Political terrorism: A new guide to actors, authors, concepts, data bases, theories and literature*, New Brunswick, Transaction Publishers, 1988, p. 5; M.-H. Gozzi, *op. cit.*, 2003, p. 31; S. Freedman, "Psychological Effects of Terror Attacks", *Essentials of Terror Medicine*, S. Shapira, J. Hammond and L. Cole (eds.), London, Springer, 2009, p. 405 to 424; H. L'Heuillet, *op. cit.*, 2009, p. 69.

[23] H. L'Heuillet, *op. cit.*, 2009, p. 79; M.-H. Gozzi, *op. cit.*, 2003, p. 65; D. Spinellis, "Terrorism", *Revue hellenique de droit international*, 1994, 47, p. 446 to 462.

influencing them or forcing them to adopt certain positions[24]. The terrorist act therefore seeks to benefit from the widest possible publicity and, in this context, its direct victims are merely "collateral damage": they are in fact exploited, set up as messages to influence more broadly the social group that is the main target of the terrorist action[25].

The third one is to *promote a specific ideology* of a philosophical, social, cultural, political or religious nature[26]. This ideological dimension allows to distinguish terrorism from other types of violent crimes[27] and its perpetrators from other criminals such as those belonging to organised crime (the Mafia or Cosa Nostra in Italy, the cartels in Latin America, etc.) However, the line between these two worlds is sometimes blurred[28]. The perpetrators of the terrorist act perceive it as a legitimate means of propaganda, in the context of a political conflict where an attempt is made to defend a cause that does not have (or not enough) legitimacy (the terrorist act is then analysed as being linked to an "impatience to act" in a conflict that lacks popular support and/or has an imbalance of forces)[29]. This ideological-political dimension of terrorism as a "weapon of the weak" mired in a battle for influence is clearly supported in cases of nationalist terrorism, liberation, resistance, secession or insurrection faced together with an authoritarian regime or an invading State[30]. It is also claimed nowadays in the framework of jihadist terrorism which presents itself in many ways as the vanguard of the fight against the West and its posture of domination and exploitation[31].

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[24] P. Gueniffey, *op. cit.*, 2003, p. 158 to 161; M.-H. Gozzi, *op. cit.*, 2003, p. 31.

[25] B. Pfefferbaum, "Victims of Terrorism and the Media", *Terrorists, Victims and Society. Psychological Perspectives on Terrorism and its Consequences*, A. Silke (eds.), West Sussex, Wiley, 2003, p. 175 to 187; P. Mannoni, *Les logiques du terrorisme*, Paris, In Press, 2004, p. 119; A.P. Schmid, "Magnitudes and Focus of Terrorist Victimization", *Victims of Crime and Abuse of Power*, A.P. Schmid (eds.), Bangkok, UN Congress on Crime Prevention and Criminal Justice, 2005; R. Letschert and I. Staigner, "Introduction and Definitions", *Assisting Victims of Terrorism: Towards a European Standard of Justice*, R. Letschert, I. Staigner and A. Pemberton (eds.), Dordrecht, Springer, 2010, p. 8; J. Paust, "A Survey of Possible Legal Responses to International Terrorism: Prevention, Punishment, and Cooperative Action", *Georgia Journal of International and Comparative Law*, 1975, 2, 5, p. 431 to 469; A. Schmid and A. Jongman, *Political Terrorism*: *a new guide to actors, authors, concepts, data bases, theories and literature*, Brunswick, Transaction, 1988, p. 5; L. Weinberg, A. Pedahzur and S. Hirsch-Hoefler, "The Challenges of Conceptualizing Terrorism", *Terrorism and Political Violence*, 2004, 16, p. 777 to 794.

[26] D. Spinellis, *op. cit.*, 1994, p. 446.

[27] R.A. Friedlander, "Sowing the Wind: Rebellion and Violence in Theory and Practice", *Denver Journal of International Law & Policy*, 1976, 6, 1, p. 83to 93. The latter all the successfully summarised that "terrorism is different from criminal violence in that its purpose is symbolic, its means psychological, and its ends political". (*Ibid.*, p. 88).

[28] M.-H. Gozzi, *op. cit.*, 2003, p. 41 and following.

[29] M. Crenshaw, "The Logic of Terrorism: Terrorist Behavior as a Product of Strategic Choice", *Origins of Terrorism: Psychologies, Ideologies, Theologies, States of Mind*, W. Reich (eds.), New York, Cambridge University Press, 1990, p. 13; D. Spinellis, *op. cit.*, 1994, p. 446; M.-H. Gozzi, *op. cit.*, 2003, p. 28 and following.

[30] Some authors therefore insist on the distinction between illegitimate terrorism and legitimate national liberation struggles (the especially P.C. Kratcoski, M.M. Edelbacher and D.K. Das, "Terrorist Victimization: Prevention, Control and Recovery", *International Review of Victimology*, 2001, 8, p. 257).

[31] S. Garcet, "La question de la privation relative au sein du processus de radicalisation", *Revue de droit pénal et de criminologie*, 2019, 1, p. 53.

In a way, it is also reinforced by the answer it receives, often presented as a "war against terrorism", against its perpetrators and the values it defends[32].

The fourth and final feature of a terrorist act, central to this "ideological war"[33] is the will to *destabilise a social group, its institutions and its values*. Terrorism generally targets a specific group, its fundamental values and its representations in the name of opposing values and representations. In this context, it may seek to exacerbate the conflict and fragment opinions in order to widen the gap between them and win over potential members who are sympathetic towards the values it promotes, the discrimination it denounces and the struggle it defends[34].

We shall therefore retain that the terrorist act, if it has a material element (an act of violence against people and goods), is characterised above all by the particularity of its moral element. It is the intention linked to the act, which can be broken down into various elements revolving around the ideological core, which gives the terrorist act its true specificity. This is also what makes the largely privileged criminal response difficult: on the one hand, the more it is exacerbated, which is often the case[35], the more the criminal response reinforces the war logic that the terrorist strategy aims to create, potentially fuelling recruitment channels it wants to fight against. On the other hand, the traditional objectives of sentencing in terms of deterrence, moralisation and reintegration, already widely questioned in response to ordinary crime, are even more difficult to imagine in a dispute with such strong ideological connotations[36]. This also makes the conceptualization of discussion or collaboration mechanisms of a "repentant" type more difficult with authors engaged in a struggle against a system they wish to destroy.

2. *A genealogy of terrorism in Western Europe (1960-2020)*

Terrorism took on a specific dimension in Europe after the Second World War. In this regard, two periods can be distinguished quite clearly. The first is the period of the "Years of Lead" (1960-1980), marked by the development of political terrorism, but also by autonomist or separatist terrorism (2.1). The second is the contemporary terrorism of the beginning of the 21st century, characterised by a weakening (although not the disappearance)

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[32] G.W. Bush, Speech before Congress, 20 September 2001, cited in T. Delpech, *op. cit*., 2002, p. 37.

[33] H. L'Heuillet, *op. cit*., 2009, p. 79; M.-H. Gozzi, *op. cit*., 2003, p. 71.

[34] T. Delpech, *op. cit*., 2002, p. 679; M.-H. Gozzi, *op. cit*., 2003, p. 10 and 41.

[35] Penalties are generally harsher, procedural rules are more flexible, and certain general principles of criminal law (legality, proportionality) are undermined in "special regimes". M.-L. Cesoni, "Nouvelles méthodes de lutte contre la criminalité: paradigme de l'efficacité et désuétude des principes fondamentaux. Introduction générale", *Nouvelles méthodes de lutte contre la criminalité*: *la normalisation de l'exception. Étude de droit comparé (Belgique, États-Unis, Italie, Pays-Bas, Allemagne, France)*, M.-L. Cesoni (eds.), 2007, Bruxelles, Bruylant, p. 1 to 56.

[36] R. Letschert and M. Groenhuijsen, "Global Governance and Global Crime - Do Victims Fall in Between?", *The New Faces of Victimhood, Globalization, Transnational Crimes and Victim Rights*, R. Letschert and J. van Dijk (eds.), 2011, p. 40.

of this political terrorism and especially by the rise of a jihadist terrorism which mobilises the political-religious reference (2.2).

2.1. *Terrorism during the Years of Lead: political polarisation and autonomist claims*

The expression "Years of Lead" refers to the period of political violence in which several European countries were confronted between the end of the 1960s and the end of the 1980s[37].

This period is characterised in several European countries by political radicalisation phenomenon against the background of a left-right split, accompanied by terrorist movements resorting to armed struggle in order to assert their political message. While the two countries most dramatically exposed to this type of political terrorism were West Germany and Italy, resonances were heard in France, Spain and Belgium as well. Characteristically enough, these countries will experience an alternation of attacks attributed sometimes to the extreme left and sometimes to the extreme right, against a backdrop of marked (if not absolute) differences: the extreme-left movements, anxious to attack the capitalist system and to win the popular masses in their struggle, develop a targeted terrorism, aiming at symbolic figures representative of the system to be brought down[38]. Extreme right terrorism is more marked by a blind and indiscriminate violence intended to spread fear and create reflexes of identity or conservative withdrawal among the population[39].

Italy is without doubt the most representative country of this dual terrorism of extreme left and extreme right that will develop for 20 years starting in the 1960s. The attacks claimed by the extreme left (the *Brigate Rosse* but also to a lesser extent *Prima Linea* or the *Nuclei Armati Proletari*) will combine the "black terrorism" of the *Fronte Nazionale Rivoluzionario*, d'*Ordine Nuovo* or the *Nuclei Armati Rivoluzionari*, marked by indiscriminate and unclaimed attacks, against the backdrop of what some call "the tension strategy"[40] and a judicial activity very regularly blocked by invoking state secrecy[41].

In (Western) Germany, la *Rote Armee Fraktion* (RAF) or "Baader-Meinhof group" resort to armed struggle and to "urban guerrilla" in order to fight

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[37] M.-H. Gozzi, *op. cit*., 2003, p. 11 and following.

[38] M.-H. Gozzi, *op. cit*., 2003, p. 16.

[39] G. Bocca, *Il terrorismo italiano 1970-1980*, Milano, Rizzoli 1981, p. 133.

[40] G. Flamini, *Il partito del golpe, La strategia della tensione e del terrore dal primo centrosinistra organico al sequestro Moro*, Bologna, Bovolenta, 1981-1985. The tension strategy refers to a strategy promoted by the extreme right in Italy aimed at creating fear and to disqualify the "historical compromise" under negotiation between the Christian Democracy and the Italian Communist Party against the backdrop of the intervention of the P2 lodge and, potentially, the "gladio" cells (see specially, G. Panvini, *Ordine nero, guerriglia rossa*, Turin, Einaudi, 2009; G. Flamini, *op. cit*., 1981-1985).

[41] Y. Cartuyvels, "Justice et intérêt: la lutte contre le terrorisme noir et le secret d'État politico-militaire en Italie", *Droit et intérêt. Droit positif, droit comparé et histoire du droit*, Ph. Gérard, Fr. Ost and M. van de Kerchove (eds.), Brussels, F.U.S.L., p. 115 to 138.

against capitalism and state imperialism[42]. Mainly practising targeted terrorism on the national scene, the RAF laid down its arms in 1992 and announced its dissolution in 1998. As a counterpoint, between 1950 and 1980, Germany saw the development of various neo-fascist groups such as the *Wehrsportsgruppe Hoffman*, which carried out indiscriminate attacks in public places[43]. In France, the Direct Action ("AD") group, inspired by communism and libertarianism developed the project of creating along with the *Rote Armee Fraktion*, a common revolutionary front of the extreme left in Western Europe[44]. In Belgium, the Communist Combatant Cells (CCC), created in 1983, resorted to targeted attacks directed at material targets before its leaders were arrested in 1985. These years are also marked in Belgium by bloody and unclaimed attacks, the "Brabant killings" (28 deaths between 1982 and 1985). The source of these attacks, which has not been clarified to date, has been attributed sometimes to organised crime and sometimes to paramilitary forces as part of an Italian-style tension strategy[45]. Finally, in Spain, the *Grupos de resistencia antifascista primero de octubre* ("GRAPO") resort since 1975 to armed struggle and revolutionary guerrilla warfare to fight against Franco's regime, bourgeois domination and imperialism[46].

In addition to this political terrorism, some European countries such as France, Spain or the United Kingdom have been facing separatist or independence terrorist movements since the mid-20th century. Since the end of the 1950s, Spain has been confronted with Basque separatist terrorism, represented by the *Euskadi Ta Askatasuna* ("ETA") organization[47]. Gradually losing influence with the democratisation of the Spanish regime, Basque terrorism is undoubtedly one of the deadliest in Europe, claiming countless victims (more than 800 dead and thousands injured between 1959 and 2008)[48]. In response to this separatist terrorism, an extreme right-wing neo-fascist movement developed at the end of the 1970s, namely with the *Groupe Anti-terroriste de Libération* ("GAL"), a group that uses methods of armed struggle and targeted assassination against ETA members[49]. In Northern Ireland, the Irish Republican Army ("IRA") is a group of nationalists fighting for the annexation of Ulster to Eire and the recognition of a single sovereign state out-

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[42] S. Aust, *Baader-Meinhof, The Inside Story of the R.A.F.*, Oxford, Oxford University Press, 2009.

[43] P. Chassaigne, *Les années 1970. Fin d'un monde et origine de notre modernité*, Paris, Armand Colin, 2012, p. 230 and following.

[44] See Action Directe and RAF, bilingual press release entitled in its French version "pour l'unité des révolutionnaires en Europe Occidentale", January 1985. Available at *http://www.socialhistoryportal.org/sites/default/files/raf/fr/0019850100_01%2520FR_2.pdf*.

[45] House of Representatives, "Parliamentary enquiry into the necessary adjustments to the organisation and functioning of the police and judicial system in light of the difficulties that arose during the investigation into the Brabant killers", 14 October 1997, No. 573/7-95/96. Available at *http://www.lachambre.be/FLWB/PDF/49/0573/49K0573007.pdf*.

[46] *Ibidem*.

[47] R. Alonso and F. Reinares, "L'Espagne face aux terrorismes", *Pouvoirs*, 2008, 124, 1, p. 107 to 121; G. Ménage, *L'oeil du pouvoir. Face aux terrorismes 1981-1986. Action directe. Corse. Pays basque*, Fayard, Paris, 2000, p. 12.

[48] R. Alonso and F. Reinares, *op. cit*., 2008, p. 107.

[49] R. Alonso and F. Reinares, *op. cit*., 2008, p. 112.

side the United Kingdom[50]. In this case once again, in response to the actions of the IRA, small terrorist groups emerge that oppose the demands for independence[51]. In France, there are the actions of the *Front National de Libération de la Corse* ("FNLC"), which become more violent as of the 1990s[52].

2.2. *The transformation of terrorism in Europe in the 21st century*

Although political and/or separatist terrorism has not completely disappeared in the 21st century, it has clearly declined in intensity, with the result that from 2010 onwards the various groups and entities linked to such terrorism will no longer be included on the list drawn up by the Council of the European Union[53].

In practice, after the turning point of the attacks of 11 September 2001 in the United States, 21st century Europe has been faced with a "new phase" of terrorism[54], of political and religious inspiration and with a significant transnational character which embodies "Islamist jihadism"[55]. Originating in the Israeli-Palestinian conflict in the 1970s, gaining strength in the context of the war against the Soviet Union in Afghanistan in the 1980s, jihadist radicalism flourished in Africa and the Middle East in the 1990s before reaching Europe at the beginning of the 21st century[56]. The armed intervention in Iraq initiated in 2003 by the United States and followed by some European states – the coalition forces – favoured the expansion of jihadist terrorism, whose aim is to attack the West, its posture of domination and its logic of exploitation, its values and principles[57].

Unlike the previous "political" terrorism, jihadist terrorism would be characterized by claiming a religious ideological inspiration[58], relying on a

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[50] N. Bernheim, "I.R.A. (Irish Republican Army)", *Encyclopædia Universalis* [en ligne], disponible sur: *http://www.universalis.fr/encyclopedie/irish-republican-army/*; J. Tarnero, *Les terrorismes*, Paris, Milan, 1997, p. 16 and 17.

[51] T. Delpech, *op. cit.*, 2002, p. 7 and 8.

[52] J. Tarnero, *op. cit.*, 1997, p. 37. Still active in the 21st century, the organisation announced their commitment to a demilitarisation process on 25 June 2014 (Le Monde, "Corse: le FNLC annonce qu'il dépose les armes", article du 26 June 2014).

[53] Council Common Position 2009/468/CFSP of 15 June 2009 updating Common Position 2001/931/CFSP on the application of specific measures to combat terrorism and repealing Common Position 2009/67/CFSP, Official Journal of the Union 1/45; Council Decision 2010/386/CFSP of 12 July 2010 updating the list of persons, groups and entities to which Articles 2, 3 and 4 of Common Position 2001/931/CFSP on the application of specific measures to combat terrorism apply.

[54] D. Benjamin, "Le terrorisme en perspective", *Politique étrangère*, 2006, 4, p. 887 to 900.

[55] R. Jackson, "Constructing Enemies: 'Islamic Terrorism' in Political and Academic Discourse", *Government and Opposition: an International journal of comparative politics*, 2007, p. 394 to 426.

[56] C.R. Lister, *The Islamic State: A Brief Introduction*, Washington, Brookings Institution Press, 2015; G. Kepel, *Jihad. The Trail of Political Islam*, Harvard, Harvard University Press, 2002.

[57] A. Laoukili, "Emprise de l'idéal, pacte dénégatif et répétition: l'islamisme comme matrice idéologique du terrorisme djihadiste", *Connexions*, 2017, 107, p. 87 to 106.

[58] R. Guolo, *L'ultima utopia. Gli jihadisti europei*, Guerini e Associati, Milano, 2015, p. 14.

largely transnational[59] structure and seeking to produce mass victimisation in order to accentuate its message. Endorsing a war logic at the expense of blurring the boundaries between crime and act of war[60], it would have the effect, instead, of toughening the response of Western states both inside[61] and outside[62] their borders, this time at the expense of blurring the boundaries between criminal and military response[63].

The *religious reference*, regularly instrumentalized and producing a conflation between Islam and terrorism, unfortunately echoed by various Western leaders[64], is very present. The perpetrators of some thirty attacks on European soil since those in Madrid in March 2004[65], members of Al Qaeda first of all, and then of the Islamic State, invoke radical Islam to justify a fight aimed at destroying the enemy[66]. If, unlike the "political" terrorism of the Years of Lead, the religious banner is well raised, not all the political dimension has been removed: where revolutionaries of the Years of Lead claimed the defence of the working class against an oppressive capitalist system, the jihadists invoke the defence of the Muslim community exploited and persecuted by the modern West, both in the South (colonisation, armed interventions in Afghanistan and Iraq, etc.) and in the North (exclusion, Islamophobia, racism, etc.)[67]. Jihadist terrorism in fact functions, perhaps in the end no less than its "political" predecessor, on a double political-religious level[68].

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[59] I.B. Gomez de la Torre, *El terrorismo en el siglo XXI: del terrorismo nacional al terrorismo global*, *Revista penal*, 2018, 42, p. 5 to 30.

[60] M. Llobet, "Terrorism: Limits Between Crime and War. The Fallacy of the Slogan 'War on Terror'", *Post 9/11 and the State of Permanent Legal Emergency. Security and Human Rights in Countering Terrorism*, A. Masferrer (eds.), Dordrecht, Springer, 2012, p. 101 to 117.

[61] K. Roach, "Sources and Trends in Post-9/11 Anti-terrorism Laws", *SSRN Electronic Journal*, 2006, (disponible sur *http://ssrn.com/abstract=899291*); C. Walker, *Terrorism and the Law*, Oxford, Oxford University Press, 2011, p. 386; C. Walker, "The Impact of Contemporary Security Agendas Against Terrorism on the Substantive Criminal Law", *Post 9/11 and the State of Permanent Legal Emergency. Security and Human Rights in Countering Terrorism*, A. Masferrer (eds.), Dordrecht, Springer, 2012, p. 122 and 123.

[62] T. Degenhardt, "The Use of War as Punishment in the International Sphere: Special issue on 'War, Law and Global Order'", *Jura Gentium. Journal of Philosophy of Law and Global Politics*, 2007, p. 15.

[63] M. Trapani, "Guerra e diritto penale. Sull'adeguatezza degli strumenti penalistici nei confronti del c.d. terrorismo islamico", *Politica criminale e cultura giuspenalistica. Scritti in onore di Sergio Moccia*, A. Cavaliere, C. Longobardo, V. Masarone, F. Schiaffo, A. Sessa (eds.), Napoli, 2017, p. 249 and 250.

[64] R. Jackson, *op. cit.*, 2007, p. 394 to 426.

[65] We will mainly cite the attacks in Madrid in March 2004, in London in July 2005 and in June 2017, in Paris in January and in November 2015, in Brussels in March in 2016, in Nice in July 2016, in Berlin in December 2016, in Manchester in May 2017 and in Barcelona in August in 2017.

[66] W.R. Louis and D.M. Taylor, "Understanding the September 11 Attack on America: The Role of Intergroup Theories on Normative Influence", *Analyses of Social Issues and Public Policy*, 2002, p. 10 and following.

[67] W.R. Louis and D.M. Taylor, *op. cit.*, 2002, p.10 and following.

[68] A traditional distinction tends to oppose political terrorism at the end of the 20th century to the jihadist terrorism against the backdrop of a double distinction: "traditional" terrorism would intend to alter the social structures whereas jihadist terrorism would aim at "destroying the enemy" (P. Gueniffey, *op. cit.*, 2003, p. 169). The religious ideology typical of the latter deepens the divide and facilitates the resort to mass victimization. Some, however, rightly point out that the gap is probably less important than it seems: on the one hand, the

Another characteristic of this contemporary terrorism is its *transnational* character. While terrorism of the 20th century was generally (although not exclusively[69]) local, domestic or internal[70], jihadist terrorism is international both in its structure and organisation, its functioning and its intentions and in the issues it raises[71]. The aim is to take the fight to an international level, with transnational recruitment that promotes a discourse centred on a "conflict of civilisations" and mirrored by the conviction that the "war on terrorism" can no longer be thought of on the basis of a strictly national approach[72].

A third specificity of contemporary terrorism is the *emphasis put on mass victimisation* designed to fuel fear and increase the divide within European societies. While it has not escaped blind and indiscriminate forms of violence[73], political terrorism at the end of the 20th century is more generally described as "individual", local and targeted terrorism[74]. Contemporary terrorism, for its part, clearly pursues mass violence, with the conviction that the greater the victimisation, the greater the media repercussions will be and the greater the strength of the message it seeks to deliver. In this regard, the mass media coverage of contemporary terrorism, though not new[75], is a central strategic issue. Today's communication technologies (the Internet, social networks) facilitate a wider and faster dissemination of terrorist acts, facilitating the spread of terror and manipulation of the popular audience[76].

A fourth characteristic of contemporary terrorism is to mark a *turning point in the response to it*. The political terrorism of the 20th century was, for the most part, regarded as a crime and fought with the weapons of criminal law, even if this was at the expense of emergency laws. Jihadist terrorism has led to a questioning of the criminal approach: if classical criminal law remains mobilised, it is largely overwhelmed by the creation of a "criminal law

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ideological reference of the political terrorism of the Years of Lead could also have a "quasi-religious" dimension, (D. Benjamin, *op. cit.*, 2006, p. 887 to 900; P. Gueniffey, *op. cit.*, 2003, p. 169), seeking to destroy the "class enemy" and resorting to "indiscriminate" attacks targeting an undetermined number of people; on the other hand, contemporary jihadist terrorism also claims behind a religious reference, a political dimension with an outspoken will of using violence to protect an oppressed community.

[69] 20th-century terrorism, particularly extreme left on, already had four in elements whether at logistics, planning or even operational level (G. Ménage, *L'œil du pouvoir, t. 2, Face aux terrorismes*, Paris, Librairie Arthème Fayard, 2000, p. 6).

[70] H. L'Heuillet, *op. cit.*, 2009, p. 243.

[71] R. Letschert and A. Pemberton, *op. cit.*, 2008, p. 305.

[72] See especially: Report of the Secretary-General's High-level Panel on Threats, Challenges and Change, AMore SecureWorld: Our Shared Responsibility, UN Doc A/59/565 (2004), para 145.

[73] "Blind" violence was more readily practised by the extreme right.

[74] E. Marenssin and A. Squirrel, *La "bande à Baader" ou la violence révolutionnaire*, Paris, Champ libre, 1972, p. 162 and following.

[75] P. Gueniffey, *op. cit.*, 2003, p. 158 and 159.

[76] G. Weimann, *Terror on the Internet. The New Arena, the New Challenges*, Washington, United States Institute of Peace, 2006; T. Garcin, *Terrorisme, Médias et Démocratie*, Lyon, Presses universitaires de Lyon, 2001; U. Yanay, "Victims of terrorism: Is it a 'Non-issue'?", *Hebrew university of Jerusalem*, 1993, 20, p. 28; J. Breckenridge and P. Zimbardo, "The strategy of terrorism and the psychology of mass-mediated fear", *Psychology of Terrorism*, B. Bongar, L. Brown, L. Beutler, J. Breckenridge and P. Zimbardo (eds.), Oxford, Oxford University Press, 2007, p. 116 to 133.

of the enemy" derogating from the basic principles of criminal law for efficiency reasons[77], as well as by a militarisation of the fight against "enemy combatants"[78], or even against "unlawful combatants"[79], at the expense of a potential depersonalisation and dehumanisation of the other, which are precisely part of the objectives of the jihadist strategy[80].

II. *Understanding the terrorist trajectories: from socio-political factors to individual paths*

The causes of contemporary terrorism and the explanation of the trajectories leading to radicalisation and jihadist terrorism have been the subject of numerous studies in Europe[81]. Without going into a detailed analysis of the various explanatory models, we propose in this paper a synthetic analysis of the main types of explanations put forward in the literature to explain the success of radicalisation and the slide of some towards a terrorist trajectory. In this regard, a dual framework can be organized. The first one emphasizes the general or environmental factors ("a clash of civilisations", geo-political power relations, mechanisms of exclusion and discrimination) which concern more or less large groups of individuals and which are regularly shared in the literature to explain the success of contemporary terrorism (1). The second emphasises the truly individual dimension of involvement in a terrorist trajectory, highlighting the role of various elements of a subjective nature (personality of the subject, conditions of a cognitive encounter with the terrorist narrative, the procedural dimension of a violent path) in the construction of such a trajectory (2).

1. *The contextual dimension: clash of cultures, geopolitical power relations, social exclusion and racial discrimination*

Three factors of an environmental character are generally put forward, which constitute a sort of "backdrop" or reservoir of elements to explain the rise of contemporary terrorism, in its jihadist version. The first is the success

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[77] J. Alix, O. Cahn, "Mutations de l'antiterrorisme et émergence d'un droit répressif de la sécurité nationale", *Revue de sciences criminelle et de droit pénal comparé*, 2017, 4, p. 845 to 868.

[78] R.A. Duff, "Notes on Punishment and Terrorism", *American Behavioral Scientist*, 2005, 48, p. 758.

[79] See mainly H. Carvalho, "Terrorism, Punishment, And Recognition", *New Criminal Law Review*, 2012, 15, p. 345 to 374; R.A. Duff, *op. cit*., p. 760.

[80] A. Pemberton, *op. cit*., 2010, p. 109; A. Laoukili, *op. cit*., 2017, p. 92.

[81] For a summarised approach, see F. Rossi, "Brevi note sul processo multifattoriale di radicalizzazione", *op. cit*.; M. Hafez, C. Mullins, *The radicalizazion puzzle: a theoretical synthesis of empirical approaches to homegrown extremism*, in *Studies in Conflict & Terrorism*, n. 38/2015, p. 967; C. Guérandel and E. Marlière, «Les djihadistes à travers Le Monde", *Hommes et migrations*, 2016; P. Gueniffey, *op. cit*., 2003, p. 166 and following; A. Laoukili, «Emprise de l'idéal, pacte dénégatif et répétition: l'islamisme comme matrice idéologique du terrorisme djihadiste", *Connexions*, 2017, 107, p. 87 to 106; D. Benjamin, *op. cit*., 2006, p. 887 to 900; D. Bachet, "Le terrorisme djihadiste: ses causes, ses effets et ses suites", *L'Homme et la Société*, 2015, 195-196, p. 25 to 28.

of a culturalist argument that links terrorism to the "clash of civilisations" between the West and the Muslim world (1). The second underlines the role played by a second mobilising narrative, focusing on the geo-political and economic power relations between the West and the Muslim world (2). The third focuses on the links to exploitation and discrimination experienced in Europe by people of the Muslim faith (3). These three elements are likely to nourish a feeling of injustice among a certain number of actors prone to being sensitive to terrorist discourse.

1.1. *The "clash of civilisations": a culturalist argument*

The culturalist explanation associates jihadist terrorism to a conflict of civilisations, referring to the theory on "clash of civilisations" by S. Huntington. According to him, the end of the Cold War and the East-West divide would give room to a conflict of civilisations at the heart of which Islam would play a driving role[82]. Against the backdrop of a historical conflict with the West, which goes back to the Crusades and more recent episodes of colonisation, the Islamic religion would serve as a sounding board for a jihadism seeking to place the Muslim world in a logic of war against non-Muslims[83].

Regardless of the relevance of the concept of "clash of civilisations"[84], it is clear that this culturalist argument has been mobilised by jihadist propaganda[85] and symbolised by the choice of certain emblematic targets of the culture of the adversary to be destroyed[86]. From this perspective, the West, its values (democracy, pluralism, freedom, secularism, modernity, respect for human rights, the rule of law, etc.) and its "infidel" populations represent the enemy of Islam: if the West is presented as the source of the political, economic and social problems of Muslim societies[87], it also, if not above all, in this culturalist perspective, represents a danger of the "deterioration of values"[88], of corruption and moral decay for Islam. Terrorism therefore appears

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[82] S. Huntington, *The Clash of Civilizations and the Remaking of World Order*, Simon & Schuster, New York, 1996, p. 98 and following.

[83] M. Lazar, "Le terrorisme en Italie et en France. Questions de recherche", *Vingtième siècle. Revue d'histoire*, 2017, 2 p. 42; M. Gauchet, *Le Monde*, 19 March 2016, p. 1.

[84] Huntington's thesis is based on "the absence, in the Muslim world, of the matrix political values that underpin representative democracy in Western civilization: the separation of political and theological authority, the rule of law, social pluralism, parliamentary institutions of a representative government, the protection of individual rights and civil liberties, which act as a buffer between citizens and the power of the State" (R. Inglehart and P. Norris, "Le véritable choc des civilisations", *Le Débat*, 2003, 126, p. 77). Some global studies (World Values Survey), show the empirical weakness of this thesis, since they allow us to conclude that "today throughout the world, societies, both Muslim and Judeo-Christian, consider democracy to be the best form of government". (*Idem*, p. 77).

[85] S.J. Baele, K.A. Boyd and T.G. Coan, "The Matrix of Islamic's Propaganda: Magazines", *ISIS Propaganda. A Full-Spectrum Extremist Message*, S.J. Baele, K.A. Boyd and T.G. Coan (eds.), New York, Oxford University Press, 2019, p. 84 to 126.

[86] The attack of Charlie Hebdo in Paris in January 2015 comes to mind, or the attack in the Jewish museum in Brussels in May 2014.

[87] W.R. Louis and D.M. Taylor, *op. cit.*, 2002.

[88] R. Guolo, *op. cit.*, 2015, p. 31 and following; J. Raflik, *Terrorisme et mondialisation. Approches historiques*, Paris, Gallimard, 2016.

to be an act of resistance by a civilisation defending its culture in the face of a "cultural westernization of the globe" or "westoxification"[89], characterised by a "religious exit"[90] as well as by the spread of widely shared Islamophobic sentiment. This also explains why jihadist terrorism has developed intensely and as a priority within the Arab-Muslim world itself, in order to fight against the secularisation of Islam, a sort of Trojan horse of the Westernization of the world[91].

This culturalist argument has also been abundantly echoed by many European politicians during various attacks. Several of them did not hesitate not to qualify each new attack as an attack on European civilisation, its principles and fundamental values[92], at the risk of encouraging the confusion between Muslims and jihadists, of increasing polarisation within European societies between the Muslim community and the rest of the Western population, and of increasing the stigmatisation of Muslim immigrants[93].

1.2. *The geopolitical issue: an asymmetric relationship between the West and the Arab-Muslim world*

The culturalist argument crosses and is based on a second mobilising "great narrative", which is that of the geopolitical relations between the West and the Arab-Muslim world[94]. Sometimes associated with a "Third World" reading, the analysis here highlights the role played by the policy of Western domination over the Muslim world in the context of colonisation and decolonisation in Africa and the Middle East[95]. From the Sykes-Picot agree-

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[89] R. Guolo, *op. cit*., 2015, p. 18 to 22.

[90] M. Gauchet, "Le fondamentalisme islamique est le signe paradoxal de la sortie du religieux", *Le Monde*, 22-23 November 2015.

[91] P. Gueniffey, *op. cit*., 2003, p. 169.

[92] Certain reactions from European leaders following the attacks in Brussels in March 2016 illustrate this fact well: "Through the attacks in Brussels, the whole of Europe is being hit" (the French President, François Hollande); "These attacks were not only aimed at Belgium, but also at our freedom of movement, our mobility", values that "are part of the European Union" (German Interior Minister Thomas de Maizière); "This is an attack on democratic Europe. We will never accept that terrorists attack our open societies" (Swedish Prime Minister Stefan Löfven); "Europe has been touched in the heart but we remain who and what we are: an open and democratic society" (Dutch Prime Minister, Mark Rutte). The excerpts of speeches and reactions of European leaders were taken from the website of la libre Belgique dated 22 March 2016: *http://www.lalibre.be/actu/politique-belge/toutes-les-reactions-politiques-a-travers-le-monde-apres-les-attentats-a-bruxelles-56f1139f35702a22d59e03ad*.

[93] Report prepared by the "Migration Policy" group of the OSCE entitled "Policies on Integration and Diversity in some OSCE Participating States - An Explanatory Study", thus concluded that the war on terrorism mainly affects Muslim immigrants by making their integration into Western populations more difficult. See also V.M. Esses, J.F. Dovidio and G. Hodson, "Public Attitudes Toward Immigration in the United States and Canada in response to the 11 September, 2001 'Attack on America'", *Analyses of Social Issues and Public Policy*, 2002, 2, 1, p. 69 to 85; L. Sheridan, "Islamophobia Pre and Post September 11th 2001", *Journal of Interpersonal Violence*, 2006, 21, 3, p. 317 to 336.

[94] J-P. Filiu, *Les Arabes, leur destin et le nôtre. Histoire d'une libération*, Paris, La Découverte, 2015; F. Khosrokhavar, *La radicalisation*, Paris, Maison Des Sciences de l'Homme, 2014.

[95] R. Lioger, *La Guerre des civilisations n'aura pas lieu. Coexistence et violence au XXe siècle*, Paris, CNRS, 2016; D. Benjamin, *op. cit*., 2006, p. 887 to 900; D. Bachet, "Le terrorisme djihadiste: ses causes, ses effets et ses suites", *L'Homme et la société*, 2015, 195-196, p.185.

ments redrawing the borders of the Middle East (1916) to the military intervention in Syria (2011-2017), from support for the creation of Israel (1948) to contempt for the Palestinian cause since the Six Day War (1967), the invasion of Iraq (1991 and 2003), to the war in Afghanistan (2001) and the armed intervention in Libya (2011), or the opportunistic support of certain dictators in the Middle East, the attitude of the Western world provides powerful elements for jihadist propaganda.

Perceived as an expression of contempt for the Muslim world, a source of political and socio-economic destabilisation in the Arab world[96], the Western stance which does not hesitate to exploit the conflicts in the Middle East for economic purposes is a source of humiliation and resentment in the Muslim world[97]. The logic of domination and exploitation poorly masked by Western interventionist policies appears then to be a powerful driver of jihadist terrorism, which can promote itself as a defender of the oppressed and an actor in the fight against injustice. In the same way, the disastrous humanitarian consequences caused by Western (especially the US) armed interventions, which are considered illegitimate[98] or, on the contrary, the disengagement of Western forces according to their interests, reinforce bitterness and feed the desire for revenge or vengeance of young people who are more receptive to calls for radicalisation[99].

1.3. *The duplication of a relationship of domination within the Western world: exclusion and discrimination*

The geopolitical context, when marked by international conflicts, can generate a sense of injustice and influence a process of violent engagement[100]. Reinforced by a culturalist interpretation of the conflict, the overall sense of injustice, fuelled by radical propaganda, is likely to reinforce the individual's identification with a group perceived as persecuted and threatened, whose honour and dignity must then be repaired, at the heart of a battle between the just and the unjust placed under divine arbitration[101].

Moreover, this feeling of injustice can be intensified for a certain number of people when the logic of domination denounced on the international scene finds an echo within European countries, in a kind of duplication of North-South relations within the Western world. This feeling of injustice, a source of frustration, anger or revolt, is based on two elements, distinct from

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[96] D. Benjamin, *op. cit.*, 2006, p. 887 to 900.

[97] P. Gueniffey, *op. cit.*, 2003, p. 169; D. Bachet, *op. cit.*, 2015, p. 25 to 28.

[98] The war in Iraq in particular, the theatre of more than a million deaths, would have offered a new "field of Jihad" from which the Islamic State would be created in 2006. (D. Benjamin, *op. cit.*, 2006, p. 887 to 900; T. Degenhardt, *op. cit.*, 2007, p. 15.

[99] F. Khosrokhavar, *op. cit.*, 2014.

[100] X. Crettiez, "'High Risk Activism': essai sur le processus de radicalisation violente (deuxième partie) ", *Pôle Sud*, 2011b, 35, p. 100.

[101] M. Hafez and C. Mullins, "The Radicalization Puzzle: A Theoretical Synthesis of Empirical Approaches to Homegrown Extremism", *Studies in Conflict and Terrorism*, 2015, 38, p. 967.

each other but often experienced as cumulative and sometimes associated with the title of "social reasons"[102].

The first highlights the reality of *social and economic exclusion* experienced by Muslim populations in European countries. The various forms of economic exclusion (difficulties in access to employment and discrimination in hiring, legal access prevented by the consumerist model) and social exclusion (relegation to certain schools, poor access to higher education) can feed a feeling of revolt[103]. This will be all the stronger as this type of exclusion is often coupled with forms of *spatial segregation* (confinement in ghetto suburbs) or is based on a high visibility and proximity to the wealth of others[104]. As Piazza points out, "Countries that permit their minority communities to be afflicted by economic discrimination make themselves more vulnerable to domestic terrorism. (…) The overall economic status of a country has a smaller effect on terrorism than does the economic status of a country's minority groups"[105]. Furthermore, if it turns out that the process of marginalisation is perceived as the result of an *intentional policy* of the authorities in place, the sense of injustice increases.

The second is the feeling of being subject to *cultural and racial discrimination* in societies that present themselves as multicultural but do not provide themselves with the means to do so[106]. While the promotion of multiculturalism gives "the appearance of (an) equal dignity to all cultures", Islam in Europe is still conceived as an illegitimate subculture[107] and some members of the Muslim community feel discriminated against and are regularly discriminated against. In this context, the interactions experienced with the police and the judiciary play a significant role. On the one hand, the feeling of being a victim of police targeting (ethnic profiling)[108] or of being subjected to discriminatory judicial treatment[109] feeds the discriminatory reading. It is also known that imprisonment, particularly when accompanied by ill-treatment or even torture[110], regularly contributes to the process of radi-

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[102] A. Silke, "Becoming a terrorist", *Terrorists, Victims, and Society: Psychological Perspectives on Terrorism and its Consequences*, A. Silke (eds.), 2003, Chichester, Wiley, p. 29 to 53.

[103] F. Khosrokhavar, "Le nouveau terrorisme djihadiste", *La pensée de midi*, 2010, 31, p. 188 and 189; D. Lapeyronnie, *Ghetto urbain, ségrégation, violence, pauvreté en France aujourd'hui*, Paris, Robert Laffont, 2008; X. Crettiez, "'High Risk Activism': essai sur le processus de radicalisation violente (première partie) ", *Pôle Sud*, 2011a, 34, p. 49.

[104] L. Van Campenhoudt, *Comment en sont-ils arrivés là? Les clés pour comprendre le parcours des djihadistes*, Malakoff, Armand Colin, 2017, p. 54 and following.

[105] J. Piazza, "Poverty, Minority Economic Discrimination and Domestic Terrorism", *Journal of Peace Research*, 2011, 48, p. 350.

[106] C. Torrekens, "Pour une analyse interdisciplinaire des processus de radicalisation", *L'effet radicalisation et le terrorisme*, F. Brion, C. De Valkeneer and V. Francis (eds.), Brussels, Politeia, 2019, p. 107.

[107] F. Khosrokhavar, "Le nouveau terrorisme djihadiste", *La pensée de midi*, 2010, 31, p. 186.

[108] L. Mucchieli, *Violences et insécurité. Fantasmes et réalités dans le débat français*, Paris, La Découverte, 2007.

[109] C. Adam, J.-F. Cauchie, M.-S. Devresse, F. Digneffe and D. Kaminski, *Crime, justice et lieux communs. Une introduction à la criminologie*, Brussels, Larcier, 2014.

[110] S. Labat, *Les islamistes algériens. Entre les urnes et le maquis*, Paris, Le Seuil, 1995; X. Crettiez X. and R. Sèze, *Saisir les mécanismes de la radicalisation violente*: *pour une*

calisation, both through the creation or accentuation of traumas and through the phenomenon of acculturation to radical Islamism and socialisation into existing networks, which it encourages[111]. Sommier shows, however, that repression (torture, incarceration) can have opposite consequences; depending on its "degree" and "timing", it can either discourage the activist (because of the imbalance between the benefits of violent action and, on the other hand, the risks and costs involved) or cause a moral shock and (morally) justify the struggle in the eyes of the activist[112]. On the other hand, in the context of the fight against terrorism, preventive police and judicial actions can escalate the phenomenon of radicalisation instead of combating it. While certain administrative police measures (closing down premises, enforcing curfews, etc.) may discourage some "moderates", they may also exasperate others, encouraging their radicalisation and leading them to take action in a more clandestine context[113]. A political-judicial discourse of "war on terrorism", opposing "defenders of freedom" to the "axis of evil" accentuates the divide and can have the same effects[114] on those who consider the reactions unjust or outrageous.

Against a backdrop of socio-economic exclusion and sometimes political marginalisation[115], the feeling of cultural and racial discrimination is likely to stir up an identity problem, particularly among young people who

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analyse processuelle et biographique des engagements violents, Rapport de recherche pour la Mission de recherche Droit et Justice, 2017.

[111] A. Silke and T. Veldhuis, "Countering Violent Extremism in Prisons: a review of key recent research and critical research gaps", *Perspectives on Terrorism*, 2017, 11, p. 2 to 11; F. Khosrokhavar, "Radicalization in prison: the French case", *Politics, Religion and Ideology*, 2013, 14, p. 284 to 306; A. Mac Gilloway, P. Ghosh and K. Bhui, "A systematic review of pathways to and processes associated with radicalization and extremism amongst Muslims in Western Societies", *International Review of Psychiatry*, 2015, 27, p. 39 to 50; F. Khosrokhavar, "Nouveau paradigme de radicalisation en prison", *Cahiers de la sécurité et de la justice*, 2014, 30, p. 17.

[112] I. Sommier, "Engagement radical, désengagement et déradicalisation. Continuum et lignes de fracture", *Lien social et Politiques*, 2012, 68, p. 22. Fillieule also insists, though in a different fashion, on the ambivalence of repression (O. Fillieule, "Le désengagement d'organisations radicales. Approche par les processus et les configurations", *Lien social et Politiques*, 2012, 68, p. 49). According to the author, if repression only concerns the leaders and active members of a movement, it could cause activists' disengagement. On the other hand, if it is indiscriminately directed at all of its supporters, their engagement could increase. Amghar and Fall believe that fear of prison could have a demobilising effect on the accused persons than prison itself. (S. Amghar and K. Fall, "Quitter la violence islamique. Retour sur le phénomène de désaffiliation djihadiste", *Revue du MAUSS*, 2017, 1, 49, p. 123).

[113] D. della Porta, "Radicalization: a relational perspective", *Annual Review of Political Science*, 2018, 21, p. 461 to 474; S. Malthaner, "Contextualizing Radicalization: the Emergence of the 'Sauerland-group' from Radical Networks and the *Salafist* movement", *Studies in Conflict and Terrorism*, 2014, 37, p. 638 to 653; I. Detry, B. Mine and P. Jeuniaux, "Revue des études empiriques concernant la radicalisation et la justice", *Revue internationale de criminologie et de police technique et scientifique*, 2019, p. 285.

[114] A. Garapon, "Le terrorisme du XXIe siècle, une coproduction de la mondialisation", *La pensée de midi*, 2010, 31, p. 198.

[115] If a social group is, intentionally or unintentionally, excluded from traditional political decision-making arenas, terrorist violence is a possible resource for trying to penetrate political life in order to establish itself as a credible interlocutor (M. Humphreys and J. Weinstein, "Who Fights? The Determinants of Participation in Civil War", *American Journal of Political Science*, 2008, 52, p. 440). This was the case, for example, in 1991 with the banning of the Islamist Salvation Front and the imprisonment of some of its leaders. (S. Amghar and K. Fall, *op. cit.*, 2017, p. 123).

do not find their place in the dominant culture. Sometimes distancing themselves from their "integrated" parents, these young people feel torn between "an Islamic culture which fascinates them but which they know little about and a Western society which seems to reject them"[116]. Engaging in violent behaviour can then be understood as a revenge strategy based on a "stigma reversal": having experienced various processes of exclusion and discrimination, these young people claim their stigma in order to better turn it against the perpetrators[117], some of them overplaying the role assigned to them by taking on a "rigid identity to respond to an Islamic ideal wounded by the West and its values"[118]. Adherence to jihadism then allows these young people to rediscover an identity that their parents would have dishonoured, with religion becoming a place for asserting their identity rather than a sign of submission to religious dogmas[119]. The jihadist commitment of these young people in an identity crisis would therefore be more the result of the Islamisation of a radical revolt against the world around them ("Islamisation of radicalness") than the fruit of a religious drift ("radicalisation of Islam")[120] and which could just as easily have resulted in the adoption of other types of disruptive behaviour[121].

This explanation focuses on structural elements whose effects are highlighted both outside (geopolitical context) and within the European territory (exclusion, Islamophobia, racism, etc.)[122]. The diversity of these factors would explain why, as was the case with the extreme left-wing terrorism of previous years, radicalisation has not only affected "excluded young people" in revolt against a society of discrimination[123], but also young people who are educated and well-integrated. They see the jihad as a form of "humanitarian commitment" and solidarity or as a "duty" to react against the imperialism of the Western project[124].

These explanatory factors provide an interesting macro-sociological backdrop for understanding various forms of radicalisation and their dri-

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[116] X. Crettiez, "Penser la radicalisation", *Revue française de science politique*, 2016a, 66, p. 724.

[117] E. Goffman, *Stigmate*: *les usages sociaux des handicaps*, Paris, Minuit, 1963; H. Becker, *Outsiders*: *études de sociologie de la déviance*, Paris, Métailié, 1985.

[118] "The individual who has experienced exclusion, racism, inner indignity finds in radical Islam the instrument of the desire for revenge". (R. Guolo, *op. cit*., 2015., p. 66); See also K. Yusoufzai and F. Emmerling, "How identity crisis, relative deprivation, personal characteristics, and empathy contribute to the engagement of Western individuals in Islamist terrorist behavior", *Journal of Terrorism Research*, 2017, 8, 1, p. 68 to 80; X. Crettiez, *op. cit*., 2016a, p. 725. This may also explain Benslama's concept of "super Muslim". (F. Benslama, *Un furieux désir de sacrifice. Le surmusulman*, Paris, Seuil, 2016).

[119] V. Cret and M. Pantea, "Islamic fundamentalist terrorism issues", *International Journal of Juridical Sciences*, 2013, p. 17; O. Roy, *Globalised Islam*, London, Hurst, 2004.

[120] O. Roy, *Le djihad et la mort*, Paris, Seuil, 2016.

[121] Such as engagement in an anorexic, drug-addicted or artistic trajectory (D. Le Breton, "Jeunesse et djihadisme", *Le Débat*, 2016, 188, p. 130).

[122] R. Lioger, *La Guerre des civilisations n'aura pas lieu. Coexistence et violence au XXe siècle*, Paris, CNRS, 2016; D. Benjamin, *op. cit*., p. 887 to 900; D. Bachet, *op. cit*., p. 25 to 28.

[123] D. Bachet, *op. cit*., p. 25 to 28; J-P. Filiu, *op. cit*., 2015; F. Khosrokhavar, *op. cit*., 2014; C. Guérandel et É. Marlière, *op. cit*., 2016, p. 10 and following.

[124] A. Garapon and M. Rosenfeld, *Démocraties sous stress. Les défis du terrorisme global*, Paris, PUF, 2016, p. 109 and 110.

vers. They have, moreover, been largely mobilised by terrorist propaganda, in a differentiated way to adapt to the diversity of individual profiles.

2. *The individual dimension: subjectivity: cognitive encounter and procedural engagement*

The contextual elements, or environmental variables evoked so far constitute a relevant but insufficient framework to explain a radicalisation trajectory that remains, each time, singular. This individual trajectory refers to categorical or personal variables specific to the subject (2.1) and presupposes the existence of an environment capable of generating a cognitive encounter between the subject and the radical ideology (2.2). It also has a strong procedural dimension that can be associated with the construction of a "career" (2.3).

2.1. *The importance of elements related to subjectivity in the radicalisation trajectory*

A sociopsychological literature emphasises several elements of an individual nature that would make certain subjects more receptive to radical ideology and the transition to violent acts.

The focus is first on certain "personality traits", such as psychopathy, anti-sociability, low self-esteem, anxiety, depression, aggressiveness, mental fragility, impulsiveness, instability or a strong sensitivity to injustice[125]. This pathologising approach is debatable: apart from the fact that it employs vague concepts – what is "anti-sociability"? what is a "strong sensitivity to injustice"? – it regularly pushes "open doors": for someone who is aggressive, radicalisation provides an excuse and an outlet[126]; for someone suffering from depression, radical ideology provides an escape route[127]; for someone suffering from a disorder of self-esteem, becoming a fighter helps to strengthen that self-esteem beyond one's true social identity[128]. As in other areas of deviance[129], the heuristic potential of this type of pathologising explanation remains low and, moreover, regularly contributes to masking the social sources of behaviour deemed problematic[130].

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[125] V. G.M. Nanna, *Minori, radicalizzazione e terrorismo*, Bari, 2018; C. Torrekens, *op. cit.*, 2019, p. 111; X. Crettiez, *op. cit.*, 2016a, p. 723; D. Bouzar, "Repérer les idéaux proposes par les groupes radicaux pour refaire du lien humain", *Le sociographe*, 2017, 58, p. 74; F. Khosrokhavar, «Nouveau paradigme de radicalisation en prison", *Cahiers de la sécurité et de la justice*, 2014, 30, p. 17.

[126] C. Torrekens, *op. cit.*, 2019, p. 112.

[127] J. De Bie, C. De Poot and J. Van Der Leun, "Jihadi networks and the involvement of vulnerable immigrants: reconsidering the ideological and pragmatic value", *Global Crime*, 2014, 15, p. 275 to 298.

[128] J. Wilhelmsen, "Between a Rock and a Hard Place: The Islamisation of the Chechen Separatist Movement", *Europe-Asia Studies*, 2005, 57, p. 41.

[129] Y. Cartuyvels, "L'avenir de la criminologie en question. Réflexions à partir du débat français", *Revue de droit pénal et de criminologie*, 2017, n° 7, pp. 703-723.

[130] M. Sageman, *Understanding terror networks*, Philadelphia, University of Pennsylvania Presse, 2004; J. Horgan, *Walking Away from Terrorism. Accounts of disengagement from*

On the other hand, other variables of an individual nature seem more relevant. In this way, moments of critical transition in the construction of a subject's identity, such as *adolescence*, make the subject more permeable to radical ideologies and their staging work[131]. This would help to explain the recruitment of younger minors[132]. Similarly, individual motivations for violent engagement may differ by *gender*. For women, reasons related to a personal situation such as to avenge a relative[133], a desire for emancipation or, on the contrary, a way of assuming tradition[134] would be motivating factors. For men, environmental (peer pressure and fear of being seen as a coward) and ideological motives would be more effective[135].

Finally, a *material or symbolic gain* is also presented as a potential incentive. A material incentive, such as the lure of gain from violent engagement, may encourage an "opportunistic activist" to take action[136]. This is particularly the case when the violent engagement allows parallel racketeering activities or when the offer of engagement holds out the prospect of escaping from a situation of poverty[137]. These material gains, which are not systematically discovered at the beginning of the radical engagement, are analysed as a "reward for radical sacrifice"[138]. But sometimes it is a symbolic incentive that will act as a driving force. By providing an official status (e.g. martyr, hero), violent engagement can fill an existential void or a lack of recognition, compensate for the futility of a daily life experienced as trivial, reinforce one's self-esteem (being the "just", the "avenger", the "guide" of a community...) or even the perception of one's ability to act (at the level of history or one's destiny)[139]. Besides this logic of filling the existential void, some underline the real pleasure of engaging in radical actions, which pro-

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radical and extremist movements, London and New York, Routledge, 2009; J. Victoroff, "The mind of the terrorist: A review and critique of psychological approaches", *The Journal of Conflict Resolution*, 2005, 49, 1, p. 405 to 426.

131 C. Torrekens, *op. cit*., 2019, p. 112. Thomson speaks of "selfie djihad" to interpret the stagings that some young people post on social networks (D. Thomson, *Les revenants*, Paris, Seuil, 2016).

132 *European Union Terrorism Situation and Trend Report*, TE-SAT 2017, p. 13.

133 K. Jones and P. Taylor, «Male and Female Suicide Bombers: Different Sexes, Different Reasons», *Studies in Conflict and Terrorism*, 2008, 31, p. 304 to 326.

134 X. Crettiez, *op. cit*., 2011a: p. 48 and 49.

135 K. Jones and P. Taylor, *op. cit*., 2008.

136 F. Khosrokhavar, *L'Utopie sacrifiée. Sociologie de la révolution iranienne*, Paris, Presses de science po, 1993; A. Bloom, "Les kamikazes du Cachemire, 'martyrs' d'une cause perdue", *Critique internationale*, 2003, 20, p. 143.

137 While the impact of this economic factor is undoubtedly more crucial in certain countries devastated by the war in the Middle East, it is not absent in Europe. On the role played by this factor, see A. Sperini, "I Modelli Sistemici del jihadismo: aspetti evolutivi in chiave anti-sistema", *Comprendere il terrorismo. Spunti interpretativi di analisi e metodologie di contrasto del fenomeno*, R. Razzante (eds.), Pisa, Pacini, 2019, p. 87; E. González Calleja, "Las oleadas históricas de la violencia terrorista", *Revista de Psicología Social*, 24, 2, 2009, p. 119 and following; C. del Prado Higuera, E. Sánchez de Rojas Díaz, *Terrorismo islamista: El caso de Al Gama'a al Islamiya*, Valencia, Tirant, 2018, p. 74 and following.

138 I. Sommiers, *op. cit*., 2012, p. 23.

139 J.M. Post, *The Mind of the Terrorist*: *the psychology of terrorism from the IRA to Al-Qaeda*, New York, Palgrave MacMillan, 2007; X. Crettiez, *op. cit*., 2011a, p. 51; V. Nikolski, *Le moment escapiste. Militantisme et production théorique dans une conjoncture de crise. Deux mouvements de jeunesse radicaux (NBP and ESM)*, Thèse de doctorat, Paris I, 2010; X. Crettiez and R. Sèze, *op. cit*., 2017; I. Sommiers, *op. cit*., 2012, p. 23.

vide excitement and narcissistic rewards[140]. This type of symbolic incentive is clearly employed by terrorist organisations which, like Daesh, do not hesitate to offer young people a positive personal dream with a concrete chance of realization[141]. It would also explain the conversion of certain offenders into radical terrorist involvement[142].

2.2. *The cognitive dimension or the encounter between an individual and the terrorist discourse*

In addition to the existence of predisposing factors, involvement in a terrorist trajectory presupposes an encounter of a subject with a cognitive framework offering a "reading" or "interpretation mechanisms" that encourage the use of violence[143]. These acculturation channels can be multiple and, in order to be fruitful, presuppose that the proposed cognitive framework be rooted in a cultural background capable of making it resonate.

2.2.1. *Diverse acculturation channels in the jihadist discourse*

Access to "cognitive radicalisation"[144] or to the reading framework offered by the radical ideology specific to contemporary jihadism can be provided through various channels of acculturation to this type of discourse. A first traditional channel of socialisation is *family*. Family plays an important role in reinforcing the jihadist narrative when it is itself caught up in an ancestral conflict, where it transmits its memory and favours the cause, even instilling a desire for vengeance in its youngest members[145]. If, in some countries, a second actor in the socialisation of the cause may be a *clan*, i.e. a group structured around (male) village populations[146], in the Western world the second type of access to radical discourse is more likely to take place through *friendly and relational networks*[147]. It is through the interactions that take place in small groups operating on this gang model (a group

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[140] V. Nikolski, "Lorsque la répression est un plaisir: le militantisme au Parti national bolchevik russe", *Cultures et conflits*, 2013, 89, p. 13 to 28; Thus, Venhaus indicates, with regard to Al-Qaeda fighters, that beyond "revenge seekers" and "identity seekers", there are 30% of individuals that he qualifies as "status seekers" and "thrill seekers". (J. Venhaus, «Why Youth Join Al-Quaeda", *United States Institute of Peace*, 2010, 236, p. 8).

[141] S. Atran, "Looking for the roots of terrorism", *Nature*, 15 January 2015, interview available at *https://www.nature.com/news/looking-for-the-roots-of-terrorism-1.16732*.

[142] T. Holman, "Belgian and French Foreign Fighters in Iraq, 2003-2005: A Comparative Case Study", *Studies in Conflict and Terrorism*, 2015, 38, p. 603 to 621; M. Van San, "Lost Souls searching for answers? Belgian and Dutch converts joining the Islamic state", *Perspectives on terrorism*, 2015, 9, p. 47 to 56.

[143] X. Crettiez, *op. cit*., 2011a, p. 52.

[144] X. Crettiez and R. Sèze, *op. cit*., 2017; F. Demant, M. Slootman, F. Buijs, J. Tillie, *Decline and Disengagement. An Analysis of Processes of Deradicalisation*, Amsterdam, IMES Reports Series, 2008, p. 12 and following.

[145] A. Elorza, J.M. Garmendia, G. Jauregui, F. Dominguez and P. Unzueta, *ETA, une histoire*, Paris, Denoel, 2002, p. 272.

[146] This clan logic explains why, in some cases in Afghanistan and Kurdistan, the members of entire villages have become involved in armed struggles. (X. Crettiez, *op. cit*., 2011a, p. 53).

[147] M. Sageman, *Understanding terror networks*, Philadelphia, University of Pennsylvania Presse, 2004, p. 113; X. Crettiez, *op. cit*., 2011a, p. 54.

of peers) that ideologies and beliefs can be mobilised and exploited, which also helps to strengthen group cohesion facing the rest of the world[148]. This shows the role that local places of socialisation such as sports halls, schools, associations, youth centres, places of worship or buildings' entrance halls can play[149].

The channels of acculturation to the radical discourse mentioned above are procedural, they proceed in phases and are marked by the relationship and are engraved in time. Today, they are complemented by more individual and sometimes more instantaneous modes of indoctrination, which are reinforced by new communication technologies. On the Internet or with social networks, the encounter with jihadist discourse and "moral entrepreneurs" (some being real "professional recruiters")[150] is done virtually. The radicalisation "process" can here be compressed over time, giving rise to forms of "express radicalisation" that are much more difficult to circumvent[151]. Indeed, with regard to jihadist terrorism, the Internet makes it possible to spread information on the struggle, to create "emotional communities", to have access to political or politico-religious speeches encouraging violent engagement, to images valuing the combatants and to give practical advice[152]. However, the impact of the Internet needs to be contextualised, which is underlined by authors who criticise the thesis of self-radicalisation through the Internet[153].

2.2.2. *The prior existence of a favourable cultural breeding ground*

In order for the encounter with an ideological discourse advocating violence to have an effect on the subject, it still needs to resonate with *a cultural breeding ground* capable of legitimising this violence. In other words, a discourse advocating radicalisation is all the more likely to have a larger effect if it unfolds against the backdrop of an experience of injustice or oppression experienced by the individual, awakening or accentuating emotions of fear, hatred or moral indignation[154]. As Crettiez points out, ideology "feeds action only if it confirms in the eyes of activists a situation of injus-

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148 L. Van Campenhoudt, *op. cit*., 2017, p. 41.

149 S. Atran, "Genesis of Suicide Terrorism", *Science*, 2003, 299, p. 1534, C. Torrekens, *op. cit*., 2019, p. 117; X. Crettiez, *op. cit*., 2016a, p. 720.

150 L. Bonelli and F. Carrié, "La radicalité djihadiste en France. Quelques enseignements tirés d'une recherche récente", *L'effet radicalisation et le terrorisme*, F. Brion, C. De Valkeneer and V. Francis (eds.), Brussels, Politeia, 2019, p. 88.

151 A. Garapon, M. Rosenfeld, *op. cit*., 2016, p. 98.

152 B. Ainine, T. Lindemann, X. Crettiez and R. Sèze, *Saisir les mécanismes de la radicalisation violente*: *pour une analyse processuelle et biographique des engagements violents*, Rapport de recherche pour la Mission de recherche Droit et Justice, sous la direction de X. Crettiez and R. Sèze, 2017, p. 10 (disponible sur *www.gip-recherche-justice.fr*); G. Weimann, *Terror on the Internet*: *The New Arena, the New Challenges*, Washington, United States Institute of Peace, 2006; Ph. Seib and D. Janbek, *Global Terrorism and New Media: The Post al-Qaeda Generation*, London, Routledge, 2010; X. Crettiez, *op. cit*., 2016a, p. 722.

153 I. Von Behr, A. Reding, C. Edwards and L. Gribbon, *Radicalisation in the digital era. The use of the internet in 15 cases of terrorism and extremism*, Rand, 2013 (disponible sur *www.rand.org*); D. Benson, "Why the Internet is not Increasing Terrorism", *Security Studies*, 23, 2, 2014, p. 293 to 328.

154 X. Crettiez, *op. cit*., 2011a, p. 56.

tice or oppression that is actually felt and allows negative emotions to be fuelled"[155].

The power of radical ideology must therefore be recontextualised with regards to the unique path and environment of the individual. In order to be effective, it must lead the subjects to agree on three elements. It is first necessary to stir consent *on the diagnosis* of the situation, by proposing a convincing cognitive framework and identifying those responsible of the problem (diagnosis frame). It is then necessary to stir *consent on the (violent) means* to remedy the problem, highlighting the powerlessness of traditional actors (e.g. religious leaders considered "lethargic") or of public authorities to solve problems in a fair and equitable manner (prognostic frame). Finally, *agreement must be reached on the need for action* to achieve the desired change (motivational frame)[156].

In light of this threefold requirement, the jihadist discourse adapts to the backgrounds and needs of the candidates to be recruited[157]. Far from being unequivocal or necessarily centred around religion, the proposed cognitive framework proves to be flexible, likely to insist on elements of a social, political or religious nature, depending on the emotions to be mobilised in the subject in order to encourage radicalisation[158].

2.3. *Violent engagement, the result of a gradual process*

The presence in a subject's environment of various factors predisposing him/her to a violent engagement and/or the existence of individual variables likely to influence it do not automatically lead to an act of violence. Whatever the impact of these factors, they must always be recontextualised taking into account local situations and individual experiences. In other words, violent engagement is always part of a particular biographical itinerary which mobilises these contextual factors in a unique way each time.

This subjective perspective, which highlights how a factorial logic in search of universal categories or "profiles"[159] is incomplete, emphasises the importance of the process in engaging in terrorist violence. Speaking in terms of "a process" allows us to underline the time and interaction dimen-

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[155] X. Crettiez, *op. cit.*, 2011a, p. 57.

[156] C. Torrekens, *op. cit.*, 2019, p. 107. See also J. Jackson, A. Huq, B. Bradford and T. Tyler, "Monopolizing force? Police legitimacy and public attitudes toward the acceptability of violence", *Psychology, Public Policy, and Law*, 2013, 19, p. 479 to 497; B. Bradford, "Policing and social identity: procedural justice, inclusion and cooperation between police and public", *Policing and Society*, 2014, 24, p. 22 to 43.

[157] N. Bouzar, *op. cit.*, 2017.

[158] Thus, if the unconscious needs of young people are to flee the real world to build a "just" world, the ideological discourse will insist that jihad will enable them to build a truly egalitarian and solidary society. Whereas if the young person wishes to take revenge and protect Muslims perceived as victims, the ideological discourse will focus on the fact that the jihad will allow him to fight against the army of Bashar Al-Assad, dictator and torturer. (N. Bouzar, *op. cit.*, 2017, p. 68). If the young person has a bad self-image and seeks recognition and dignity, the speeches will insist on self-sacrifice in the name of the cause, his violent commitment will allow him to pass from the status of a slave of Western imperialism to that of a courageous adversary (capable of giving death and sacrificing himself as a martyr).

[159] L. Bonelli and F. Carrié, *op. cit.*, 2019, p. 93.

sions that are most often present in building a violent engagement, at the antipodes of an approach that sometimes dramatically emphasises the notions of "turnaround" and "lone wolf"[160].

This process approach is compatible with using two complementary reading grids derived from interactionist sociology to understand engagement in terrorist violence. The first uses the notion of a *deviant career*[161] to shed light on a gradual trajectory that is built up in stages. The second is concerned with the strengthening of a *deviant subculture* fostered by the functioning of a group that helps to anchor a new identity for the subject in question[162].

2.3.1. *Entering the "violent career": diversity and stages*

Thanks to Howard Becker[163], the notion of "deviant career" makes it possible to underline that a behaviour is the result of "a series of different sequences ordered in relation to each other"[164]. These series are the stages experienced by those who share the same career. However, the duration, contexts and organisation of these stages vary from one individual to another, and each career thus presents singularities. Although *facilitating factors* (previous experience of violence, devotion to friends, etc.) and *precipitating factors* (solidarity towards a friend who has been arrested, death of an activist, the need to go underground to escape prosecution, etc.) are mentioned in the literature[165], they do not all influence people's careers in the same way.

In our field, the notion of "career" is used to emphasise the time it takes for "dispositions to", objective factors and radical thinking to be translated into real action[166]. The modification of the cognitive framework and the acquisition of skills that lead a person to violent engagement are gradual and some authors speak in this regard of "step-by-step radicalisation"[167], by "successive stages"[168].

Schematically, three types of violent careers can be distinguished[169]. The *vocational* career is the result of a decision to oppose inequalities or injustices whose existence is no longer tolerated. The *accidental* career is more

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[160] X. Crettiez, *op. cit.*, 2016b, p. 7; X. Crettiez, *op. cit.*, 2011b, p. 103; O. Fillieule, "Propositions pour une analyse processuelle de l'engagement individuel. Post scriptum", *Revue française de science politique*, 2001, 51, p. 199 to 215; M. Hafez and C. Mullins, "The Radicalization Puzzle: A Theoretical Synthesis of Empirical Approaches to Homegrown Extremism", *Studies in Conflict and Terrorism*, 2015, 38, p. 958 to 975.

[161] H. Becker, *op. cit.*, 1985.

[162] R. Cloward and L. Ohlin, *Delinquency & Opportunity*, The Free Press, 1960.

[163] H. Becker, *op. cit.*, 1985.

[164] X. de Larminat, "Sociologie de la déviance: des théories du passage à l'acte à la déviance comme processus", *Ressources en Sciences Économiques et Sociales*, 2017, *http://ses.ens-lyon.fr/articles/sociologie-de-la-deviance*.

[165] D. della Porta, *Social Movements, Political Violence and the State*, Cambridge, Cambridge University Press, 1995.

[166] O. Filieule, *op. cit.*, 2001.

[167] A. Collovald and B. Gaïti, "Questions sur la radicalisation politique", *La démocratie aux extrêmes. Sur la radicalisation politique*, A. Collovald and B. Gaïti (eds.), Paris, La dispute, 2006, p. 32.

[168] I. Sommier, *op. cit.*, 2012, p. 23.

[169] M. Felices-Luna, "Déviance et politique: la carrière des femmes au sein des groupes armés contestataires", *Déviance et Société*, 2008, 32, p. 163 to 185.

circumstantial and random. The actor's observation of an injustice, for example, does not create a precise desire for violent action, but leads to the gradual and sometimes unconscious inclusion in an environment or a referential universe that will lead to it. Violent engagement then resembles a "non-choice" [and] is rather a mechanism, sometimes invisible to the actor, in which integration into a group of friends or an association, learning in this or that school or attending [this or that place of worship] induces a gradual insertion into a militant universe"[170]. Finally, some careers are due to *constraint*. The entry into a violent career is experienced here as an obligation which may be the result of various sources: the person may think that his or her survival or that of his or her family is at stake; social pressure may prove to be such that "inaction would become more costly than the violent action itself"[171]; the need to obtain protection from the violent organisation or the terror it inspires, such as the desire to follow a companion who has already committed himself or herself to it[172].

Regardless of the type of career being considered[173], different steps must be taken for the commitment to become a reality. The first and central step is *meeting the violent group*. Entry into an organisation, which is often clandestine, presupposes that the applicant meets some of its members or "authorised smugglers" who are likely to introduce him or her into the group[174]. The notion of "tutor" or "recruiting agent" must be understood in the broadest sense: some authors thus point out that in current careers, the *Internet* can be considered as a "fictitious tutor"[175]. The encounter therefore plays a central role in the career. Thus, the inability to meet one of the necessary contacts can put an end to a budding career. However, despite a "promising" encounter, a career may stagnate or come to a halt due to factors specific to the individual or the context (such as the presence of dependent children, the existence of an established job, low self-confidence or low trust in the violent group)[176].

After this first stage, the career continues to be built through the *learning of rules, uses and techniques* useful in the violent struggle (e.g. making explosives, handling weapons, escape techniques, etc.). The individual will also have more access to "radical" ideological discourses, so that he/she

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[170] X. Crettiez, *op. cit.*, 2011a, p. 54. We are then close to Beker's notion of "commitment by default", which "occurs through a series of acts, none of which is capital, but which, taken together, constitute for the actor a series of subsidiary bets on such a scale that the actor finds himself in a situation where he does not want to lose them". (H. Becker, "Notes sur le concept d'engagement", *Tracés. Revue de Sciences humaines*, 2006, 11, p. 188).

[171] X. Crettiez, *op. cit.*, 2011b, p. 104.

[172] M. Felices-Luna, *op. cit.*, 2008, p. 167 to 169.

[173] Contrary to Crettiez (X. Crettiez, *op. cit.*, 2016b, p. 104), we believe that these different stages are also fruitful to understand certain careers by constraint.

[174] D. Mac Adam, "Recruitment to High Risk Activism. The case of Freedom Summer", *American Journal of Sociology*, 1986, 92, p. 66; I. Sommier, *La violence révolutionnaire*, Paris, Presses de sciences po, 2008, p. 88. If the violent organisation is not really clandestine, this stage of the career is facilitated. (K. Chaib, "Parcours de militantes", *Le Hezbollah. État des lieux*, S. Mervin (eds.), Paris, Actes Sud, 2008, p. 293 to 315).

[175] A. Boubekeur, "La violence islamiste en Europe: des approches incertaines, un objet aux enjeux multiples", *Les violences politiques en Europe. Un État des lieux*, L. Mucchielli and X. Crettiez (eds.), Paris La découverte, 2010, p. 31 to 43.

[176] X. Crettiez, *op. cit.*, 2011b, p. 104.

gradually becomes accustomed to a culture of violence[177]. The roles played by the individual in the organisation can gradually evolve from the support of the follower, to basic logistical or administrative tasks (e.g., name-taker to rent a flat, information transmitter, tracker, etc.) to the actor responsible for violent interventions in the field[178].

Moreover, during this learning process, a phenomenon of *attachment to and identification with the group* occurs: the actor gradually becomes part of a subculture that he shares with the other members of the group, who are often confronted with the same difficulties (educational, professional, economic, social) as him and with whom he shares a socio-cultural and ideological background[179]. This process of identification with the group also leads the individual *to conform his or her behaviour to the group's expectations*. The priority that guides his behaviour is the recognition and respect of "*significant others*", i.e. those who now matter to him[180]. This attachment to group members may be accompanied by a loss of empathy for others[181]. The separation between the *in group* and the *out group* is experienced as increasingly rigid. This objective of recognition explains why the individual is ready to sacrifice his relations with his family, to risk prison or to sacrifice his life and why any turning back is perceived as difficult or even impossible[182]. A new identity is constructed within the group, which tends to become exclusive and to veil the previous identity markers[183]. In the words of Berger and Luckmann, an "identity alternation"[184] occurs, i.e. a radical change in the world due to a secondary socialisation that breaks completely with primary socialisation.

2.3.2. *The functioning of the violent group, a reinforcing factor*

The attractiveness and functioning of the group are important elements in the radicalisation process. Built on a logic of *solidarity*, often reinforced by the *clandestine* nature of its structure[185] and the mutual *dependence* (emotional, financial, etc.) of its members, the radical group becomes a new family for candidates for radicalisation, a tribe that provides a sense of belonging to a "cause" or a "(transnational) movement"[186]. The core of a *cause*

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[177] I. Sommier, *op. cit*., 2008.

[178] I. Sommier, *op. cit*., 2012, p. 24.

[179] According to Crettiez, "the actor becomes cognitively and emotionally in love with the identity image he has of himself and his entourage". (X. Crettiez, *op. cit*., 2011b, p. 105).

[180] L. Van Campenhoudt, *op. cit*., 2017, p. 44 and 45.

[181] A. Bandura, "Mechanisms of moral disengagement", *Origins of Terrorism: Psychologies, Ideologies, Theologies, States of Mind*, W. Reich (eds.), New York, Cambridge University Press, 1990, p. 161 to 191.

[182] C. Guibet Lafaye, "Engagement radical, extrême ou violent: basculement ou 'continuation' de soi?", *Sens public*, 2017, p. 1 to 42; E. Goffman, *Encounters: Two studies in the Sociology of Interaction*, Indianapolis, Bobbs-Merrill Company, 1961; L. Van Campenhoudt, *op. cit*., 2017, p. 45 and 46.

[183] I. Sommier, *op. cit*., 2012, p. 25.

[184] P. Berger and T. Luckman, *La construction sociale de la réalité*, Paris, Armand Colin, 1986, p. 262.

[185] Certain uses of social networks and the Internet facilitate clandestine communications between members of terrorist groups. (P. Gueniffey, *op. cit*., 2003, p. 162).

[186] C. Le Thomas, "Formation et socialisation: un projet de contre-société", *Le Hezbollah. État des lieux*, S. Mervin (eds.), Paris, Actes Sud, 2008, p. 153.

shared by all, on the basis of common experiences, makes it possible to respond to an individual's need for meaning and belonging[187] and is likely to overturn his mental economy. In the name of the cause, the sacrifice of one's life (suicide) or that of others (murder) takes on a different meaning and no longer carries sufficient weight to avoid violence[188]. An *"esprit de corps"* is created in the group, and this in a double sense: an "internalization in the biological body of the gestures (…) and attitudes constitutive of the group's culture ('way of doing, feeling, thinking')" and an "externalization of its ways of being together in a 'body of specific rules'"[189].

Within the group, solidarity is often expressed through the mobilisation of *codes*[190] and the carrying out of *loyalty rituals* that testify to a "desire for exclusive allegiance to the group and submission to its practical imperatives"[191]. This solidarity can increase the radicalisation of the group when the group feels threatened[192]. Defending the security of the group is a powerful justification for violent behaviour towards those who would threaten the group. A tendency to radical violence has more to do with group logic than with the individual predispositions of its members[193]. The importance of this group logic makes it possible to understand Atran's advice: "forget the profiles [to] understand the cells (in the sense of links in the group)"[194].

Solidarity also increases the radicalisation of the group when it is caught up in *intergroup competition*: competing on its own ground with other organisations with similar aims, the group can take harder action to show its determination and demonstrate its greater radicalness[195]. On the other hand, this solidarity may be called into question when the group is subject to *intra-group competition*, while paradoxically producing an identical radicalisation effect[196]: some members may seek to instrumentalise violent action in order to assert their place or acquire a status within the group. No less than the spirit of solidarity, a competitive dynamic within the group can therefore encourage the transition to violent acts[197].

If the group is small, a conclusion that some authors regularly draw[198] is that the internal links within the group are more important than ideolog-

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[187] C. Torrekens, *op. cit.*, 2019, p. 117.

[188] D. Casoni and L. Brunet, "Processus d'idéalisation et violence sectaire", *Déviance et Société*, 2005, 29, p. 80.

[189] I. Sommier, *op. cit.*, 2012, p. 25.

[190] For example, the use of similar clothing, similar tattoos or haircuts, the use of nicknames and pseudonyms… (C. Torrekens, *op. cit.*, 2019, p. 118; X. Crettiez, *op. cit.*, 2016a, p. 721).

[191] Thus, Al-Qaeda is familiar with the practice of "Bayat" which is an "oath of total allegiance to the organisation and its leader". (X. Crettiez, *op. cit.*, 2016a, p. 721).

[192] C. Mac Cauley and S. Moskalenko, "Mechanisms of Political Radicalization: Pathways Toward Terrorism", *Terrorism and Political Violence*, 2008, 30, p. 415 to 433. This is the case when a "counter-movement" emerges and its violence is supported by a government.

[193] C. Mac Cauley and S. Moskalenko, *op. cit.*, 2008, p. 422.

[194] S. Atran, "The moral logic and growth of suicide terrorism", *The Washington Quarterly*, 2006, 29, 2, p. 141.

[195] X. Crettiez, *op. cit.*, 2011b, p. 107.

[196] P. Collier and D. Horowitz, *Destructive generation. Second thoughts about the sixties*, New York, Summit Books, 1989, p. 147.

[197] L. Van Campenhoudt, *op. cit.*, 2017, p. 49.

[198] For example, Atran has shown that radicalisation takes place in groups that generally do not exceed eight people. (S. Atran, *op. cit.*, 2006, p. 141).

ical factors because it is these concrete bonds that provide "emotional and social support [and promote the] development of a common identity"[199].

3. *Conclusion*

Engaging in a terrorist trajectory is based on the intersection of multiple macro and micro social factors. More general factors, most often referring to relations of domination at the international level and relations of exclusion or discrimination at the national level, provide a backdrop against which individual trajectories are constructed.

Some have attempted to construct typologies that make it possible to identify typical trajectories or "typical profiles" leading to terrorist radicalisation. This is based on "ideal-typical" categories reconstructed on the basis of psychological criteria ("Loners", "Thrill seekers", "Identity seekers", "Moral crusaders", etc.)[200] or psycho-social criteria ("entrepreneurs", "dropouts", etc.)[201] and remains random, as it seems difficult to identify linear sequences leading to terrorist involvement[202]. On the other hand, the notions of career and deviant subculture remain interesting for understanding the gradual entry of an individual into a violent group.

III. *The challenges of cooperating with the judiciary in matters of terrorism*

Before tackling the delicate question of the willingness to collaborate with the judicial authorities, it seems necessary to first briefly raise the issue of individuals capable of collaborating usefully with the judicial authorities (1). Next, it will also be necessary to present the sociological aspects of a notion that is at the heart of collaboration: betrayal (2). Finally, we will be able to propose some hypotheses on the elements that may influence the terrorist's acceptance or refusal to collaborate (3).

1. *Capability of collaborating with the judiciary*

In Europe, and under the influence of the European Union among others[203], many States have increased the number of behaviours labelled as ter-

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[199] M. Sageman, *Understanding terror networks*, Philadephia, University of Pennsylvania Press, 2004, p. 135.

[200] I. Awan, "Cyber-Extremism: Isis and the Power of Social Media", *Society*, 2017, 54, 2, p. 146.

[201] P. Nesser, "Joining jihadi terrorist cells in Europe. Exploring motivational aspects of recruitment and radicalization", *Understanding violent radicalization: terrorist and jihadist movements in Europe*, M. Ranstorp (eds.), London-New York, Routledge, 2009, p. 91.

[202] See P. Giannetakis, "Psicologia del terrorismo", *Comprendere il terrorismo. Spunti interpretativi di analisi e metodologie di contrasto del fenomeno*, *op. cit.*, 2019, p. 29. See also E. Dieu, L. Testouri and O. Sorel, "Proposition d'une méthodologie d'évaluation de l'identité en voie de radicalisation", *Revue internationale de Criminologie et de Police Technique et Scientifique*, 2019, 72, 4, p. 457 to 483.

[203] Framework Decision 2002/475/JAI of 13 June 2002 on combating terrorism.

rorist and punishable under criminal law. This increase in terrorist behaviour may correspond to an increase in the number of individuals who may be offered to collaborate with the judiciary to help fight terrorism. Even if the exercise is oversimplified and overly abstract, we can try to distinguish some of these figures that are likely to collaborate.

First, if a State's criminal law so provides, it is possible for an individual who has committed (or is suspected of having committed) a "common law" offence to be offered collaboration in exchange for information relating to a terrorist offence. This case (collaboration of a "non-terrorist") does not seem to be a priority since it is only rarely that this type of person has relevant information.

The next figure is that of the *non-radicalised terrorist*, i.e. an individual who has committed (or is suspected of having committed) a terrorist offence that is not characterised by engagement in violence. This figure does exist in European countries, due to the new terrorist criminal offences introduced in the legislation of many EU Member States. In the Belgian Penal Code, for example, there are many non-violent terrorist offences: it is indeed possible to "finance" a terrorist activity, to "acquire objects likely to cause considerable economic loss", without violence. This figure will not keep our attention because, while the individuals concerned will probably find it easier to "talk" than the following figures, they will also have "less to say".

The figure of the *radicalised and isolated terrorist* does not seem to us to be the most interesting either. The scope of such "isolation" is debated in doctrine[204], but in any case, such a characteristic renders the individual incapable of collaborating, as he is incapable of betraying anyone (except an innocent person).

Finally, the figure of the *radicalised terrorist who is a member of an organisation* seems to be the one that should be given priority attention. It is indeed in such a configuration that we find individuals capable of holding information relevant to the judicial authorities. But before considering the question of accepting or refusing to collaborate, let us first look at what collaboration implies for the person to whom it is offered.

2. *Collaboration is a form of treason*

Collaboration, when it involves denunciation, is a form of betrayal. A betrayal implies a rupture and therefore presupposes the pre-existence of a bond based on trust and loyalty[205]. Acts of betrayal are of two types: acts relating to the disclosure of information and acts relating to physical or men-

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[204] Crettiez criticizes the notion of the "lone wolf". (X. Crettiez, «Interventions de Xavier Crettiez", *Radicalisation, processus ou basculement?*, Paris, Fondation Jean Jaurès, 2016b, p. 7) while Davies attributes more than 70% of the violence committed between 2011 and 2015 by jihadists to isolated individuals. (W.A. Davies, "Counterterrorism Effectiveness to 'Jihadists' in Western Europe and the United States: We are Losing the War on Terror", *Studies in Conflict and Terrorism*, 2018, 41, p. 281).

[205] S. Schehr, "Sociologie de la trahison", *Cahiers internationaux de sociologie*, 2007, 2, p. 313 and 314.

tal subtraction (an "exit")[206]. In both cases, there is indeed a rupture: betrayal presupposes an "Us"[207] and a "Them" as well as a "movement from the inside to the outside"[208]. In fact, from the moment a "We" is formed, a certain number of elements (action, belief, representations…) can no longer be shared with the outside world. In the case of collaboration, there will always be a question of a transfer of information and possibly a question of "conversion" (to non-violence).

Betrayal always presents a triangular configuration: there is the traitor ("Ego"), the betrayed (group) ("Us"), and the one with whom one makes a pact or for whom one betrays ("Them")[209]. Betrayal involves two friends and a stranger, one of the friends striking a deal with the stranger. After his betrayal, "Ego" will appear as a third party both in the eyes of "Us" and in the eyes of "Them"[210]. In the framework of collaboration, "Ego" will sacrifice the interest of "Us" to its private interest since the negotiation with "Them" which precedes the betrayal is indeed a bargaining which serves its own interests.

The sensitivity of the "Us" to betrayal varies depending on the context. In the situation at hand – collaboration following terrorist actions – we are faced with a contentious context: "Us" (the terrorist group) and "Them" (the negotiating state or the justice that represents it) are in a friend-foe relationship. Hostility towards the common enemy strengthens the cohesion of the members of the "Us" and the demand for loyalty is particularly strong. In such a context, more acts are likely to be regarded as betrayal (a simple "distancing" might sometimes suffice), and fantasies of betrayal will also be more frequent. Paranoia will more easily invite itself into the "Us". This contentious context will also reinforce the immoral connotation of betrayal (even if, paradoxically, the latter could be considered as a "necessary evil" by "Them"). It also makes it more difficult to adopt a neutral position (especially if the conflict lasts, because sooner or later, anyone who stands in a position of neutrality will be considered a traitor). Finally, in such a contentious context, the desire to collaborate will be calmed, before the arrest, by joint surveillance between the members of the "Us" and, after the arrest, by the fact that it is not a question of helping any third party but the former enemy.

In the context of terrorism, another contextual element must be taken into account: the perception of the traitor by another social actor, the "public". In the context of collaboration with the justice system, the traitor will not be perceived by the public as a "whistle-blower" since the public is un-

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[206] M. Akerström, *Betrayal and Betrayers: The Sociology of Treachery*, New Brunswick, Transaction Publishers, 1991.

[207] An "Us" can only emerge if there is mutual trust and minimal loyalty; moreover, this trust and loyalty are standards to be respected within this "We".

[208] S. Schehr, *op. cit.*, p. 315.

[209] A. Petitat, *Secret et formes sociales*, Paris, PUF, 1998; E. Pozzi, "Le paradigme du traitre", *De la trahison*, D. Scarfone (eds.), Paris, PUF, 1999, p. 9.

[210] "How can we not despise our agent who is a foreigner who betrays his country, since our compatriots who betray for the enemy will be considered disgraceful?" (A. Dewerpe, *Espion*: *une anthropologie historique du secret d'État contemporain*, Paris, Gallimard, 1994, p. 330, cited by S. Schehr, *op. cit.*, 2007, p. 322).

likely to recognize "good reasons"[211] for his actions. The public will generally believe that the collaborator's rupture is linked to "bad reasons" and, in the best case scenario; the collaborator will be supported (discreetly) by the public as an occasional ally. In the worst case scenario, it will not be supported by the public and will be unanimously opposed[212]. The lack of public support can therefore also hinder the willingness to collaborate.

For collaboration to be conceivable for "Ego", its relationship with "Us" would have to be weakened. Collaboration would therefore presuppose the initiation of disengagement or de-radicalisation. These two concepts are not synonymous. Disengagement refers to the idea that a member of the group leaves or moves away from the group. He distances itself from the other members of the organisation. De-radicalisation, on the other hand, refers to the "progressive and evolutionary reduction of a rigid way of thinking, an absolute and non-negotiable truth, where logic structures the actors' vision of the world, who uses violent repertoires of action to make it be heard"[213]. It may happen that the collaborator moves away from his or her former group without this disengagement reflecting a form of de-radicalisation[214]. Distancing may be linked to personal interests and does not necessarily imply an awareness of the misuse of violence, a conversion to the democratic order and a willingness to normalise one's future behaviour.

3. *Some hypotheses on the elements influencing the acceptance or refusal to collaborate*

The main explanatory elements of the terrorist trajectories taken up in the previous section are repeated here in order to formulate hypotheses on the chances of success of a proposal for collaboration with the justice system. Two preliminary remarks are in order. Firstly, we can only formulate hypotheses that would have to be confronted with an empirical system in order to be challenged or validated. Secondly, it is important for the reader to bear in mind the unethical nature of collaboration in order not to end up in Machiavellian practices aimed at maximising the chances of success of these collaborations at all costs[215].

Having said that, six elements seem to us to have a role to play in the chances of collaboration in the fight against terrorism. The purpose and cost

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[211] If good reasons are recognised by the "public", the rupture made by "Ego" in the face of "Us" will not be perceived as a betrayal. (S. Schehr, *op. cit.*, 2007, p. 321).

[212] On this question of public support for the act of treason, the situations of "jihadist" and "nationalist" terrorists are probably not entirely identical. It is assumed that the European public will more readily regard the former as a "convenient ally" and the latter as "despicable".

[213] B. Ainine, T. Lindemann, X. Crettiez and R. Sèze, *op. cit.*, 2017, p. 10.

[214] I. Sommier, "Repentir et dissociation: la fin des 'années de plomb' en Italie", *Cultures et conflits*, 1999, 40, 1, p. 43.

[215] We would find it problematic if our scientific work were used by the negotiator to artificially increase the confidence of the candidate collaborator. This negotiator should not mobilise political or religious messages that do not correspond to reality (see below) or invent judicial elements to increase pressure on the individual in the context of the "prisoner's dilemma" (see below).

of terrorist action (3.1), the weight of the religious (3.2) and political (3.3) dimension in the transition to the terrorist act, the weight of material (3.4) and/or symbolic (3.5) gains and the role of the bond between the perpetrator of a terrorist offence and the group which he/she belongs to (3.6).

3.1. *The purpose and the cost of terrorist action*

What can be the place of negotiation when the aim of terrorist action is to intimidate a population, to constrain a government or an international organisation to perform or abstain from performing any act, or to destabilise them in their fundamental structures? To answer this question, two types of terrorist actions can be distinguished.

Some perpetrators of terrorist acts are described as "absolute"[216]. They carry out actions they wish to be murderous (bomb attacks, attacks in public spaces…). They seek to "advertise" their actions and "get a message across": they are prepared to perpetrate violent actions to build another world in line with their aspirations[217]. These terrorists (and perhaps part of the population) define their actions as acts of liberation, rebellion or resistance in the face of a government considered illegitimate[218]. Such violent actions are initially in contradiction with a betrayal negotiated for personal ends and the possibility of negotiation for these "absolute" terrorists seems practically non-existent. On the one hand, the willingness to "resist" the opponent may, on the activist's side, make him or her prefer to stay in the conflict rather than enter into negotiations with someone perceived as illegitimate, especially if the issue at stake in the negotiation is only personal and not related to the cause[219]. On the other hand, on the government side, entering into negotiations with "such individuals" also seems unattractive in that it would be perceived as an "admission of weakness" and an abandonment of the ideal of equality of all before the law[220].

Other perpetrators of terrorist acts, referred to as "contingent"[221], act with the aim of negotiating. Through their instrumental actions (hostage-taking and kidnappings), they seek to negotiate in order to exchange their victims for something else: media visibility, the release of activists, a ransom,

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[216] G.-O. Faure and W. Zartman, "Négocier avec les terroristes?", *Négociations*, 2011, 2, 16, p. 137 and 140.

[217] A. Schmid and A. Jongman, *Political Terrorism: a new guide to actors, authors, concepts, data bases, theories and literature*, Brunswick, Transaction, 1988, p. 5; L. Weinberg, A. Pedahzur. and S. Hirsch-Hoefler, "The Challenges of Conceptualizing Terrorism", *Terrorism and Political Violence*, 2004, 16, p. 780.

[218] A. Pemberton, "Needs of Victims of Terrorism", *Assisting Victims of Terrorism. Towards a European Standard of Justice*, R. Letschert, I. Staiger and A. Pemberton (eds.), Dordrecht, Springer, 2010, p. 127.

[219] The cost of agreement may be perceived as higher than the cost of persistent disagreement. (R. Bourque and C. Thuderoz, *Sociologie de la négociation*, Rennes, Presses universitaires de Rennes, 2011, p. 21).

[220] R. Bourque and C. Thuderoz, *op. cit.*, p. 30. Faure and Zartman (*op. cit.*, 2011, p. 142) mention a discursive strategy that a government could adopt in order to avoid being accused as weak if it agrees to negotiate with terrorists: it should state that it only accepts negotiations with "former terrorists"; the concepts of "collaborators" and "repentant" are then very useful.

[221] G.-O. Faure and W. Zartman, *op. cit.*, 2011, p. 137.

political change… [222]. These instrumental actions, which are from the outset part of a logic of negotiation, make it possible to imagine, in the event of arrest, a greater interest on the part of the perpetrator in a negotiation concerning his criminal situation than in the case of "absolute" terrorists. Collaboration here could be more fruitful from the point of view of justice, even if the chances of success remain low and conditional on other factors.

Another (double) distinction proposed by Mc Adam[223] proves useful in analysing the chances of successful negotiation with the justice system. This distinguishes between *low-cost or high-cost* radical engagement, "depending on the time, energy and money involved"[224] and *low-risk or high-risk* radical engagement, depending on the anticipated physical, social, legal and financial dangers associated with the engagement. The hypothesis can be formulated that if an individual has devoted an important amount (*high cost*) of resources to carry out his violent engagement, he might refuse to collaborate in order not to ruin the high costs to the (free) members of his group preparing a violent action[225]. However, a high-cost radical commitment can sometimes end in disappointment or even "burn-out"[226], which could then facilitate a negotiated betrayal. Sometimes this disappointment and burn-out can result in the activist behaving unconsciously which lead to his or her arrest[227]. If an individual has accepted a radical, high-risk commitment, he or she might also find it easier to accept the criminal risks associated with repression and would therefore not be very interested in the idea of reducing these risks through collaboration.

Finally, at present, a terrorist act is often defined as an "act of war"[228], implying a martial reaction (militarisation of the reaction, torture…)[229]. Such a metaphorical[230] (and potentially legal[231]) qualification of the terrorist act as an act of war seems to dictate solutions that are more collective (amnesties, rehabilitation policies) than individual (negotiation-bargain-

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[222] G.-O. Faure and W. Zartman, *op. cit*., 2011, p. 138 and 150.

[223] D. Mc Adam, "Recruitment to High Risk Activism. The case of Freedom Summer", *American Journal of Sociology*, 1986, 92, p.67.

[224] I. Sommier, "Engagement radical, désengagement et déradicalisation. Continuum et lignes de fracture", *Lien social et Politiques*, 2012, 68, p. 19.

[225] Bateson was able to show that the more expensive an engagement was, the more likely the individual is to ignore information that calls him into question (G. Bateson, *Vers une écologie de l'esprit*, Paris, Seuil, 1977).

[226] J. Ross and T. Gurr, "Why Terrorism Subsides: A comparative Study of Canada and the United States", *Comparative Politics*, 1989, 21, 4, p. 420; M. Ribetti, "Disengagement and beyond. A case study of demobilization", *Leaving Terrorism Behind. Individual and Collective disengagement*, T. Bjorgo and J. Horgan (eds.), London and New York, Routledge, 2009, p. 152 to 169.

[227] I. Sommier, *op. cit*., 2012, p. 27.

[228] M.-H. Gozzi, *op. cit*., 2003, p. 53; T. Delpech, *op. cit*., 2002, p. 37.

[229] J. Burger, "Terrorism", *Military Law and Law of War Review*, 2003, 42, p. 467 to 478.

[230] We use the concept of "metaphor" because when we speak of an act of war when we refer to a terrorist act, we can only refer to a "low intensity" war. (P. Gueniffey, *op. cit*., 2003, p. 162). Indeed, even the attacks of 11 September 2001 (the bloodiest in the history of terrorism) are incomparable to the acts of war that Europe experienced in the 20th century.

[231] M.-L. Cesoni, "Terroriste et combattant: une confusion pernicieuse", *L'effet radicalisation et le terrorisme*, F. Brion, C. De Valkeneer and V. Francis (eds.), Brussels, Politeia, 2019, p. 123 to 154.

ing)[232]. Moreover, the war-like reactions of the State (this time we are no longer in the metaphor but in a very concrete reality) suppress, due to the death of many potential partners, the possibility of a series of negotiations for lack of purpose.

3.2. *The weight of the religious dimension*

When the religious dimension appears important in the radical engagement of a jihadist terrorist, it is necessary to understand the place of religion in that individual's life. Interviews with imprisoned jihadists were able to show that "entry into Islam was mainly in the form of a rupture" in the sense that these "returns to religion respond to the search for a standardized and orderly life as one enters adulthood"[233]. In this religious market, the Salafist offer is particularly accessible (via the Internet) and makes it possible to achieve the expected rupture in that it invites to a hyper standardized life, shaped by the demands of rigour and discipline. Ethical righteousness, associated with loyalty to the group, is then valued and may explain the low relevance, in the eyes of the arrested terrorist, of a negotiated proposal of betrayal stemming from human justice and associated with a secular State. Some authors[234] conclude (very quickly[235]) that such a religious ideology makes people insensitive to punishment, which would be an obstacle to collaboration.

When the use of violence is perceived as an obligation to make the divine Word triumph, the terrorist's abandonment of this violence seems particularly complicated[236]. This would be all the truer when the terrorist makes a link between a religious text and a demand for violence against non-believers, when he is convinced of the decline of Arab-Muslim civilisation and fascinated by conspiratorial and eschatological discourse[237]. However, researchers have been able to show that disengagement can occur in certain circumstances that weaken the weight of this religious factor. On the one hand, certain "quietist" or "pietist"[238] Salafist discourses can create doubt about the relevance of the use of violence by terrorists. These speeches call for an end to the fighting by indicating that it is immoral (the killing of innocents is opposed to the values of Islam) or, more pragmatically, that it is counterproductive ("What is the point of killing one of theirs if, in return, it

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[232] S. Mullins, «Rehabilitation of Islamist Terrorist: Lessons from Criminology», *Dynamics of Asymmetric Conflict. Pathways toward terrorism and genocide*, 2010, 3, 3, p. 162 to 193.

[233] B. Ainine, T. Lindemann, X. Crettiez and R. Sèze, *op. cit*., 2017, p. 62 and 63.

[234] R. Duff, "Notes on Punishment and Terrorism", *American Behavioral Scientist*, 2005, 48, p. 758 to 763.

[235] H. Carvalho, "Terrorism, Punishment, And Recognition", *New Criminal Law Review*, 2012, 15, p. 345 to 374.

[236] F. Glowacz, "Mineurs judiciarisés pour participation à des activités d'un groupe terroriste. Analyse des processus et dynamiques de radicalisation", *Revue internationale de criminologie et de police technique et scientifique*, 2019, p. 275.

[237] B. Ainine, T. Lindemann, X. Crettiez and R. Sèze, *op. cit*., 2017, p. 81, 92 and 95.

[238] S. Amghar and K. Fall, "Quitter la violence islamique. Retour sur le phénomène de désaffiliation djihadiste", *Revue du MAUSS*, 2017, 1, 49, p. 119.

eliminates a thousand of ours?")[239]. These ideological reversals – some speeches sometimes use very harsh words to talk about the fighters ("dogs of Hell"[240]) – certainly contribute to reducing the symbolic gains of violent engagement. This shows that the link between Salafism and Jihadism is more complex than is usually presented[241]. On the other hand, it has also been shown that some individuals who joined the Islamic State came back with much disappointment. Their personal aspirations to help the suffering Muslim population or to live in a climate more in line with their religion were faced to a reality on the ground made up of infighting, corruption, brutality against civilians, and arbitrary executions of hostages[242]. While these elements may lead to disengagement on the part of some, it is far from certain that this disengagement is accompanied by a willingness to betray and negotiate with justice.

3.3. *The weight of the political dimension*

The political dimension can play an important role in jihadist terrorism (see above). Many activists want to depict an asymmetrical relationship between the West and the Arab-Muslim world, denouncing the injustice of a logic of domination and exploitation unfavorable to the latter. They identify with a group of individuals perceived as persecuted and threatened, whose interests must be defended and their suffering even avenged. As a certain number of exclusions and discriminations are not without foundation, the negotiation proposal risks being perceived by the potential collaborator as allowing the injustice denounced to prevail.

Negotiation strategists believe that, in this framework, the negotiator must "take into account the motivation(s)"[243] of the activists. He must show the terrorist that his voice was heard, that his cause was understood[244]. The negotiator's objective here is not to change the terrorist's belief system[245] but to make him understand that his "tactical actions are counterproductive"[246]. In other words, the negotiator must convince the terrorist that there are better ways than violence to achieve his political objective. The negotiator must make the terrorist aware that his violent actions do not serve his cause and that what is true for him is also true for his free comrades: denouncing them makes it possible to put an end to counterproductive tactics and thus to

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[239] S. Amghar and K. Fall, *op. cit.*, 2017, p. 119 and 120.
[240] S. Amghar and K. Fall, *op. cit.*, 2017, p. 119.
[241] B. Ainine, T. Lindemann, X. Crettiez and R. Sèze, *op. cit.*, 2017, p. 10, 25, 36, 40, 64, 79 and 80.
[242] S. Amghar and K. Fall, *op. cit.*, 2017, p. 126.
[243] G.-O. Faure and W. Zartman, *op. cit.*, 2011, p. 139.
[244] G.-O. Faure and W. Zartman, *op. cit.*, 2011, p. 152.
[245] G.-O. Faure and W. Zartman, *op. cit.*, 2011, p. 141.
[246] G.-O. Faure and W. Zartman, *op. cit.*, 2011, p. 142. In order to show that the objectives of the political struggle are inaccessible through violence, the negotiator must avoid "condescending" attitudes that could lead to a feeling of inferiority. It is to be feared that the meeting between an arrested person and a magistrate will not facilitate the fulfillment of these conditions of possibility of negotiation. The presence of a lawyer could restore a sense of equality between the protagonists and thus be conducive to negotiation.

make the political cause triumph in the medium term (with, it is true, short-term collateral damage for the individuals betrayed). If the reasoning can be understood theoretically, it seems unlikely to us that, in practice, negotiators will be able to convince many terrorists on this point. Swapping violent action for political action is a process that can take "years, even decades"[247] and convincing someone who has just been arrested (and often not yet convicted) to make the switch and denounce those who persist in violent action seems unrealistic. It seems to us, in this respect, that individualised denunciation policies are less promising than collective amnesty or rehabilitation policies[248].

3.4. *The role of material gains or the chances of a possible bargaining*

Individuals for whom material gains have (become) central to violent engagement (see above the notion of "opportunistic militant") are likely to react most positively to proposals for collaboration, as long as they are convinced that this is where the maximisation of their personal interests lies. This utilitarian calculation, attributed to a rational individual is analysed by game theory and often illustrated using the "prisoner's dilemma"[249].This dilemma is presented as follows. Two prisoners are interrogated and:

– if one of them denounces the other and the other does not denounce him, the one who denounces will have his sentence removed, while the other will have his sentence increased to the maximum;

– if both denounce, they will both receive a medium sentence (their guilt is proven but their cooperation with the judicial authorities is taken into account);

– if neither of them denounces the other, they will both receive a minimal sentence (their guilt for the most serious acts cannot be proven, the judge can only condemn them for less serious acts for which he has sufficient evidence).

This prisoner's dilemma is usually illustrated in the form of a table[250]:

	Does not denounce	Denounces
Does not denounce	1 year, 1 year	5 years, 0 years
Denounces	0 years, 5 years	3 years, 3 years

In the situation at hand, legislation generally only accepts a reduced sentence if the statements are "revealing" and bring new information to the public prosecutor's office. It is therefore not enough to denounce, but to be the first to denounce. The previous table would then become:

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[247] G.-O. Faure and W. Zartman, *op. cit.*, 2011, p. 146.
[248] S. Mullins, *op. cit.*, 2010, p. 162 to 193.
[249] N. Eber, *Le dilemme du prisonnier*, Paris, La Découverte, 2006.
[250] This table is borrowed from N. Eber (*op. cit.*, 2006, p. 3).

	Does not denounce	Denounces first	Denounces second
Does not denounce	1 year, 1 year	5 years, 0 years	
Denounces first	0 years, 5 years		0 years, 5 years
Denounces second		5 years, 0 years	

For the negotiator (often the public prosecutor himself[251]), it is important to know whether the individual in front of him is rather "selfish" (and ready to denounce) or rather "cooperative" (and not ready to denounce). There is a large body of literature that has attempted to identify the determinants of cooperation. Despite contradictory results, some research shows that women cooperate more than men[252]. In terms of personality traits, individuals who think they are masters of their own destiny, who have considerable self-control and who are sensation-seeking are more cooperative[253]. If the two "prisoner-players" have been able to communicate beforehand (which is possible in the context of terrorist offences), the level of cooperation will increase[254]. It is therefore important to isolate the person with whom one wishes to negotiate from the person to be denounced and, in general, from any person (co-prisoners) who can convince him or her not to denounce[255]. If the "prisoner-players" know each other[256] (which is always the case in the situations we are dealing with), they will be more cooperative. And the more they know each other (presence of a "group spirit"[257]), the more this will be the case. If the "prisoner-players" know that denunciation can lead to a sanction, even an informal one (gossip, ostracism), they adopt a more cooperative behaviour[258].

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[251] Negotiation strategists favour a "strict application of the principle of separation between those who negotiate and those who decide" (G.-O. Faure and W. Zartman, *op. cit.*, 2011, p. 150). In the negotiations of interest to us here, it is often the magistrate of the public prosecutor's office who negotiates and decides on the criminal advantage granted. It is true that it also happens that another actor – a judge – intervenes to approve the content of the agreement (see the national reports above).

[252] A. Ortmann and L. Tichy, «Gender differences in the laboratory: evidence from prisoner's dilemma games", *Journal of Economic Behavior and Organization*, 1999, 39, 3, p. 327 to 339.

[253] C. Boone, B. De Brabander and A. van Witteloostuijn, "The impact of personality on behavior in five prisoner's dilemma games", *Journal of Economic Psychology*, 1999, 20, 3, p. 343 to 377.

[254] D. Sally, "Conversation and cooperation in social dilemmas: a meta-analysis of experiments from 1958 to 1992", *Rationality and Society*, 1995, 7, 1, p. 58 to 92.

[255] G.-O. Faure and W. Zartman, *op. cit.*, 2011, p. 144.

[256] D. Sally, "A general theory of sympathy, mind-reading, and social interaction, with an application to the Prisoners's Dilemma", *Social Science Information*, 2000, 39, 4, p. 567 to 634.

[257] N. Eber, *op. cit.*, 2006, p. 51.

[258] E. Fehr and S. Gächter, "Cooperation and punishment in public goods experiments", *The American Economic Review*, 2000, 90, 4, p. 980 to 994; D. Masclet, C. Noussair,

For the negotiation-bargaining process to succeed, attention must also be paid to the *relationship of trust* between the terrorist and the negotiator. This relationship produces a sequential dilemma in which the first actor must show trust and the second must be loyal. The terrorist must trust the representative of the judicial institution in thinking that his statements will indeed lead to a reduction of the sentence and the judicial actor must be loyal and keep his promise of reward. There is also extensive literature on the elements that can influence levels of trust and loyalty during a negotiation. These include greater loyalty from women[259], the impact of the difference in ethnic origin between the partners[260], the personality type of the negotiators (cynical, manipulative, opportunistic, who believes that the end always justifies the means)[261], or even the existence of social ties between the two partners[262], especially if the second partner (i.e. the one who will have to be loyal[263] after the trusting attitude of the first partner) adopts positive attitudes (smiles) during the interaction[264]. However, the weight of these factors in a judicial negotiation remains to be determined.

When the instrumental dimension of the terrorist action is significant, negotiation is initially facilitated because the stakes are also mainly instrumental (reduction of the sentence). However, the scientific conclusions on the chances of negotiation linked to game theory (often resulting from simplified experiments[265]) that we have just presented, seem to us to overvalue the economic rationality of the players[266] . In the real world, it is not self-evident for actors to identify their interests so easily, immersed as they are in a complex social world in which access to relevant information and the ability to process it is limited. Moreover, this desire to maximise these interests probably takes too little account, in our field, of other factors such as the need for recognition and symbolic gains linked to terrorist action (see below).

S. Tucker and M.-C. Villeval, "Monetary and nonmonetary punishment in the voluntary contributions mechanism", *The American Economic Review*, 2003, 93, 1, p. 366 to 380.

[259] R. Crosson and N. Buchan, "Gender and Culture: International Experimental Evidence from Trust Games", *The American Economic Review*, 1999, 89, 2, p. 386 to 391.

[260] E. Glaeser, D. Laibson, J. Scheinkman and C. Soutter, "Measuring trust", *Quarterly Journal of Economics*, 2000, 115, 3, p. 811 to 846. For a different reading, see J. Bouckaert and G. Dhaene, "Inter-ethnic trust and reciprocity: results of an experiment with small businessmen", *European Journal of Political Economy*, 2004, 20, 4, p. 869 to 886.

[261] A. Gunnthorsdottir, K. McCabe and V. Smith, "Using the Machiavellianism instrument to predict trustworthiness in bargaining game", *Journal of Economic Psychology*, 2002, 23, 1, p. 49 to 66.

[262] E. Glaeser, *and al.*, *op. cit.*, 2000.

[263] In the configuration we are interested in, it is the magistrate.

[264] C. Eckel and R. Wilson, "The human face of game theory: trust and reciprocity in sequential games", *Trust and Reciprocity: Interdisciplinary Lessons from Experimental Research*, E. Ostrom and J. Walker (eds.), New York, Sage, p. 245 to 274. Men seem to be more influenced than women on this point.

[265] Thus, the procedural dimension of action is not taken into account, or only superficially, in these experiments.

[266] Certainly, contrary to classical economic theory in which the *homo economicus* only acts selfishly, game theory makes it possible to explain the rationality of cooperative behaviour.

3.5. *The role of symbolic gains or recognition offered by the judiciary*

Violent engagement can provide symbolic benefits to the terrorist (see above). The latter can obtain an official status (martyr, hero, warrior), he can strengthen his self-esteem by reinforcing his "actority" (ability to act) and by fighting a feeling of non-recognition or powerlessness. Powerlessness, as a factual and/or perceived reality, plays an important role in the transition to a terrorist act. Through the recognition it provides, the terrorist act is sometimes described as the weapon of the weak trying to compensate for this powerlessness.

Faced with this narcissistic wound that the terrorist act compensates for, negotiators must, according to some, try to restore the terrorist's decision-making capacity by insisting on other ways of taking power[267]. We have already mentioned the delicate transition between violent action and legitimate political action (see above). Collaborating with the judiciary would be another way of regaining power, no longer linked to a political objective but to the management of one's own life. The negotiator can insist here on the fact that the arrested person is not powerless, that he or she can conquer a real decision-making capacity by denouncing. Here again, the reasoning seems to encounter serious limitations in practice. The proposal to collaborate with the judiciary is undoubtedly not a very realistic way to increase the arrested terrorist's "actority". Any action does not contribute to strengthening the feeling of recognition and it is unlikely that the proposal to collaborate with justice will allow "congruence between the self-image we claim for ourselves or our community of reference and the image that others have of us"[268].

In the longer term (after the enforcement of the sentence), the individual who enjoyed "hero status" within the violent group might be tempted to seek the same role (and the symbolic gains associated with it), but this time as a key player in de-radicalisation. This leads some to see former activists as key actors in de-radicalisation programmes[269]: not only is a "repentant" – not in the sense of a collaborator, but in the sense of a person who has committed violent acts and has become aware of his or her mistakes – best placed to shake the certainties of other activists[270]. But moreover, this role contributes to restoring its status and reintegrating it into the human bond.

It should also be noted that the attractiveness of symbolic gains may change over time and that it is interesting for the negotiator to identify possible changes in the terrorist's trajectory on this point. Changes in the biographical trajectory (the individual is getting older, is in a relationship, has children, has a job…) can change the attractiveness of these symbolic gains.

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[267] G.-O. Faure and W. Zartman, *op. cit*., 2011, p. 147.

[268] X. Crettiez, *op. cit*., 2016a, p. 724; T. Lindemann, *Causes of War*, Colchester, ECPR Press, 2010, p. 9.

[269] D. Bouzar, *op. cit*., 2017, p. 69.

[270] D. Bouzar, *op. cit*., 2017, p. 75; D. Bouzar and M. Martin, «Méthode expérimentale de déradicalisation: quelles stratégies émotionnelles et cognitives", *Pouvoirs*, 2016, 158, 3, p. 91.

Commitment can be experienced as a sacrifice (daily deprivation, moral rigour, military discipline, loss of autonomy…) that is increasingly burdensome[271].Testimonies from "returnees" show that the fascination of some people for a death as a martyr can be shaken by the experience lived within the Islamic State: when death presents itself concretely (having seen "brothers in arms" die), a fear of death can appear and curb the warrior impulse[272]. If the negotiator is aware of these changes, he or she will be able to adjust their arguments in the negotiation. Knowing the state of advancement in the violent career is important in order to know the level of identification and attachment to the violent group. The greater the involvement in the career, the more the disengagement will be perceived as inconceivable or symbolically risky since it destroys the new identity as a member of the group. It is therefore essential for the negotiator to gather information about the arrested persons in order to conduct the negotiation effectively or, if there are several arrested persons, to determine with whom the chances of success are greater.

3.6. *The impact of group bonding*

The more clandestine the radical group operates, the stronger the dependence on the group. The reduction of the individual's life to his or her role in the group limits the possibilities of disengagement. Indeed, in these groups, emotional tension, solidarity and pressure to conform are particularly important, which encourages a sense of guilt to leave and to betray[273]. This is why individual voluntary disengagement is in this case infrequent but not impossible, since the symbolic attraction to life in the violent group may be reduced on certain occasions: tensions in the group (lack of loyalty, paranoid atmosphere), loss of an enviable role, a level of violence considered excessive…[274].

If the group is marked by strong internal competition, one can imagine that collaboration is more easily accepted in order to oust an internal competitor within the group. If there is strong intergroup competition, it is easier to imagine the denunciation of members of the competing group (as long as the individual has useful information on the activities of this other group).

In any case, in order to hope for collaboration, it will always be necessary to be attentive to the different costs of collaboration for the activist: costs for the mental integrity of the activist's self, costs related to the lack of social perspective, or costs related to the loss of protection from the group. The collaborative arrangement should therefore possibly be accompanied by psychological support, credible protection measures and help in building a new life.

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[271] S. Amghar and K. Fall, *op. cit.*, 2017, p. 128 and 129.
[272] D. Thomson, *Les Revenants*, 2016, Paris, Seuil.
[273] I. Sommier, *op. cit.*, 2012, p. 26 and 27.
[274] S. Mullins, *op. cit.*, 2010, p. 165.

Conclusion

Throughout this text, we have tried to show that radicalness has no essence but that it is constructed "through a dialectical relationship between acts that transgress established norms (…) and the reaction to these acts"[275]. To be defined as radical, transgressive behaviour must be perceived as subversive to the political or social order. The State is the main guarantor of respect for this political or social order, so its reaction is crucial in drawing "the distinction between acceptable and unacceptable subversion"[276]. In the current context, more and more acts are considered as "terrorist" and lead to increasingly stronger penal reactions. We have been able to show that the subversive nature of terrorist action undermines the credibility of collaborative measures: can we expect many betrayals, to the benefit of the State above all, of those who justify their actions by "overturning existing hierarchies and principles of division"[277]? It appears, however, that where terrorist action is strongly linked to material gains – this action would then be closer to certain delinquent behaviour – the criminal reward could probably be perceived as more attractive.

This work, centred on collaboration and therefore focused on a reaction addressed to an individual, must not completely neglect "collective" reactions to terrorist acts. Recent history has shown that the reduction of terrorist acts can be achieved through these collective strategies[278]. The chances of successful collective disengagement are greater when there is a public offer of exit, such as political negotiations leading to an amnesty, or when the individuals who can benefit from it can then (easily) join socially and economically structured circles. The reduction in violent terrorist behaviour would therefore be linked less to de-radicalisation than to the possibility of alternative "re-engagement". As for this alternative re-engagement, regarding the reintegration into more structured environments, it would seem that there is no equality between all terrorists. The political and independence activists of the Years of Lead were probably better off than the current jihadist activists. While the former was able to benefit from a range of opportunities offered by environments that were favourable to them, it would seem that the latter could less easily rely on groups to reintegrate after their experience. The label of "terrorist" is likely to be a very persistent stigma. Would States agree to alleviate these difficulties by putting in place specific reintegration policies themselves? We believe that proposals for collaboration specifically aimed at terrorists only respond very imperfectly to the fundamental social issues raised by these violent actions.

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[275] L. Bonelli and F. Carrié, *La fabrique de la radicalité. Une sociologie des jeunes djihadistes français*, Paris, Seuil, 2018, p. 67.

[276] L. Bonelli and F. Carrié, *op. cit.*, 2018, p. 67.

[277] L. Bonelli and F. Carrié, *op. cit.*, 2018, p. 67.

[278] This was the case in Algeria in 1999 when President Bouteflika granted pardons to 2,300 imprisoned Islamist militants. An amnesty policy was also conducted in 2016 in Niger for some members of Boko Haram. (See S. Amghar and K. Fall, *op. cit.*, 2017, p. 121).

CHAPTER 3

EU CRIMINAL LAW COMPETENCES WITH SPECIAL REGARDS ON TERRORIST OFFENCES

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SUMMARY: 1. Introduction. – 2. EU competences. – *a*) Categories of the EU competences. – *b*) Principle of proportionality and subsidiarity. – *c*) EU competences to enact criminal (procedural) law. – 3. Legal basis for the creation of criminal law. – *a*) Administrative measures. – *b*) Criminal substantive law. – *c*) Criminal procedural law. – 4. The competence on dealing with terrorism. – *a*) Internal competences - EU vs. Member States. – *b*) Implied powers and the external competences of the EU. – 5. Terrorism and fundamental rights. – *a*) Rights of individuals in criminal procedural law. – *b*) Existing legal framework on combating terrorism. – 6. Conclusion - possible basis for rewarding measures to prevent terrorism on the EU level.

1. *Introduction*

The assignment of the Croatian unit of the project "fight against international terrorism. discovering european models of rewarding measures to prevent terrorism (fighter)" was to address the competences assigned to the union by the treaties and the possible legal basis for future enactment of EU criminal law and its harmonization with the respect of EU fundamental principles regarding rewarding measures to prevent terrorism on the EU level. the Lisbon treaty explicitly determines existence of the EU competence to enact and harmonize criminal law at supranational level. the art. 82 and 83 TFEU provide a specific basis for such competences. this paper will first look into the EU competences in general bearing in mind principles of subsidiarity and proportionality and afterwards provide explanation of the EU criminal competences in concrete. in the third chapter, possible legal basis for creation of criminal law on the EU level will be analysed following that, chapter four provides an explanation of EU criminal competences in field of terrorism in its internal and external application. protection of fundamental rights will be discussed in the chapter five. finally, in concluding remarks and after the proper identification of the range of possibilities accorded by the treaties possible models for enactment and harmonisation of rewarding measures to prevent terrorism on the EU level which are also respectful of the prerogatives and competences of the member states will be outlined.

2. *EU competences*

Division of competences between the EU and the Member States is established in the Treaty of Lisbon. The Treaty of Lisbon entered into the force

in 2009 and led to the European Union replacing and succeeding the European community. The Treaty of Lisbon consists of two distinct treaties, the Treaty on European Union (TEU) and the Treaty on functioning of the European Union (TFEU)[1]. The competencies of the European Union are established by primary Union law, which provides the basis for actions of EU institutions and specific goals. Art. 5 TEU in its paragraphs 1 and 2 establishes the principle of conferral of competences. This principle determines that the EU can act only within the limits of competences conferred to it by the Treaties, otherwise they are retained by the Member States. (Art. 5(2) TEU)

There are three main categories of competences: exclusive, shared, and supporting competences. The principle of conferral governs the limits to EU competences, while its use is governed by the principles of subsidiarity and proportionality.

a) *Categories of the EU competences*

The competences of the EU transferred to the Union by the Member States based on the principle of conferral are divided in the following categories:

1. Exclusive competences are conferred on the Union in specific areas in which the EU alone can legislate and adopt binding acts. The Member States can legislate and adopt legally binding acts in these areas only if empowered by the Union or when implementing Union acts (Art. 2(1) TFEU). Based on Art. 3 TFEU the EU has exclusive competence in the following areas: customs union; the establishing of the competition rules necessary for the functioning of the internal market; monetary policy for the Member States whose currency is the euro; the conservation of marine biological resources under the common fisheries policy; common commercial policy. (Art. 3 TFEU)

2. Shared competence are the ones that the Union shares with the Member States in specific areas and in those areas, both can legislate and adopt legally binding acts. However, EU has primacy because Member States can only exercise competence where the EU does not. Also, the Member States shall regain the right to act alone once the EU ceases to exercise its competence (Art. 2(2) TFEU)[2]. Shared competence between the EU and EU Member States applies in the following areas: internal market; social policy, for the aspects defined in this Treaty; economic, social and territorial cohesion; agriculture and fisheries, excluding the conservation of marine biological resources; environment; consumer protection; transport; trans-European networks; energy; area of freedom, security and justice. (Art. 4(2) TFEU). Those areas are listed as principal areas but the Union will share competence with the Member States everywhere where the Treaties prescribe. Those areas can never relate to the areas referred to in Art. 3 which

[1] See more Z. Đurđević, Lisabonski ugovor: prekretnica u razvoju kaznenog prava u Europi Hrvatski ljetopis za kazneno pravo i praksu, vol. 15, No. 2/2008, Zagreb, pp. 1077-1079.

[2] Z. Đurđević, Lisabonski ugovor (n. 1), p. 1081.

prescribes exclusive competences and Art. 6 which determines supporting competences (Art. 4(1) TFEU).

When it comes to EU criminal law and the competences that the EU has in this area, which is the main topic of this paper, they fall under the category of shared competences.

3. Supporting competences represent the ones connected to the area in which the EU can only intervene to support, coordinate, or complement the action of EU countries without superseding those competences. This means that the action taken by the EU does not prevent Member States from acting on their own and the EU cannot harmonise Member States laws and regulations by adopting legally binding acts in these areas. According to Art. 6 TFEU those areas are: protection and improvement of human health; industry; culture; tourism; education, vocational training, youth and sport; civil protection; administrative cooperation (Art. 6 TFEU).

In addition to the three main categories of EU competences mentioned above there are also special competences according to Art. 5 TFEU. The EU can take measures to ensure that Member States coordinate their economic, social and employment policies at EU level. In particular, this includes defining guidelines for these policies with the aim of achieving harmony in those fields all over the EU territory.

b) *Principle of proportionality and subsidiarity*

The exercise of the Union competences, in areas which do not fall within its exclusive competence, is restricted by the two fundamental principles laid down in Art. 5 TEU, namely the principle of subsidiarity (Art. 5(3) TEU) and the principle of proportionality (Art. 5(4) TEU). All legislative proposals and initiatives must comply with those principles. This is specifically stated in Art. 69 TFEU which directs national parliaments to ensure compliance with those principles. This means that all actions regarding the exercise of shared or supporting competences of the EU must be in line with those principles and pass the test imposed by them.

In accordance with the principle of the subsidiarity, the EU legislator shall act only if the goal pursued cannot "be sufficiently achieved by the Member States" and it can be "be better achieved at Union level" because of the effects or the scale of the proposed action. So, the necessity of EU involvement has to be thoroughly scrutinised to ensure the protection of "national identities" of Member States under Art. 4(2) TEU. The aim is to exercise majoritarian democracy as much as possible, so that decisions and actions of the EU are connected to the real will of citizens and justified and legitimate at every level (national, regional or even local)[3].

One of the annexes to the Lisbon Treaty, namely Protocol No. 2 on Application of Principles of Subsidiarity and Proportionality annexed to the Treaties sets the criteria for applying those principles[4]. Art. 2 of the Protocol

[3] See more Z. Đurđević, Lisabonski ugovor (n. 1), p. 1082.

[4] Protocol No. 2 In the application of the principles of subsidiarity and proportionality (OJ [EU] 2010 No. C 83/206).

requires the Commission to consult widely before proposing the legislative acts. Also Art. 7 and 8 of the Protocol enable Member States to express their opinions regarding the respect of the principle of subsidiarity in the EU legislative process. The other key document for the application of subsidiarity is Protocol No. 1 on the Role of National Parliaments in the European Union. It is of great importance due to its empowering effect on the involvement of national Parliaments' in EU activities. Its aim is not just to encourage that EU documents and proposals are forwarded to national Parliaments for examination before the Council takes a decision but also to ensure promptness[5].

In addition to the principle of subsidiarity, the principle of proportionality also regulates the exercise of powers by the EU. Actions of the European Union must not exceed what is necessary to achieve the objectives of the Treaties. The criteria for applying this principle are also set in Protocol No. 2.

c) EU competences to enact criminal (procedural) law

The post-Lisbon EU legislative competences as regards criminal law are more extensive. Matters within the area of freedom security and justice (AFSJ) fall within "shared competence" between the EU and Member States according to Art. 4(2)(j) TFEU. Existence of the Union competence to enact supranational criminal law for achieving a certain goal is determined by primary Union law in general while interpreting the respective competence provisions[6].

In the field of criminal law, the EU only has the competence for minimum harmonization. This means that minimum level of criminalization in Member States has to be ensured but they can also go further[7]. Decriminalization, on the other hand, cannot be the aim of the approximation by the Union[8].

As regards EU criminal law the Protocol No. 2 on Application of Principles of Subsidiarity and Proportionality is especially important because national sovereignty of the Member States is intertwined with enaction of the criminal law[9]. Regarding EU criminal competences, the principle of proportionality demands that the criminal law sanction can only be the *ultima ratio* because of its stigmatizing effect[10]. Only if less restrictive means are proven to be ineffective or unavailable a criminal law sanctions can be used.

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[5] Protocol No. 1 on the role of national Parliaments in the European Union, Official Journal of the European Union, C 202/203.

[6] H. Satzger, International and European Criminal Law, Beck - Hart - Nomos, 2. Auflage 2018; p. 65.

[7] H. Satzger, International and European Criminal Law (n. 6), p. 90.

[8] R. Hefendhel, in B. Schünemann (ed.), A programme for European Criminal Justice, pp. 457 et seq.

[9] See Satzger, KritV 2008, 17, 37; Weber, EuR 2008, 88, 102 et seq.

[10] See "A Manifesto on European Criminal Policy" established by the research group "European Criminal Policy Initiative", ZIS 4 (2009), 697, et seqq. and EuCLR 1 (2011), 86 et seqq.

3. *Legal basis for the creation of criminal law*

The Area of Freedom Security and Justice is regulated in the Title V of the TFEU. According to Art. 67(1) TFEU the Union shall constitute an area of freedom security and justice with respect for fundamental rights and different legal systems and traditions of the Member States. To ensure a high level of security the Union is obliged to take measures "to prevent and combat crime, racism and xenophobia", to secure "coordination and cooperation between police and judicial authorities and other competent authorities", and to achieve "mutual recognition of judgments in criminal matters" if needed "through the approximation of criminal laws" (Art. 67(3) TFEU). However, Art. 67 TFEU should not be relied on as a legal basis for creating criminal law but rather should be understood as *lex generalis*.

But there are other Articles which establish EU criminal competences (legal basis) as regards EU criminal substantive and criminal procedural law, as well as administrative measures. Possible preventive administrative measures are regulated through Art. 75 TFEU, while mutual recognition, including certain harmonisation of criminal procedural law to foster it, and harmonization of criminal material law are regulated in Art. 82 and 83 TFE.

a) *Administrative measures*

Firstly, regarding the administrative measures that the EU can take, Art. 75 TFEU may provide a specific legal basis for measures directed to prevent and combat terrorism and related activities. This gives the EU competence to adopt measures necessary too "achieve the objectives set out in Art. 67, as regards preventing and combating terrorism and related activities"[11]. With regulations, adopted in accordance with the ordinary legislative procedure, EU can "define a framework for administrative measures with regard to capital movements and payments", e.g., "freezing of funds, financial assets or economic gains belonging to, or owned or held by, natural or legal persons, groups or non-State entities" (Art. 75 TFEU). This enables the adoption for some measures under the scope of Art. 75 for the crimes such financing of terrorism which are connected to the aim of the project FIGHTER. Still, Art. 75 TFEU can be used only for financial sanctions of preventive nature regarding terrorism.

b) *Criminal substantive law*

In an area of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis Art. 83(1) TFEU provides for the creation of minimal rules concerning the definition of criminal offenses and sanctions. The provision gives the EU criminal law competences as regards "terrorism, trafficking in human beings and sexual exploitation of women

[11] Compare with Art. 215 TFEU. See in that regard CJEU, case C-130/10, European Parlimant v. Council, ECLI:EU:C:2012:472.

and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime" (Art. 83(1) TFEU). Other crimes with cross border dimensions that are considered to be of serious nature can be brought within the competence of the EU but only if this is decided unanimously by the Council after gaining the consent of the European Parliament (Art. 83(1) TFEU). Those minimal rules can only be created by directives in accordance with the ordinary legislative procedure in accordance with Art. 294 TFEU. Such a proposal is subjected to qualified majority voting in the Council and co-decision of the European parliament is required. In addition to the Commission, also 1/4 of Member States can initiate the adoption of instruments under Chapters 4 and 5 of Title V TFEU (Art. 76 TFEU).

Art. 83(2) TFEU provides the legal basis to legislative criminal law for the purposes of approximation and ensuring the effective implementation of EU policy. Such a competence that is now expressly outlined in the Lisbon Treaty was developed through CJEU judgments in environmental crime and ship-source pollution cases. The result of interpretation of those judgments by the Commission was a criminal law competence when it is necessary to ensure the effective implementation of other EU policies in an area which has been subject to harmonisation measures[12].

When "approximation of criminal laws and regulations of the Member States" is "essential to ensure and the effective implementation of a Union policy in an area which has been subjected to harmonization measures", directives can establish "minimum rules concerning the definition of criminal offences and sanctions". Improving the *effet utile* of the Union policy with criminal law is the obvious aim of harmonization when it is essential to ensure its effective implementation. So, one limitation is hidden in the word "essential". The opinion of the German Constitutional Court (BVerfG) is that the existence of this condition is satisfied only if there is a serious deficit concerning enforcement which can only be removed by the threat of a sanction[13]. The area in which this competence can be exercised is every area that was already subjected to harmonization measures by the EU[14]. Criminal law approximation cannot be done in the same time as the initial approximation of the non-criminal law provisions[15].

Directives must be adopted by the same ordinary or special legislative procedure[16] as was followed for the adoption of harmonization measures in

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[12] Communication from the Commission to the European Parliament and the Council on the implications of the Court's judgment of 13 September 2005 (Case C 176/03 Commission v Council), Brussels, 24 November 2005, COM (2005) 583 final/2 and subsequently confirmed in the sheep source case and in the Case C-301/06 Ireland v Parliament and Council [2009] ECR I-593 (trade disparities).

[13] BVerfG, Judgement of 30 June 2009, 2 BvE 2/08 *et al.* = BVerfGE 123, 267 = NJW 2009, 2267, 2288, para. 362, "Lissabon".

[14] H. Satzger, International and European Criminal Law (n. 6), p. 90; see Vedder and Heintschel von Heinegg-Kretschmer, art. III-271 EVV para. 20.

[15] *Ibid*.

[16] Special legislative procedures are not specifically described by TFEU rather they are defined by treaty articles, for specific policy areas, which contain conditions for their implementation. The sole legislator is the Council while Parliaments role is limited to consent (e.g.

question (Art. 83(2) TFEU). The Lisbon Treaty widens EU criminal law competences substantially with the blanket clause in Art. 83(2) TFEU[17].

The question whether Art. 83(2) can be the only legal basis for criminal law directives was answered when Directive (EU) 2017/1371 on the fight against fraud to the Union´s financial interests by means of criminal law (PIF Directive) was adopted in July 2017. Even though Commissions proposal named Art. 325(4) TFEU as the adequate legal basis the European Parliament was in favor of Art. 83(2) TFEU[18] as the correct legal basis for enactment of criminal law directives[19].

The broad substantive criminal law competence that the EU has according to the Art. 83 TFEU is subjected to the emergency brake mechanism. This mechanism was created to govern national sovereignty of the Member State which was disrupted with the exercise of EU competences in the criminal law context. Member State may request that a draft directive is referred to the European Council if there is a danger that the adoption would "affect fundamental aspects of its criminal justice system". As a result, the ordinary legislative procedure is suspended. This suspension is terminated if "after discussion, and in case of a consensus, the European Council, within four months of this suspension, refers the draft back to the Council"[20]. In the case of disagreement, a group of at least nine member states can establish enhanced cooperation on the basis of the draft directive. This means that a group of Member States that consider instruments provided in the draft directive acceptable can enhance their cooperation in the police and criminal justice fields allowing other Member States not to participate[21]. In such a case, the authorisation to proceed with enhanced cooperation referred to in Art. 20(2) TEU and Art. 329(1) TFEU shall be deemed to be granted and the provisions on enhanced cooperation shall apply (Art. 83(3) TFEU).

c) *Criminal procedural law*

One of the goals of harmonization of EU substantive criminal law under Art. 83 TFEU, as foreseen in the Art. 82(1) TFEU, is to strengthen the operation of mutual recognition. Because of its connection with sovereignty and national legal systems of Member States regulation and harmonization of criminal law was always a sensitive area[22]. The basis for EU criminal procedural law is the principle of mutual recognition. Harmonization of substantive criminal law can have a positive impact on mutual recognition be-

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regarding EPPO - Art. 86 TFEU) or consultation (e.g. regarding cross-border police operations - Art. 89 TFEU).

[17] See Ambos and Rackow, ZIS 4 (2009), 397, 403.

[18] Directive 2017/1371/EU, OJ (EU) 2017 No. L 198/29.

[19] Councile Document No. 9024/14 of 29 April 2014; on the current status, see Council Document No. 5478/17 of 1 February 2017.

[20] See Z. Đurđević, Lisabonski ugovor (n. 1), pp. 1087-1088.

[21] *Ibid*., p. 1088.

[22] See, for example, A. Erbežnik, Mutual Recognition in EU Criminal Law and Fundamental Rights - The Necessity for a Sensitive Approach, in The Needed Balances in EU Criminal Law, 2018, pp. 185-212.

cause when there is similarity as regards substantive criminal rules Member States develop mutual trust more easily[23].

EU procedural criminal policy[24] includes EU legislative actions, policies, strategies, and rules related to the criminal procedure at the EU and domestic levels. These rules and instructions regulate treatment of suspects during the apprehension, investigation, and trial, as well as victims' rights and judicial institutions involved[25]. All of that is applicable not only in cases concerning cross-border crimes but also in purely internal situations as regards 6 directives on procedural rights for suspects and accused persons the EU has adopted.

Chapter 4 of Title V of the AFSJ (in Art. 82, 85 and 86 TFEU) governs, inter alia, judicial cooperation between Member States based on mutual recognition, as well as harmonization of criminal procedure and the establishment of specific EU bodies in the area of judicial cooperation (Eurojust, EPPO)[26]. Three types of competences emerge from these provisions. Firstly, the EU can adopt instruments to ensure mutual recognition of judgments, decisions and other measures with a purpose of making transnational criminal cooperation more efficient (Art. 82(1) TFEU)[27]. Secondly, Art. 82(2) TFEU enables the harmonization of domestic criminal procedure[28]. Thirdly, the Union competences to create and regulate EU criminal enforcement institutions are prescribed in Art. 85 TFEU (relating to Eurojust) and Art. 86 TFEU (provides for establishing of a European Public Prosecutor's Office)[29]. Because the focus of this paper are EU competences relating to terrorist criminal offences, the first two competences will now be explained further.

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[23] See P. Asp, The Procedural Criminal Law Cooperation of the EU, JURIDISKA FAKULTETENS SKRIFTSERIE NR 84, Faculty of Law, Stockholm University Research Paper No. 6, 27 Feb 2017, pp. 20-23; V. Mitsilegas, The constitutional implications of mutual recognition in criminal matters in the EU, Common Market Law Review, Volume 43, Issue 5 (2006), pp. 1279-81; Commission, 'Communication from the Commission to the Council and the European Parliament, Mutual Recognition of Final Decisions in Criminal Matters' COM (2000) 495 final, 4; J. Ouwerkerk, 'The Potential of Mutual Recognition as Limit to the Exercise of EU Criminalisation Powers' [2017] European Criminal Law Review 5.

[24] See A. Weyembergh, and I. Wieczorek, 'Is There an EU Criminal Policy?', in R. Colson, and S. Field, (eds.), *EU Criminal Justice and the Challenges of Legal Diversity* (Cambridge University Press 2016).

[25] See H. Packer, 'Two Models of the Criminal Process' (1963) 113 University of Pennsylvania Law Review 1, 2; House of Lords European Union Committee, *The European Union's Policy on Criminal Procedure*, 30th Report of Session 2010 - 12, HL Paper 288, pp. 6-8; E. Baker, 'Governing Through Crime - the Case of the European Union' (2010) 17 European Journal of Criminology 187, 190-192; J. Monar, 'Decision-Making in the Area of Freedom, Security and Justice' in A. Arnull, and D. Wincott (eds.), *Accountability and Legitimacy in the European Union* (Oxford University Press 2002), pp. 67-70.

[26] See C. Harding, and J. Banach-Gutierrez, 'The Emergent EU Criminal Policy: Identifying the Species' (2012) 37 European Law Review 758; S. Peers, 'EU Criminal Law and the Treaty of Lisbon' 33 European Law Review, pp. 507-508.

[27] See TFEU art. 82(1).

[28] See S. Peers, EU Justice and Home Affairs Law: EU Criminal Law, Policing, and Civil Law 4/e: Volume II: EU Criminal Law, Policing, and Civil Law: 2 (Oxford European Union Law Library) Hardcover - 24 Mar. 2016, 513 at fn 24; European Union Committee, *The European Union's Policy on Criminal Procedure* (n. 25), pp. 14-16, 20-22 for support of this contestation.

[29] See P. Asp, *Procedural Criminal Law Cooperation*, (n. 23), pp. 18-20.

In ordinary legislative procedure, on the basis of Art. 82, the EU can adopt (*a*) measures to secure recognition of all forms of judgments and judicial decisions and (*b*) measures that deal with the conflicts of jurisdiction between Member States, as well as (*c*) support the training of the judiciary and judicial staff and even (*d*) facilitate cooperation between judicial or equivalent authorities of the Member States.

With the Treaty of Lisbon, the principle of mutual recognition was incorporated into primary European law by Art. 82(1)[30]. Even though this principle was first developed for establishment of the internal market as regards free movement of goods ("Cassis de Dijon" logic), when applied to criminal procedural law it requires from the Member States to recognise in principle judicial decisions lawfully enacted in another Member State[31]. Constrains that national borders impose on judicial cooperation shall be eased through the principle of mutual recognition[32].

In addition, Art. 82(2) TFEU provides as a kind of flanking measure to mutual recognition the approximation of Member States' laws and regulations:

a) in matters of mutual admissibility of evidence between Member States,

b) concerning the rights of individuals in criminal procedure,

c) regarding the rights of victims of crime,

d) any other specific aspects of criminal procedure which the Council has identified in advance by a decision. In that case, after it gains the European Parliament's consent, the Council must act unanimously (Art. 83 (2) TFEU).

In those areas and only if necessary, to facilitate mutual recognition of judicial decisions and police cooperation concerning crimes with cross-border dimension the EU has the competence to establish minimal rules by means of directives. Those directives have to be adopted in the ordinary legislative procedure. Minimal rules established on the EU level do not prevent Member States from ensuring a higher level of protection. Approximation on the basis of art. 82(2) TFEU merely complements the principle of mutual recognition as we can see from the words: "to extent necessary to facilitate mutual recognition". Interference with the national criminal law systems must always be minimally invasive and because of that the approximation of criminal procedural law must be *ultima ratio*[33].

Contrary to the para. 2, para. 1 of Art. 82 TFEU does not allow the approximation of national provisions. Criminal policy can be based on mutual recognition without approximation. This can be clearly seen from the wording which limits the approximation of the laws of national laws to the areas referred to in paragraph 2 (and in Art. 83 TFEU as regards criminal material law). Moreover, the so-called "emergency break" that protects national criminal law of the Member States is only applicable to Art. 82(2) TFEU.

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[30] H. Satzger, International and European Criminal Law (n. 6), p. 139.

[31] See C. Burchard, Die Konstitutionalisierung der gegenseitigen Anerkennung, Juristische Abhandlungen, Band 55) (Deutsch) Taschenbuch, Juni 2019, pp. 65 et seqq.

[32] Streinz and Satzger, art. 82 AEUV, para. 9.

[33] H. Satzger, International and European Criminal Law (n. 6), p. 164.

4. *The competence on dealing with terrorism*

a) Internal competences - EU vs. Member States

The Lisbon Treaty, it seems, had a greater impact on the EU's internal powers in relation to counterterrorism rather than on external ones, first and foremost due to the depillarization of the EU's competences[34]. Union role related to internal security is wider. Art. 3(2) TEU implies that fundamental objective of the EU is internal security[35]. Also, the decisions in the area of justice and home affairs are made according to the "community method". A qualified majority vote (QMV) among the Member States is enough for an act to be adopted in the Council, opposed to the unanimity required before Lisbon. Moreover, the European Parliament now has a greater oversight role on these matters and the role of national parliaments has been strengthened. This division of powers between EU institution is reflected in the field of internal security and thus as regards counterterrorism. Also, the jurisdiction of CJEU now covers the area of freedom, security, and justice[36] which has a great impact on internal but also external counterterrorism policies. The CJEU can now press unwilling Member States to implement measures adopted by the EU[37].

Still, the competence on addressing terrorism is divided between Member States and the EU. On the one hand, Art. 4(2) TEU stipulates that the Union shall respect the essential functions of its Member States, including the safeguarding of national security which is their sole responsibility. Matters related to national security remain exclusively in the competence of the Member States despite the importance of establishing the AFSJ. On the other hand, Art. 3(2) TEU states that the Union shall ensure its citizens an area of freedom, security and justice by preventing and combating crime. Also, Art. 67 TFEU specifies the EU competence in the field of criminal law. Still Member States do have the competence to act outside the scope of EU law when terrorism is concerned as a matter of national security. In that case Member States could also argue that they do not have to apply some aspects of the Directive 2017/541[38] when dealing with matters concerned purely national.

The CJEU refrains from labelling 'terrorism' as a matter of national security as this would imply a limited competence for the EU in this field. In-

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[34] T. Renard, EU Counterterrorism Policies and Institutions After the Lisbon Treaty, POLICY BRIEF, Center on Global Counterterrorism Cooperation, September 2012, p. 2.

[35] "[t]he Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime".

[36] Exceptions: assessing the validity and proportionality of police operations and measures taken in the Member States to maintain internal security, see Vara, "The External Dimension of the Area of Freedom, Security and Justice in the Lisbon Treaty," European Journal of Law Reform 10, No. 4 (2008), pp. 577-597.

[37] J. Argomaniz, "Before and After Lisbon: Legal Implementation as the 'Achilles Heel' in EU CounterTerrorism?" European Security 19, No. 2 (June 2010), pp. 297-316.

[38] Directive (EU) 2017/541 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA.

stead, it argued that terrorism is threatening 'international security' in many cases[39]. This clearly illustrates the existence of the shared competence between the EU and Member States in respect to combating terrorism[40].

b) *Implied powers and the external competences of the EU*

Internal and external security are strongly intertwined, and this reflects to the internal/external competences of the EU. In its pre-Lisbon case law the CJEU established that the EU competence to conclude international agreements may emerge from an express conferral by the Treaty or implicitly from *i*) other provisions of the Treaty and *ii*) from measures adopted within the framework of those provisions by EU Institutions[41]. The Court also determined that, even in the absence of an express provision, *iii*) whenever EU law creates powers, for EU Institutions, within its internal system for the purpose of attaining a specific objective, the EU has authority to undertake international commitments necessary for the attainment of that objective[42]. This is known as the principle of parallelism[43].

Post-Lisbon the Union legal personality is explicitly recognised in Art. 47 TEU and this impacted the external projection of the AFSJ in a positive way[44]. Issues connected to EU representation in international organizations and negotiations but also the procedure for concluding international treaties and agreements with the unification of the international legal status of the EU is be simplified[45]. The Lisbon Treaty "does not seek to transform the external AFSJ into an autonomous external policy. The focus is rather on using external powers to achieve (internal) AFSJ objectives and on integrating an AFSJ dimension into other external policies"[46]. The Lisbon Treaty aimed to codify the CJEU jurisprudence on implied competences in external relations[47]. Now Art. 216(1) and 3(2) TFEU regulate the existence and nature of the EU's competence to conclude international agreements. Union implied

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[39] Cases C-402/05 and C-415/05 Kadi and Al Barakaat International Foundation v Council and Commission of 3 September 2008, para. 363, and Cases C-539/10 P and C-550/10 P Al Aqsa v Council of 15 November 2012, para. 130.

[40] M. Henley, Q. Liger, C. Möller, J. Eager, Y. Oviosu, M. Gutheil, EU and Member States' policies and laws on persons suspected of terrorism-related crimes, STUDY for the LIBE committee, Directorate-General for Internal Policies of the Union (European Parliament), Policy department C: Citizens´ rights and constitutional affairs, December 2017, pp. 17-18.

[41] Council v. Commission (European Road Transport Agreement or ERTA) (22/70) [1971] ECR 263, para. 16.

[42] Opinion 1/76 (Inland Waterways) [1977] ECR 741, para. 3; Opinion 2/91 (ILO Convention) [1993] ECR I-1061, para. 7.

[43] R. Schütze, "Parallel External Powers in the European Community: From Cubist Perspectives Towards Naturalist Constitutional Principles?" (2004) 23 Yearbook of European Law 225.

[44] J.S. Vara, External Dimension of the Area of Freedom, Security and Justice in the Lisbon Treaty, European Journal of Law Reform, vol. X, No. 4, pp. 577-597.

[45] T. Renard, EU Counterterrorism Policies and Institutions After the Lisbon Treaty, POLICY BRIEF, Center on Global Counterterrorism Cooperation, September 2012, p. 4.

[46] S. de Jong, Sterkx, and J. Wouters, The EU as a Regional Actor: Terrorism, EU-GRASP Working Paper No. 9, February 2010, p. 9.

[47] Passos and Marquardt, "International agreements - Competences, procedures and judicial control".

external powers can be exclusive or shared but the conclusion of an agreement must be "necessary" to fulfil the objectives of the Treaty. Whether the EU has competence to conclude an international agreement at all (albeit exclusively or together with Member States) is determined in Art. 216 (1) TFEU while exclusiveness of such competence is prescribed in Art. 3 (2) TFEU[48], Considering that new explicit powers were introduced by the Lisbon Treaty the necessity of implied external powers developed by the Court´s case law is under question. EU express external powers now constitute Part Five of the TFEU[49].

Post-Lisbon cases[50] reveal that the CJEU may have lowered the required threshold to trigger supervening exclusivity. In its test, the Court now consistently refers to a risk of EU law being affected[51] rather than to establishing a finding that EU law is actually affected[52]. Based on the principle of conferral, the existence and nature of EU competences are fixed in the Treaties. But the dynamic aspect of the ERTA doctrine lies in its pre-emptive effect, barring Member States from exercising a shared competence, reserving the exercise of this competence (i.e. the power) exclusively to the EU. Regarding the jurisdiction of the ECJ on criminal matters, in the new legal framework, the ECJ's jurisdictions on criminal matters is the same as that on any other issue regulated earlier in the former first pillar. The European Commission is entitled to bring an action against a Member State that does not exercise its duty to implement EU law. Even more important is unlimited competence of the ECJ to interpret the legal acts concerning criminal matters.

A watch dog of the EU acting externally is the European Parliament. It can approve or refuse any international agreement in the field of justice and home affairs[53] or ask for a preliminary CJEU opinion[54]. The establishment of

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[48] See P. Craig, The Lisbon Treaty, Law, Politics and Treaty Reform, Oxford: Oxford University Press, 2010, p. 399.

[49] Part Five consists of the Common Commercial Policy (Art. 206 and 207 TFEU); development cooperation (Art. 208 to 211 TFEU); economic, financial and technical cooperation with third countries (Art. 212-213 TFEU); humanitarian aid (Art. 214 TFEU); restrictive measures (Art. 215 TFEU); association (Art. 217 TFEU); the external dimension of monetary policy (Art. 219 TFEU); relations with international organisations (Art. 220 TFEU); and the solidarity clause (Art. 222 TFEU).

[50] Opinion 3/15, Marrakesh Treaty, EU:C:2017:114, para 124; Case C-114/12, Commission v. Council (Neighbouring Rights), para 82; Opinion 2/15, Singapore FTA, para 16.; Opinion 1/13, The Hague Convention, para 70; Case C-114/12, Neighbouring Rights, para 65; Opinion 3/15, Marrakesh Treaty, paras. 102-104.

[51] Case C-66/13, Green Network, para 29; Opinion 1/13, The Hague Convention, para 71; Case C-114/12, Neighbouring Rights, para 68; Opinion 3/15, Marrakesh Treaty, para 105; Opinion 2/15, Singapore FTA, para 180.

[52] M. Chemon, Implied exclusive powers in the ECJ's post-Lisbon jurisprudence: The continued development of the ETRA doctrine in Common Market Law Review 55: 1101-1142, 2018, Kluwer Law International, UK, 2018, p. 1133.

[53] For example, the European Parliament opposed the conclusion of the EU-U.S. Financial Messaging Data Agreement which aim was to improve efficiency of following the money related to terrorist activities or groups (11. February 2010). But if finally gave its consent to the improved Agreement on 8 July 2010.

See also F. Trauner, The Internal-External Security Nexus: More Coherence Under Lisbon?, ISS Occasional Paper No. 89, March 2011.

[54] See, CJEU, opinion 1/15.

the European External Action Service[55] is one of the most significant institutional innovation of the Lisbon Treaty that will influence fight against terrorism as well the future role of the EU Counterterrorism Coordinator.

In connection with terrorist offences, it is important to mention the Solidarity Clause prescribed in Art. 222 TFEU. It establishes the obligation of Member States to act jointly if any of them is the object of a terrorist attack or the victim of a natural or man-made disaster while the Union must mobilise all the instruments at its disposal to prevent crime, protect human rights and provide all the possible assistance. In that regard it provides for a wide range of possibilities of counterterrorism actions, both on the prevention side and on the response side[56]. This is also a clear legal basis for an external action because it complements the Member States' external commitment under Art. 42(7) TEU which is known as the mutual assistance clause[57]. Measures can be taken outside the EU territory but also inside the EU, including with military means, but the Council Decision (2014/415/EU) of 24 June 2014 on the arrangements for the implementation by the Union of the solidarity clause[58], which aim was to establish the mechanisms of EU action in crisis situations, has to be taken into account[59]. The Solidarity Clause itself can be seen as basis for 'enabling' the right to intervene in another Member State[60]. Member States are obliged to act in accordance with the principles of subsidiarity, necessity and proportionality and the Union must respect international law (see Art. 3 para. 5 TEU)[61]. Still, the use of a specific EU instrument (e. g., such as ATLAS[62]) is not mandatory neither on the basis of the Council Decision (2014/415/EU) nor Art. 222 TFEU. Even though the Recital 5 of Council Decision (2014/415/EU) (which is the same

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[55] Its task is to bring together various instruments, services, and agencies that are dealing with diplomacy, defense, and development under the authority of the High Representative which "shall conduct" the EU's common foreign and security policy; and as one of the vicepresidents of the European Commission, he/she "shall ensure the consistency" of the EU's external action (Art. 18 TEU); see more T. Renard, EU Counterterrorism Policies and Institutions After the Lisbon Treaty, POLICY BRIEF, Center on Global Counterterrorism Cooperation, September 2012, p. 8.

[56] T. Renard, EU Counterterrorism Policies and Institutions After the Lisbon Treaty, POLICY BRIEF, Center on Global Counterterrorism Cooperation, September 2012, p. 3.

[57] Art. 42 TEU - 7. If a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all the means in their power, in accordance with Art. 51 of the United Nations Charter. This shall not prejudice the specific character of the security and defence policy of certain Member States.

[58] Council decision of 24 June 2014 on the arrangements for the implementation by the Union of the solidarity clause (2014/415/EU).

[59] In case of a military response, the decision must be taken at unanimity among the member states, whereas in other cases (e.g., judicial or police), a qualified majority suffices.

[60] A.-M. Martino, The Mutual Assistance and Solidarity Clauses - Legal and Political Challenges of an Integrated EU Security System, Frankfurt a.M., 2014, p. 78.

[61] A.-M. Martino, The "Solidarity Clause" of the European Union - dead letter or enabling act? SIAK-Journal - Zeitschrift für Polizeiwissenschaft und polizeiliche Praxis (2), 2015, p. 68.

[62] ATLAS was formally established by 'Council Decision 2008/617/JHA of 23 June 2008 on the improvement of cooperation between the special intervention units of the Member States of the European Union in crisis situations' (Official Journal of the European Union L 210/73, August 6, 2008).

as the Article 222 (1) TFEU) states that "the solidarity clause calls for the Union to mobilise all the instruments at its disposal" there is no restriction to which EU instrument can be used[63]. The Council Decision lists as "relevant instruments" measures (e. g. EU Internal Security Strategy, the European Union Civil Protection Mechanism[64] and "structures developed in the framework of the Common Security and Defence Policy") but there is no exclusion of usage of other instruments available to Union (e.g., European Gendarmerie Force[65])[66]. However, application of any instrument depends solely on decision of the Member States and can use the most appropriate means necessary depending on the situation disregarding what measures Union adopted[67].

5. *Terrorism and fundamental rights*

Terrorism is one of most heinous crimes. It aims at destructing democracy and rule of law while generating fear and diminishing human rights, most notably the rights to life, liberty and physical integrity. Still, we have to bear in mind that the legislation on combating terrorism can by itself also pose challenges to fundamental rights. Most of modern terrorism is based on some radical religious beliefs. One of the problems that immediately raises concern is a risk of counter-terrorism legislation requiring mass collection of data[68] or to profile potential suspects based on their religious beliefs which would lead to the violation of the right to non-discrimination[69].

All persons have to be protected against unlawful or arbitrary interference with their liberty[70]. Lawful detention of terrorist suspects is very important and judicial scrutiny has to be provided. Member States must refrain from detaining the suspects with the aim of prevention as this could interfere with their right to liberty and bring the success of the whole criminal procedure into question.

We are faced with an extensive, even unprecedented technological leap. In that regard the main challenge is to establish adequate moral and legal boundaries to what is technologically possible. Technology represents the ex-

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[63] A.-M. Martino, The "Solidarity Clause" of the European Union - dead letter or enabling act? (no 61).

[64] Set up in 2001 "to enable coordinated assistance from the participating states to victims of natural and man-made disasters in Europe and elsewhere" - European Commission, Humanitarian Aid and Civil Protection, 'EU Civil Protection Mechanism', *http://ec.europa.eu/echo/en/what/civil-protection/mechanism*.

[65] EUROGENDFOR "is a multinational initiative of six EU Member States - France, Italy, The Netherlands, Portugal, Romania and Spain - established by treaty with the aim to strengthen international crisis management capacities and contribute to the development of the Common Security and Defense Policy", *http://www.eurogendfor.org/organization/what-is-eurogendfor*). It was established by the Treaty of Velsen in 2007 and is composed of "multinational police force with military status" (Article 3 [a] Treaty of Velsen.

[66] A.-M. Martino, The "Solidarity Clause" of the European Union - dead letter or enabling act? (no 61).

[67] A.-M. Martino, The Mutual Assistance and Solidarity Clauses (no 60), p. 76.

[68] See, for example, opinion 1/15, *supra*.

[69] Art. 21 of the Charter of Fundamental Rights.

[70] Art. 6 of the Charter of Fundamental Rights.

tension of our minds as we are more and more dependent on it. It is like and upgraded versions of our diaries, more intimate while addictive. Surveillance of communication data today can be more much more intrusive than in the past, and a full-blown surveillance state is technically possible. Data can be collected quickly and in great detail on a large scale. This can lead to a reversal of the presumption of innocence[71] since individuals may turn more easily to suspects[72]. Also, individuals that are only suspects or 'persons of interest' in relation to terrorism or related crimes might be not even aware of such surveillance which means that their right to an effective remedy might be denied[73].

Possible violations of the right to privacy and data protection[74] are especially problematic regarding the state powers to access traffic and location data. Member States increasingly rely on indiscriminate data retention and access regimes that could interfere with the rights citizens beyond merely suspects[75].

Some anti-terrorist legislation may also conflict with the rights to freedom of expression and assembly[76] when trying to combat and prevent terrorist offences, especially public provocation to commit a terrorist offence[77] and recruitment for terrorism[78]. E. g. Provisional agreement on a Draft Regulation on addressing the dissemination of terrorist content online reached between the Council Presidency and the European Parliament in December 2020[79] was initially subject to lot of criticism regarding the broad content of terrorist term.

Counter-terror legislation may also conflict with a range of other rights. For example, Germany extended investigative measures to minors which can undermine the protection of the child's rights. Several Member states prohibited full face veils due to an alleged public security threat that can be related to the right to religion[80]. Also, several Member States allow deportation

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[71] Art. 48 of the Charter of Fundamental Rights.

[72] V. Mitsilegas, 'The Value of Privacy in an Era of Security: Embedding Constitutional Limits on Pre-emptive Surveillance', International Political Sociology, vol. 8, Issue 1, March 2014.

[73] Art. 47 of the Charter of Fundamental Rights.

[74] Art. 7 and 8 of the Charter of Fundamental Rights; The European Convention on Human Rights (ECHR) only stipulates the right to privacy while case law extends the concept of privacy to data protection.

[75] This has been considered a concern in joined cases C-293/12 and 594/12 which annulled the Data Retention Directive. Note that the Directive has been adopted in the context of the London and Madrid bombings but applies not only with terror offences but also serious crimes. See more Court of Justice of European Union: Judgment of 8 April 2014 (European Commission v Hungary, Case C-288/12), Judgement of 21 December 2016 (Tele2 Sverige/Watson, Joined Cases C-203/15 and C-698/15), Judgment of 6 October 2020 (La Quadrature du Net and Others v Premier ministre and Others, Joined Cases C-511/18, C-512/18 and C-520/18).

[76] Art. 11 and 12 of the Charter of Fundamental Rights.

[77] Art. 5, Directive 2017/541.

[78] Art. 6, Directive 2017/541.

[79] Council of the EU, Press release: Terrorist content online: Council presidency and European Parliament reach provisional agreement, December 2020, *https://www.consilium.europa.eu/en/press/press-releases/ 2020/12/10/terrorist-content-online-council-presidency-and-european-parliament-reach-provisional-agreement/*.

[80] See also, ECtHR, S.A.S. v. France, a. No. 43835/11.

of terror suspects and in that way make the right to asylum unsecure[81]. To add on, there are problems of extrajudicial renditions in connection with "transportation and unlawful detention of prisoners and EU law which challenge the competence of EU institutions and/or their obligation to act"[82,83]. This can result in serious human rights violations such as prohibition of torture, right to liberty, defence rights and other fair trial rights that are relevant in area of freedom, security and justice[84].

The EU Directive 2017/541 on Combatting Terrorism, the most important directive regulating this domain, raised many human rights concerns and was highly criticised regarding compatibility with the principle of legality and its clarity, its foreseeability and non-retroactivity but also concerning the rights to privacy, liberty and fair trial. The main principle of criminal law that individuals can only be liable for their own culpable conduct and intent is undermined with this Directive especially regarding some preparatory acts e. g. where liability can be based even in absence of proof that action created any kind of foreseeable danger or had any effect or in situations where the intent is not required for establishing contribution to terrorist acts. Also, private and family life, assembly, association, expression, the freedom of movement and many other rights can be severely restricted with different ways the Directive is implemented[85].

a) *Rights of individuals in criminal procedural law*

Firstly, the EU Charter of Fundamental Rights in Art. 47 to 49 protects the right to an effective remedy and to a fair trial, presumption of innocence and right of defence and principles of legality and proportionality of criminal offences and penalties. Other than the Charter of Fundamental Rights there is a great importance of the "Suspects' Rights Package" which is applicable to suspects of all crimes[86]. In that regrad Art. 82(2), subparagraph 2, point (*b*), TFEU provides a legal basis for minimum harmonization of sus-

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[81] M. Henley, Q. Liger, C. Möller, J. Eager, Y. Oviosu, M. Gutheil, EU and Member States' policies and laws on persons suspected of terrorism-related crimes, STUDY for the LIBE committee, Directorate-General for Internal Policies of the Union (European Parliament), Policy department C: Citizens' rights and constitutional affairs, December 2017, pp. 22-23.

[82] S. Carrera, E. ,Guild, J.S. da Silva, A. Wiesbrock, The results of inquiries into the CIA's programme of extraordinary rendition and secret prisons in European states in light of the new legal framework following the Lisbon Treaty, Policy Department C: Citizens' Rights and Constitutional Affairs, European Parliament, 2012, *http://www.europarl.europa.eu/studies*.

[83] See also, ECtHR, EL-MASRI v. The former Yugoslav Republic od Macedonia, a. No. 39630/09.

[84] Z. Đurđević, The Directive on the Right of Access to a Lawyer in Criminal Proceedings: Filling a Human Rights Gap in the European Union Legal Order, published in the peer reviewed conference proceedings book "European Criminal Procedure Law in Service of Protection of European Union Financial Interests: State of Play, and Challenges", Zagreb University Press, February 2016, pp. 11-12.

[85] K. Babická, EU Counter-terrorism Directive 2017/541: impact on human rights and way forward at EU level, November 2020., *http://opiniojuris.org/2020/11/20/eu-counter-terrorism-directive-2017-541-impact-on-human-rights-and-way-forward-at-eu-level/*.

[86] European Commission, Rights of suspects and accused, *https://ec.europa.eu/info/policies/justice-and-fundamental-rights/criminal-justice/rights-suspects-and-accused_en*.

pects´ rights[87]. Still, some of the Member States are not signatories in all of the documents due to opt-outs[88].

The "Suspects' Rights Package" includes:

1. Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings ensures the right to interpretation and translation. It applies across the EU since 27 October 2015 and ensures that the suspect or accused understands his current situations and undergoing actions that include him/her.

2. Directive 2012/13/EU on the right to information in criminal proceedings ensures the right of information about his or her rights and charges. The person must get prompt information about the accusation and his/her rights or, if charged, information necessary for the preparation of the defence. It applies across the EU since 2 June 2014.

3. Directive (EU) 2016/1919 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings ensures the right to legal aid. Legal aid and legal advice must be given to the suspect or accused as early as possible in the criminal proceedings by an adequate legal counsel.

4. Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and in European Arrest Warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty ensures the right to have a lawyer, the right to provide to a third-party information of the deprivation of liberty and the right to communicate. This applies across the EU since 27 November 2016.

5. Directive (EU) 2016/800 on procedural safeguards for children who are suspects or accused persons in criminal proceedings ensures the special safeguards for suspected of accused children because of their special vulnerability.

6. Directive (EU) 2016/343 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceeding ensures he right to be presumed innocent and to be present at trial. "Member States shall take appropriate measures to ensure that suspects and accused persons are not presented as being guilty, in court or in public, through the use of measures of physical restraint".

b) *Existing legal framework on combating terrorism*

One of the most important policy documents on terrorism is the EU Council Counter-Terrorism Strategy adopted in December 2005[89]. Its aims

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[87] See Hilf Grabitz, Nettesheim-Vogel, Eisele, art. 82 AEUV paras 73, 88.

[88] Denmark opted out of all Directives; Ireland and the UK opted out of all but Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, OJ L 280, 26.10.2010, pp. 1-7 and Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, OJ L 142, 1.6.2012, pp. 1-10.

[89] Council of Ministers, The European Union Counter-Terrorism Strategy. Document number 14469/4/05.

to: PREVENT committing terrorism and future recruitment for the purpose of committing terrorism; PROTECT innocent; PURSUE investigation and punishment of criminal acts of terrorism, disable planning, traveling and funding for the purpose of committing terrorism; and RESPOND in a coordinated way to terrorist threats and crimes[90].

Furthermore, in 2015 the European Commission adopted the "European Agenda on Security". Agenda suggest that tackling terrorism and preventing radicalisation is of the great importance[91]. The principle actions serve to define and criminalise terrorist offences, prevent radicalisation and the spreading of terrorist propaganda and to cut terrorists' access to the means to perpetrate attacks (funds, firearms, explosives, etc.)[92]. New Counter-Terrorism Agenda for the EU: Anticipate, Prevent, Protect, Respond was adopted in December 2020 and aims to enhance cooperation at EU level, further develop policy and operational gaps and available instruments to better anticipate, prevent, protect and respond to terrorism[93].

Core legislation criminalising terrorism in the EU is Directive (EU) 2017/541 on combating terrorism adopted on 15 March 2017[94]. The aim of the Directive is to harmonise the definitions of terrorist offences which will be the basis for the cooperation and information exchange between Member States. New criminal offences are prescribed – terrorist financing and training, as well as traveling for terrorism. The victims of crimes related to terrorism must be insured with specialist support services and help immediately after the attack so that any additional suffering is avoided. The Directive strengthens the Member States' criminal justice approach to terrorism.

Other important documents fall into the two groups:

a. Data processing regimes where data is collected or misappropriated to combat terrorism:

1. Schengen Information System II (SIS II)[95]

2. Passenger Name Records (PNR) (including both the EU PNR Directive and international PNR regimes with the US and Australia)[96]

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[90] European commission, Counter Terrorism and radicalisation *https://ec.europa.eu/home-affairs/what-we-do/policies/counter-terrorism_en*.

[91] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, The European Agenda on Security, COM (2015) 185 final.

[92] *Ibid*., 93.

[93] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Counter-Terrorism Agenda for the EU: Anticipate, Prevent, Protect, Respond, COM (2020) 795 final.

[94] Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA.

[95] As laid down in Regulation (EC) No. 1987/2006; Council Decision 2007/533/JHA and Regulation (EC) No. 1986/2006.

[96] Directive (EU) 2016/681 of the European Parliament and of the Council of 27 April 2016, OJ L 119, 4.5.2016, pp. 132-149.

See also Opinion of the Court (Grand Chamber) 1/15 of 26 July 2017 and the issue of preliminary questions to the CJEU on the PNR Directive (Belgian Constitutional Court *https://www.const-court.be/public/e/ 2019/2019-135e-info.pdf*, Slovenian Constitutional Court, German Court - Administrative Court of Wiesbaden (*https://eucrim.eu/news/german-court-asks-cjeu-about-compatibility-pnr-legislation/*) whether the EU PNR Directive and imple-

3. Eurodac[97]
4. Visa Information System (VIS)[98]
5. Advanced Passenger Information Directive (API)[99]
6. The annulled Directive 2006/24/EC (Data Retention Directive)[100]

b. Criminalising terrorist financing:
1. EU-US Terrorist Financing Tracking Programme (TFTP)[101]
2. Anti-Money Laundering Directive[102]
3. The 5th Anti-Money Laundering Directive[103]
4. Asset Freezing (Council Regulation No. 881/2002)

6. *Conclusion - possible basis for rewarding measures to prevent terrorism on the EU level*

As already stated, terrorist crimes today impose one of the most serious treats not only to the European Union but to the whole world. After a short analysis of the current legislation regarding terrorism while having in mind general competences of the EU in the field of criminal law it is obvious that the EU institutions mostly act in this field by adopting directives using Art. 82 and 83 of the TFEU. Still, protection of national sovereignty is and will be in the hands of national authorities. The EU criminal competences are shared between EU and the Member States, so when regulating terrorist offences, one has to respect the delimitation of prerogatives and competences between the EU and the Member States. In addition, Art. 75 provides legal basis for adoption of some administrative measures related to terrorism.

Bearing all of this in mind, there are two possible legal bases for establishment and harmonisation of rewarding measures related to the perpetra-

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mented laws are compatible with Union law, in particular the Charter of Fundamental Rights).

[97] Regulation (EU) No. 603/2013 of the European Parliament and of the Council of 26 June 2013, OJ L 180, 29.6.2013, pp. 1-30.

[98] Council Decision 2004/512/EC of 8 June 2004 establishing the Visa Information System (VIS), OJ L 213, 15.6.2004, pp. 5-7.

[99] Council Directive 2004/82/EC of 29 April 2004 on the obligation of carriers to communicate passenger data, OJ L 261, 6.8.2004, pp. 24-27.

[100] The Data Retention Directive was annulled by the CJEU in 2014. However, several Member States still have data retention regimes in place. In addition, the Estonian government announced its intention to restart discussions on data retention on a technical and political level during its Presidency (see Estonian Presidency, The Estonian Presidency Programme for the Justice and Home Affairs Council (JHA), 2017). Available at: *https://www.eu2017.ee/sites/default/files/2017-07/EU2017EE%20JHA%20Programme_0.pdf*.

[101] Council Decision of 28 June 2010 on the signing, on behalf of the Union, of the Agreement between the European Union and the United States of America on the processing and transfer of financial messaging data from the European Union to the United States for the purposes of the Terrorist Finance Tracking Program, OJ L 195, 27.7.2010, pp. 1-2.

[102] Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, OJ L 141, 5.6.2015, pp. 73-117.

[103] Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU, OJ L 156, 19.6.2018, p. 43-74.

tors of terrorist offences without overstepping and diminishing the Member State competences. One provides for adoption of administrative measures under the scope of Art. 75 for the crimes such financing of terrorism, but these measures can only be utilized in a form of financial sanctions of preventive nature regarding terrorism. The other basis is Art. 82 which provides for adoption of criminal procedural measures and has a wither scope. Two logical possibilities arise based on Art. 82:

Firstly, there is a possibility of enacting a new directive with a general scope. This means that all the offences would be included and rewarding measures would be harmonized for the main purpose of preventing any criminal act. This would have a general dimension applicable not only to the crimes related to terrorism, but it would instead open up a way to deal with a wider scope of perpetrators of other serious crimes.

Secondly, the scope of Directive 541/2017/EU is already limited to terrorism. This gives the possibility of amendment which produces further development of the rewarding measures directly connected to terrorist crimes already existing in the Art. 16 of the Directive 541/2017. Consensus between the Member States is always hard to reach when enacting EU criminal law rules because of the intrusion in their sovereignty and national culture. If the enactment of the new rules is limited only to the rewarding measures for the perpetrators of the terrorist offences the consensus will be easier to reach.

CHAPTER 4

COMPARATIVE APPROACH TO CRIMINAL PROCEDURE ASPECTS

Silvia Allegrezza, Valentina Covolo, Elena Militello, Leonardo Romanò

1. *Setting the scene: introduction, methods, and purpose of the report*

The present report focuses on comparing rewarding measures for collaborators of justice in the field of terrorism offences in seven selected Member States of the European Union. The purpose of this specific report within the FIGHTER project is to compare the procedural aspects of rewarding measures to combat terrorism in the selected national legislations: namely, Belgium, Croatia, France, Germany, Italy, Luxembourg, and Spain.

This report aimed at describing national measures having in mind the development of a potential EU blueprint of rewarding measures in the field of anti-terrorism. In this light, we adopted a comparative law approach based on the commonalities and divergences narrated in the reports.

Data are extracted from seven national reports providing a multifold account on such legislation, based upon the questionnaire drafted by the main unit.

The EU Directive 2017/541 on combatting terrorism do not provide any indication on procedural requirements. Article 16 indicates the mere possibility for the Member States to reduce the penalty of the offender who "provides the administrative or judicial authorities with information which they would not otherwise have been able to obtain, helping them to: (*i*) prevent or mitigate the effects of the offence; (*ii*) identify or bring to justice the other offenders; (*iii*) find evidence; or (*iv*) prevent further offences referred to in Articles 3 to 12 and 14 (of the aforementioned Directive". The laconic provision only refers to the impact of the information obtained on the main proceedings but it does not allow a comprehensive analysis of national systems in detecting the larger group of rewarding measures.

To this aim, a working definition of the meaning of 'collaboration' is needed in order to identify the 'collaborator' and the related procedural statute. This delicate task is aimed at defining the procedural consequences of qualifying the offender as 'collaborator' in a double dimension: in her own proceedings and in the proceedings in which her statements should be used.

Collaborating with prosecutorial authorities generally means providing the necessary information in view of the dismantling of a criminal organization. The difference with an ordinary witness lies in the fact that a collaborator, "repentant" or "leniency witness"[1], was a former co-conspirator or an effective member of the organization. As in other instances of organized crime, the strength of a terrorist organization lies in the relationship of trust and mistrust built among the individuals cooperating to reach one or more criminal goals. Therefore, the State has the possibility to offer a way out to collaborating members of the organization through rewarding measures, enabling prosecutors to gain insight into criminal activities. This practice leaves unprejudiced any in-depth analysis into the existence of a proper internal remorse of conscience within the accused, at least in modern, laically oriented systems based on the rule of law. However, the authenticity of the collaboration might be inquired.

The current legal picture at national level seems to be strongly influenced by supranational legislation and related duties to implement it. However, the impact on national law – including rules of criminal procedure – depends upon the country's criminological background in terms of presence and dimension of certain criminal phenomena such as organised crime and terrorism.

From a historical point of view, different approaches emerge, depending on whether or not the Member State has a specific history with either national or international terrorism. The impact of international and supranational provisions on the development of terrorism norms was especially strong on those countries without a prior experience of domestic terrorism or organized crime. On the contrary, those same international and supranational instruments were influenced in their drafting by countries with a specific experience in countering this type of phenomena[2].

The mechanisms and tools for rewarding are still at a national level and not tantamount to a full-fledged European rewarding system, which would require cooperation among the different legal systems aimed at a common final result. This is in contrast with an exclusively national perspective, often still defended in some instances by legislators[3], despite the blatant need for a harmonized and transnational approach in several investigations in the field of terrorism.

The drafting exercise highlighted several obstacles in pursuing a harmonized effort toward an EU common framework on procedural requirements applicable to rewarding measures.

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[1] Germany, Section I, Chapter 5, § 2.2 ff.

[2] E.g. Italy: Section I, Chapter 1, § 1 (historical part).

[3] See *e.g.* the case of the Luxembourg concept of the transfer of jurisdiction; Luxembourg, Section I, Chapter 6, § 2.2.1.

First, there is an undeniable issue linked to the use of different legal lexicons, amplified by the lack of a single, all-encompassing term to define rewarding measures and many aspects of criminal procedure throughout Europe[4].

The second systemic obstacle is related to the huge differences among EU member States on prosecutorial powers. The cohabitation, among European criminal procedures, of systems of mandatory and discretional prosecution increases the difficulties in designing a common framework.

The existence of an extremely wide deformalized zone in countries characterized by the principle of discretion in State Prosecutors' actions has a strong impact. There, a whole part of criminal procedure does not follow strict rules in granting dismissals and leniency measures may rely on an entirely deformalized procedure linked to the prosecutorial discretion. This can be seen as a rewarding measure in cases of accused subjects collaborating with the investigating and prosecuting authorities[5]. National policies emerge as hardly harmonizable if some States allow their prosecutors to discretionally dismiss charges against collaborators and others are forced to prosecute in force of the principle of mandatory prosecution.

A third obstacle refers to methodology and it is linked to the difficulty to draw a distinction between substantive criminal law and criminal procedure in the field of rewarding measures.

In the drafting of this report, we extrapolated data which could be of interest for the procedural report. According to the layout chosen by the coordinator and the analysis based on the structure of questionnaire, we focussed our efforts on two subparagraphs dedicated to procedural measures, specifically those on the conditions for the application of the measures and on the conditions for the use of the declarations obtained (probative value of declarations).

One might consider that the fine line between substantive and procedural criminal law in this field is hard to draw and often fades into a grey area. This is apparent if only one considers that, in several Member States, the substantive criminal law difference between an excuse (exonerating the accused) and an attenuating circumstance (granting a reduced sentence but without exonerating the accused) lies on whether collaboration occurred before or after a prosecution was initiated.

Setting aside substantive criminal law implications on procedural aspects, the issues relating to criminal procedure that have been selected and will be analysed in the following are: the rewarding measures in different criminal procedure phases (investigation, trial, post-sentencing); the conditions for applicability of rewarding measures; and the probative value of information obtained in exchange for rewarding measures.

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[4] For this reason, in this report, several terms, especially key words, are referred to in the original language used in the national system, rather than attempting a flattening English translation: *e.g.* Discharge - dismissal - *non-lieu*.

[5] In Belgium, for example, prosecutorial choices are based on vague criteria of necessity, proportionality, subsidiarity; Belgium, Section I, Chapter 2, § 2.1.4.

2. *The Gordian knot of mandatory v discretionary prosecution and other negotiations*

The first and foremost phase of a criminal investigation which might be relevant in terms of rewarding subjects who are accused of terrorism-related offences is undeniably the preliminary investigation phase. As we will see later on, the trial phase is often more concerned with debates on substantive criminal law tools such as the choice between excuses and attenuating circumstances. We will later focus on the post-sentencing phase, when a convicted person may decide to initiate a collaboration with public authorities.

As highlighted above, the main diverging point between different legal systems in the field of criminal procedure lies in the juxtaposition between mandatory and discretionary prosecution.

In the first type of systems, prosecutors' leeway in closing an investigation is extremely rigid. They have to opt to charge the accused with a crime anytime there is sufficient evidence to deem the *notitia criminis* (the information that a crime has been perpetrated) valid, regardless of any consideration on the "opportunity" of such prosecution. Among the considered MS, those adopting a mandatory prosecution principle seem to be: Italy, pursuant to Article 112 of its Constitution, which has a uniquely strong perspective on mandatory prosecution; Spain, according to Article 105 of its Code of Criminal Procedure; Croatia (with an exception in Article 206d of its Code of Criminal Procedure).

Instead, in the second type of systems, State Prosecutors enjoy wide discretion as to whether drop a case or prosecute a criminal offence, based on the principle of opportunity. The principle of opportunity seems to be adopted, among the selected Member States, by: Belgium, according to Article 28-*quater* of the Criminal Code; Germany, which adopts the *Legalitätsprinzip ex* art. 152 of the Rules on Criminal Procedure (*Strafprozessordnung* or StPO), but later leaves one wondering whether there is a public interest for the prosecution in the actual case under consideration in Article 153; France and Luxembourg, respectively pursuant to Articles 40 and 23 of their Codes of Criminal Procedure.

In the latter systems, an explicit provision of procedural rules on how to deal with collaborators of justice and on how to reward them is much less needed than in MS adopting a mandatory prosecution approach, often linked to a strict interpretation of the legality and equality principles. In fact, a one-sided dismissal of the case before charges are brought based on the will of the prosecution is always possible, and represents the first and the most common form of rewarding measure, though informal[6]. The possibility to modulate prosecutorial power offers an unique opportunity for national prosecutors to opt for a tailor-made solution of the specific case: renounce sic et simpliciter to prosecute to collaborator or rather cooperate with other MS in case of transnational cases, leaving to other countries the choice on rewarding measures. The obvious consequences of this setting are less need for formalized rules on rewarding measures and

[6] See Luxembourg, cit., § 2.2.1.

(*ii*) less data on concrete exercise of this power because the deformalized procedures leave no record or are kept confidential among prosecutorial authorities. However, such decision is never final, as it is always possible for the State Prosecutor to reopen the case at a future time, if the information provided is revealed to be false.

Instead, where prosecution is mandatory whenever the commission of a crime emerges, as is the case of Italy, formal mechanisms to avoid, divert or reduce prosecution need be provided for in legislative provisions.

Discretionary prosecutorial powers are not limited to the basic choice to either prosecute or dismiss the case. Other interesting instruments that can be employed in the different scenarios, though always within the investigation stage, go beyond a mere dismissal.

Another tool in the hands of prosecutors of certain MS is the possibility to requalify or even decriminalize cases based on a series of criteria, including collaborating with investigating authorities[7]. The rationale behind this choice is to provide prosecutors with an additional instrument to review their initial investigatory findings over time with flexibility and common sense. However, in the context of collaboration between the accused and the prosecuting authorities, the possibility to bargain on charges is discretionary in its essence.

Additionally, the peculiar situation of Luxembourg, a small State with little to none investigations for terrorism-related crimes (except, perhaps, those related to terrorism financing and money laundering instances), led them to devise the possibility of a so-called "transfer of jurisdiction". This allows them to transfer the transnational case to another Member State with more expertise in fighting terrorism and/or where the biggest bulk of information is located if it is somehow linked to that same criminal offence according to the different linking criteria[8].

Plea agreements represent another option available during the investigation phase, and also well into the early stages of trials. These legal instruments are applicable to the less serious offences tied to terrorism, due to the existence of rigid seriousness limits in most European legislations. They emerge out of ordinary criminal procedure, where they have been gradually introduced through transplants from the Anglo-American tradition. Such examples, with striking divergences, include the Spanish tool of *conformidad* (Articles 655, 787 of the Criminal Procedure Rules)[9]; the Italian *patteggiamento* or "*applicazione della pena su richiesta delle parti*", *i.e.* imposing a sentence upon request of the parties (Article 444 ff. of the Code of Criminal Procedure); in Croatia, the judgment based on the agreement of the parties, potentially including a partial procedural immunity of witnesses *ex* Article 362(1) of the Criminal Procedure Act (CPA)[10]; the French *plaider-coupable*

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[7] In French-inspired systems, with a three-fold distinction among criminal offences (*contraventions*, *délits*, *crimes*), one needs to distinguish between *'décriminalisation'* (dealt with, in the Luxembourg Code of Criminal Procedure, in Art. 132 Ccp) and *'décorrectionalisation'* (separately dealt with in Art. 132-1 Ccp); *ibidem*.

[8] *Ibidem*.

[9] Spain, Section I, Chapter 7, § 2.2.1.

[10] Croatia, Section I, Chapter 3, § 1.2.2.

(Articles 495-7 ff. of the Code of Criminal Procedure); the German *Absprachen* (§ 257c of the German Code of Criminal Procedure); Belgian plea agreements *ex* art. 216-*bis* of the Code of Criminal Procedure; the Luxembourgish "*jugement sur accord*" (Articles 563 ff.).

Even though negotiating tools in criminal justice were not conceived aiming at terrorism cases nor to potential collaborative practices in this domain, they perfectly fit the scope of alleviating the sanction for minor offences related to terrorism, especially when those practices are allowed from the very beginning of the investigation and do not require the validation of a judge.

Rewarding measures that are applicable during the trial phase – *i.e.* once the person has been charged with a crime-, are mostly related to substantive criminal law[11]. Nevertheless, there are interesting procedural implications of those measures that we will briefly analyse.

Repentants might be rewarded with excuses or attenuating circumstances. While excuses totally exonerate the accused, attenuating circumstances only grant her or him a reduced sentence and are applied in the sentencing phase of trials.

3. *Conditions for the applicability of rewarding measures*

This third section examines what is necessary for a collaborating offender in proceedings for terrorist crimes to be granted rewarding measures, not in terms of the type of rewarding measure (again, this issue relates more to a substantive law approach) but more as concerns conditions for any rewarding measure to be applied in each actual case.

From an overview of the Member States under consideration, it seems that four classes of criteria can be identified by bringing together the different national legislations, aiming to draft a comparative scheme: the degree of severity of the offences committed (3.1); the moral and material interest shown by the repentant towards the victims of the crime (3.2); the ascertainment of a proper or authentic repenting (3.3) and, above all, the truthfulness and usefulness of the information provided by the repentant (3.4).

3.1. *Degree of severity of the offences committed*

First of all, our comparative analysis reveals divergent approaches to the controversial issue regarding the seriousness of offences committed by the repentant. In fact, on the one hand we have countries where the applicability of rewarding legislation is merely limited to terrorist or subversive offences, without any mention to seriousness limits. On the other hand, however, some national legislators introduced general rewarding provisions, whereby applicability of rewarding measures requires the offence committed by the repentant to fulfill certain procedural conditions depending on its de-

[11] See M. Cancio Meliá, S. Oubiña Barbella, *Substantial Law Issues: Selected Problems* (Section II, Chapter 5).

gree of seriousness. Thus, in some legislations, such as Belgium and Croatia, the punishment prescribed for the criminal offence committed by the collaborator must be lower than that prescribed for the offence in respect of which s/he is testifying[12]. Moreover, the degree of severity of the acts committed by the collaborator may become relevant also in determining how far the penalty can be reduced, as the more serious the offences are, the more sentence reduction must be limited[13]. In German legislation, the repentant is required to have committed an offence that is punishable by an "increased minimum sentence of imprisonment" or a "life sentence of imprisonment"[14].

Finally, it is also interesting to notice that some national legislations set out certain conditions concerning the seriousness of the offence on which the repentant provides information. In certain countries, such as Germany and Belgium, rewarding measures can only be applied if information regarding a predetermined catalogue of serious criminal offences is disclosed: this catalogue is usually given by reference to procedural provisions that originally aimed to determine offences for which phone taping is authorised[15].

The table below illustrates different conditions that the offence committed by the repentant needs to fulfill for the purpose of applying rewarding measures.

IT Applicable to the most serious crimes (at post-sentencing stage, relevance of the crime the "repentant" committed + criminal attitude will be considered).

D Limited to serious crimes.

E *All* of the felonies under Chapter VII of Title XXII of Book II entitled "*On terrorist organisations and groups and on felonies of terrorism*".

HR The punishment prescribed for the criminal offence for which the witness would not be prosecuted must be less than that prescribed for the offense in respect of which s/he is testifying, and must not be punishable with imprisonment of ten years or more – Article 286(4) CPA.

BE The principle of proportionality does not authorise collaboration if the offence committed by the informant is more serious than the crime informed upon.
The more serious the offences are, the more sentence reduction must be limited.

LU Reward measures do not have a general nature but are applicable only to specific offences: organized crime and terrorism.

F Applicable to serious offences against the person (Book II of the Criminal Code), to serious offences of damage to property (Book III) and to offences against the Nation, the State and public peace (Book IV).

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[12] See Croatia, cit., § 2.2 ff. See also Belgium, cit., § 2 ff.
[13] See *ivi*, § 2.2.1.3.
[14] See Germany, cit., § 3.2.1.1.
[15] See Belgium, , cit., § 2.1. See also Germany, cit., § 3.2.1.2.

3.2. *Proper/authentic repenting*

The second procedural condition that is normally taken into account for the purpose of granting rewards is the ascertainment of a proper or authentic repentance. From a comparative analysis of the relevant jurisdictions, what emerges is that an authentic repenting – at least in its ideological and subjective meaning – is almost never deemed necessary for a collaborating subject in proceedings for terrorism crimes to be granted rewarding measures. This means that the inner sphere of the repentant and the adherence to the values expressed by the institutional and legal framework are not relevant for the purposes of granting benefits[16].

On the contrary, and according to a more objective understanding of repentance, most national legislations subject the applicability of rewarding measures in the field of terrorism to distinct conditions depending on behaviours of the repentant that are indicative of the unequivocal willingness of the repentant to actively cooperate with the legal process and to abandon the terrorist goals. In this light, the most common indicators taken into account to opt for a reduced sentence are the analysis of whether the choice to cooperate with the legal process came from a voluntary behaviour of the repentant – i.e. without any form of external compulsion[17]; the full confession of criminal activities as the principal obligation in order to benefit from the reward[18]; the disengagement or dissociation of the collaborator, that is to say the reversibility of the severing of ties with criminal organizations and the definitive renounce to the terrorist or subversive goals[19].

In sum, the idea of proper repentance that emerges from the abovementioned conditions is merely utilitarian and objective, and it aims at assessing those tangible and positive collaborative behaviours that are indicative of the repentant's willingness to usefully cooperate with the legal process in an antithetical way to the collaborating subject's continuity in the terrorist organization.

The table below illustrates indices of repentance which are deemed necessary for the purpose of granting reward measures.

IT	Full confession of all crimes (but what crimes? Only terrorism-related). Disengagement. Case law: no need to enquire on "the inner sphere of the repentant" v. "proof of moral redemption, a critical review of the offender's past life and an aspiration to social reintegration".	Artt. 2-3 L. 304/1982

[16] See Italy, cit., § 1.3.3 ff.

[17] See Germany, cit., § 3.2.1.4.

[18] This is the case for Italy, Germany and Spain, where the repentant is obliged not only to disclose information about offences committed by a third party, but also about all crimes committed by himself; however, it is not necessary to confess crimes that are completely unrelated to terrorism and subversion, as only the terrorist experience of the offender can be considered pertinent and relevant. See Italy, cit., § 1.3.2. See Germany, cit., § 3.2.1.3. See Spain, cit., § 2.1.

[19] See Spain, *ivi*, § 2.1. See Italy, cit., § 1.3.4.

D	Voluntary (no external compulsion) disclosure of information about an offence under Section 100a para. 2 StPO.	Section 46b StGB
LU	No requirement to "renounce to future criminal or terrorist activities".	
E	Double requirement: voluntary quitting (renounce to the goals) + confession.	Art. 579-*bis*, III C.p.
HR	Factual and credible testimony, tell the truth, not withhold any information known to him/her about the criminal offence of which s/he is testifying and the perpetrator of that offence.	Art. 286(3) CPA
F	No general obligation on the person enjoying the status of repentant applies, but certain obligations may be imposed as part of the protection mechanism provided for by the law.	Artt. 706-63-1 CCP

3.3. *Moral and material interest shown in the victims of the crime*

Adopting a balanced approach in between objective and subjective meanings of "repentance", some national legislations also seem to take into account the moral and material interest shown by the repentant in the values which have been breached by the commission of the crime and, more specifically, in the victims of the crime. As regards the assessment of the requirements to grant conditional release, Italian case law sometimes takes into account victims of terrorism and the interest shown by the collaborator in the ethical and social values that have been breached and in the victims of the crime, as well as the restoration of its damages and consequences and the assistance, altruism and solidarity shown[20]. Moreover, as regards for instance the Belgian rewarding system, the obligation to compensate for damages caused is supplemented by a provision stipulating that the promise made to an individual who does not compensate for damages can be revoked[21] However, even though victims' failure to forgive is almost never an obstacle to granting rewarding measures, the effects of the offence on the latter may constitute an important element in determining how far the penalty can be reduced, as stated in the German legislation[22]. Conversely, in Croatia there is a general duty to previously obtain the consent of the victim before reaching a plea agreement in serious crimes[23]. Most notably, the acknowledgement of the facts and the victims' reparation have recently acquired a significant importance within the Spanish Restorative meetings experience, which, though initially conceived as entailing purely personal consequences for the parties (i.e. meetings between victim and perpetrator),

[20] See Italy, cit., § 1.3.5.1.
[21] See Belgium, cit., § 2.3.2.
[22] See Germany, cit., § 3.2.1 ff.
[23] See Croatia, cit., § 2.2.1.

informally started to have an impact on the granting of permits, the lowering of the penalty and the granting of probation[24].

Most jurisdictions provide more or less articulated systems of protection of endangered witnesses. It often appears that these persons are in serious and current danger due to the collaborative conduct in relation to certain crimes, including those committed for the purposes of terrorism. However, some witness protection laws come with important deficiencies. For instance, the Spanish legislation proves to be inadequate and obsolete insofar that it does not cover co-defendants[25].

The table below illustrates the relevance attributed by each Member State to interests and values which are safeguarded or sacrificed by collaboration for the purpose of granting rewarding measures.

IT	For conditional release: interest shown in the ethical and social values that have been breached and in the victims of the crime, as well as the restoration of its damages and consequences and the assistance, altruism and solidarity shown.
	No need for forgiving by victims.
D	General duty, when deciding on the exact severity of the penalty, to take into account the effects of the offence on the victim (Sec. 46 StGB).
BE	Obligation to provide compensation to victim (Art. 216/2 c.p.p.) (failure to do so might constitute a ground for revocation)
HR	Consent of the victim needed for plea deals in serious crimes.
	Protection for endangered witnesses.
E	Inadequate/obsolete witness protection law (does not cover co-defendants).
	Restorative meetings experience – informally started to have an impact on the granting of permits, the lowering of the penalty and the granting of probation.
LU	No witness protection program. Possible to ask for other MS' cooperation if relocation is needed. No case law.

3.4. *True and useful information provided. Voluntary disclosure and time limits*

Last but not least, the most common indicators taken into account to opt for a reduced sentence is the assessment of the quality and quantity of the information provided by the repentant. To this aim, it is paramount that the informative statements provided by the repentant are proved to be com-

[24] See Spain, cit., § 2 ff.
[25] See *ivi*, § 2.8.

plete, true and useful. More specifically, within the criminal justice system, the quality of information obtained through rewarding mechanisms might carry a twofold meaning: on the one hand, they might be useful in discovering and prosecuting other serious offences whose existence was previously unknown to the investigating authority; on the other hand, they can be used to prove in full or in part other crimes whose investigations and/or trials were already ongoing. Moreover, most national legislations also provide for some consequences in case the information turns out to be reticent or false. In this respect, it is necessary to distinguish between two cases. On the one hand, if the repentant has been granted early dismissal, s/he will remain under the risk that a new case can be opened if hints of falsehood in the statements later emerge. On the other hand, when the case has been closed with a final judgment, if there is no explicit ground for revocation, the repentant will be safe from any subsequent governmental check. There might also be a different case if the information was not useful in a prosecution but the fault of this lack of usefulness could not be placed upon the repentant (generally because she or he was a low-ranked member of the criminal organization and/or the criminal structure was a rigidly compartmentalized one). Most of the developments in case law – particularly in the Italian one[26] – indicate that the contribution could be acknowledged, even just to help in deradicalization and disengagement processes.

The table below illustrates how each Member State defines the type of contribution they require of repentants and whether there is a formal chance to revoke the rewarding privileges, should it later emerge that the information provided was forged or simply incorrect.

IT	Evidence that the author, after having voluntarily prevented the event (even without dissociating), must provide to the authority to reconstruct the fact and to identify any accomplices (*decisive*, *complete*, and *truthful*).	Artt. 5-16-*quinquies/septies* D.L. 8/1991 Artt. 2-3-10 L. 304/1982
	Duty to sign the minutes of declarations.	
	Possibility for revocation of rewarding measures in case the information turns out to be false or reticent (before or after a final judgment).	
DE	It must be a useful contribution to the investigation.	S. 164 para. 3 StGB
	Possible revocation.	
BE	Information on an offence listed in article 90-*ter*, § 2-4 c.p.p. which has to be suitable in order to achieve "disclosure of the truth". Collaboration must be indispensable to impart criminal justice.	Art. 216/1 c.p.p.
	Possibility for revocation of rewarding measures.	

[26] See Italy, cit., § 1.3.3.

HR	In order to obtain witness immunity, a person must state that s/he will testify in criminal proceedings as a witness and that s/he will not withhold any relevant information.	
LU	Duty to provide to the authorities information either on the existence of acts preparing the commission of the offences related to terrorism listed in the said provision, or on the identity of the authors of those acts; or of the existence of the group and, at the same time, the names of its leaders or deputies. No formal possibility for revocation.	Art. 135-7, 135-8 c.p.
E	*Collaborated actively with the authorities to prevent the felony taking place or effectively aids the obtaining of decisive evidence* to identify or capture the others who are responsible, or to prevent the action or development of the terrorist organisations or groups to which he has belonged, or with which he has collaborated (risk of applicability only to leaders of terrorist groups). No special revocation provisions.	Art. 579-*bis*, III c.p.
F	No explicit ground for revocation.	

4. *Relevance of the timely occurrence of the collaboration: pre- and post-sentencing*

4.1. *Reduced sentencing*

Even though it can be generally said that the assessment of the truthfulness and usefulness of information disclosed by the repentant is a procedural condition common to all relevant jurisdictions and, consequently, may be very easy to harmonise, nonetheless it may produce unwanted consequences in terms of temporal sequence of different criminal proceedings linked by the existence of declarations coming from a repentant. As already mentioned, in the trial phase, before sentencing occurs, the contribution of the repentants' declarations and admissions, as well as implications of other subjects, will have to be proved, in terms of their use in other proceedings. However, the proceeding in which the repentant is to be sentenced often comes to a conclusion much earlier than those other proceedings in which her or his declarations may be used as evidence against someone else. So, there is an *ex ante* judgment in the absence of an effective assessment of the usefulness and truthfulness of those statements. A suggestion for the legislators for a more efficient tool might be a suspension of her or his sentencing,

under several conditions, including a later check of the use of the declarations in the other proceedings.

4.2. *Post-sentencing*

When it comes to the post-sentencing phase, several tools have been put up in order to deal with the possibility that a subject who has already been convicted might decide to start testifying against her/his former co-conspirators and/or fellow members of criminal organizations. Rewarding measures including the tempting opportunity to obtain a reduction of the sentence or a special conditional release (on parole) after the conviction occurred[27]. Whenever this decision is made during a prison stay, the repentant is informally referred to as "prison snitch", often conveying to the prosecution information about what the convict learns within the prison itself (not only about her/his previous criminal activities).

Notoriously, the post-conviction behaviour, including collaboration with public authorities, is taken into account within a whole series of behavioural assessments, from licences to reward permits, to alternative forms of detention to semi-freedom or even parole and conditional release[28].

The table below illustrates the wide array of potential post-sentencing benefits in the several Member States:

IT	Cumulation of sentences for terrorist offences.	Artt. 8-9 L. 304/1982
	Granting of special conditional release.	Art. 4-*bis*, 58-*ter* L. 354/75
	Prison benefits and alternatives to detention (double track: D.L. 152/1991 and 306/1992).	Art. 16-*nonies* D.L. 8/1991
	Protection measures granted to informants.	Art. 9, III, *ibidem*.
D	Protection for convicts deciding to testify.	Section 57 StGB
BE	Possibility for prosecutors to promise the suspension of the execution.	Art. 216/6 c.p.p.
HR	Reduction of sentence[32]	Artt. 37(1) - 43(5) of the Act on Anti-Corruption and Organized Crime Prevention Office and Art. 497(2) CPA
	Possibility for release the person on parole beyond the time limits that are prescribed by a special legislation.	

[27] E.g. Croatia, cit., § 2.2.3.
[28] Italy, cit., § 1.3.5; Germany, cit., § 3.2.2.2.

E	Suspension of the penalty imposed as well as the granting of probation require the convict *to show unequivocal signs of having abandoned the ends and means of the terrorist activity and has also actively collaborated with the authorities.*	Art. 90.8 General Penitentiary Organic Law
	Pardon: suspend totally or partially the penalties imposed by final judgement, to those convicted of any offence, terrorism included (quite used until 1996).	Law 18.6.1870, modified by Law no 1/1988
LU	Relevance in the behavioural assessment on prison benefits.	
F	Provides that an exceptional post-sentencing reduction of sentence.	Art. 721-3 c.p.p.

5. *Conditions for the use of the declarations obtained (probative value of declarations) in exchange for rewarding measures*

The third section of this report focuses on the probative value of declarations and statements made by repentants in exchange for rewarding measures (be they the reason of the dismissal, excuses or attenuating/mitigating circumstances). This analysis, based on the structure of the questionnaire, identifies the counter line of the use of information obtained through rewarding measures in other criminal proceedings.

To this aim, we distinguished between two cases, namely the case in which the repentant is treated as an *informant* and that in which s/he is treated as a *witness*. On the one hand, if the repentant is treated as an informant, the probative value of the information gathered through repentants is often limited, whose declarations are merely informative and cannot be directly used in the evidence-gathering phase of the proceedings. Among the instances emerging from the Member States' reports of cases where repentants are treated as informants, it is interesting to note that both Belgium and Luxembourg provide for the formal possibility to take into account information obtained by informants (referred to as *"indic"*), whose identity is not recorded or disclosed in the case file and whose hints cannot be used in any formal way but only as a way to direct the action of the investigative agencies[29]. In the Italian context, Art. 16-*quater* D.L. 8/1991 provides that all declarations by a single repentant must be made within a 180-day timeframe from the moment where the subject showed a willingness to collaborate. Statements made by the repentant after this deadline (and the minutes of the declarations related thereto) are to be kept secret, and not used in formal proceedings. However, those statements are not subject to a pathological prohibition (*inutilizzabilità*), and can still be used during preliminary inves-

[29] Belgium, cit., cit., § 2.6; Luxembourg, cit., § 2.6.

tigations, in the preliminary hearing, and in those trials based on investigative materials (such as the "*giudizio abbreviato*", abbreviated trial)[30].

On the contrary, if repentants are treated as witnesses, or a form thereof, the especially low credibility features of these subjects mandates an added level of precaution, usually in the form of compliance with two procedural conditions. Among the conditions that States place upon the use of declarations obtained from the collaboration of a former member of a terrorism organization are the prohibition to use them as sole evidence, and the need for those declarations to be backed by other sources of evidence. Statements implicating other subjects made in exchange for any form of reward can only be used as evidence jointly with external supporting evidence and never on their own. Repentants are at risk of producing confessions and declarations to the sole end of obtaining a reward and, as such, are under a "relative presumption of unreliability" and require a "search for external feedback"[31].

In the table below are listed the precautions taken in each considered Member State to reduce the risk of false implications and, as a consequence, wrongful convictions.

IT	Cannot be used on its own to convict someone: "statements made by any defendant for the same offence for which proceedings are being carried out or for related or connected offences are assessed together with other evidence confirming their reliability".	Art. 192, III-IV c.p.p.
D	declarations of the repentant made during the investigation process accusing another person do not automatically count as evidence in the main hearing.	Section 250 StPO
BE	Conviction can never be based solely, or to a significant extent, on testimony given under complete anonymity. The system of witnesses/collaborators as repentants for organized crime cases (in exchange for financial assistance) was approved by ECtHR in 2017. Then amended in 2018 to include terrorist cases.	Art. 189-*bis*, III c.p.p.
HR	Need for corroboration for witness immunity/ crown witness status to be granted (otherwise it can be revoked).	Artt. 286(6)-298 CPA
E	Corroboration standard. Overcoming of the sufficiency of co-defendants' declarations: Constitutional Court's judgement STC 153/1997, of the 29th of September 1997.	Case law

[30] Italy, cit., § 2.7.
[31] *Ibidem*.

LU	Status of witness or defendant in criminal proceedings: lack of specific provisions. General rules governing the admissibility and assessment of evidence: statements made by a co-defendant cannot form the sole and decisive evidence of conviction; no anonymous testimony[32].	Case law
F	If the statements merely corroborate other evidence of the guilt of the persons charged, they may be taken into consideration by the investigating or trial courts, in accordance with the principle of freedom of evidence.	

6. *Conclusions*

From a comparison of the six national reports, it emerges that there are persistent and deep divergences in national criminal justice systems, even among Member States of the EU.

Firstly, it is undeniable that there are different rules depending on whether or not the Member State has a specific history with either national (*e.g.* Italy, Germany, Spain) or international (*e.g.* Belgium, France, Croatia) terrorism. At the same time, there are still countries (*e.g.* Luxembourg) with little to no case law, which have been implementing supranational obligations and duties to criminalize certain conducts without perceiving the urgency other countries, hit by terrorist attacks, cannot forget.

At the same time, it appears extremely hard to harmonize these norms among countries with discretionary and mandatory prosecution. In fact, countries whose criminal justice systems are based on the principle of opportunity wield discretionary dismissals more as one-size-fits-all measures and require less precise legislative interventions.

However, some similarities also emerge, leading to potentially harmonizable aspects. This is particularly apparent when it comes to the probative value of repentants' declarations: indeed, there is a rule of evidence in most Member States, in compliance with ECHR's case law, stating that those statements require external corroboration from other sources of evidence.

The structural differences in different legal systems cannot be solved through a partial harmonization, especially if one considers that the criminal procedure choice between a mandatory prosecution system and a discretionary one is highly political, based on utilitaristic conceptions of criminal justice and rooted in national history. This mandates a cautious and pessimistic overlook of the need and sense of harmonization attempts in this field. An elastic approach, able to blend in the different contexts without cultural clashes, will therefore be needed when dealing with transnational investigations expanding over several jurisdictions. That could be the case, in the French-inspired systems, of a transformation from a more serious type

[32] Luxembourg, cit., § 2.6.

of criminal offence to a less serious one (*décriminalisation* or *décorrectionalisation*). This tool was typically considered rewarding as much as when it came to discretionally choosing whether or not to bring charges at all.

Another tool, employed by Luxembourg, is the transfer of jurisdiction, bringing the prosecution abroad and away from the Member State in which the investigation was first noted down in a criminal complaint. This is a partially useful empirical measure since the proceedings might continue elsewhere, in another country, if only the internal communication system between different Member States better served the needs of European and transnational criminal justice. This is a typical case of a doubt on the meaning of "rewarding", and specifically on whether it is limited to a single national system or, rather, whether one should consider the peculiar situation of supranational coordination to assess the "degree of overall rewards".

A further suggestion for the legislators for a more efficient tool in terms of reduced sentencing might be a suspension of her or his sentencing, under several conditions, including a later check of the use of the declarations in the other proceedings.

The sole threshold that can never be surpassed in the fight against any type of crime is the *ne bis in idem* principle, with a single trial and a single conviction, balancing all different interests at stake through the use of post-sentencing techniques as clearing houses, even in the case of more than one conviction to be implemented against a single person.

A last remark concerns the difference in approaching the rewarding measures in terms of high level of formalisation of the related procedures – such as Germany or Italy in which the procedural rules govern the type, the time and the quality of the statements – versus systems where the law is almost silent on procedural aspects – e.g. Spain or Luxembourg. Therefore, prosecutorial and judicial authorities enjoy a wide discretion in assessing the applicability of the aforementioned measures. This divergent approach makes more difficult to imagine an EU blueprint triggering a higher level of harmonization.

CHAPTER 5

SUBSTANTIAL LAW ISSUES: SELECTED PROBLEMS*

MANUEL CANCIO MELIÁ, SABELA OUBIÑA BARBOLLA

1. *Introduction: fundamental starting points*

It might be useful to identify, as the framework for more specific consideration of the different single issues, some of the fundamental starting points that differ in the different Member States (MS) subject to analysis:

a) Foundations of the institution

The conflict entailed in the whole area of rewarding measures (as already pointed out in their Report II by the L-Team), this is, between justice to be made – normative approach – for the offenses the repentant may have committed and the need to combat effectively terrorism – utilitarian approach –) has been solved in all examined member states, expressly or implicitly, in principle, in favour of the utilitarian/pragmatic approach (goals: prevention of further harm or to bring to justice the [other] perpetrators of terrorist crimes) which is the fundamental ground and rationale of establishing rewarding measures (as whereas 21 and 24 of Directive [EU] 541/2017 [the Directive] expressly state: "combat terrorism effectively").

As we know, the design of Art. 16 of the Directive implies that this goal can be achieved by the MS standing on two pillars: in order to see his penalty mitigated, the offender has to

i) "renounce" terrorism: D: "lossagen", F: "renoncer"; E: "abandonar"; I: "rinunciare") (Art. 16 *a*)

and

ii) furnish (new/relevant) information, which can be done in two forms:

– internal (punitive) collaboration related to an offense already committed: information

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to mitigate or prevent effects of the offense (Art. 16 *b*) I);
to bring to justice other offenders (Art. 16 *b*) II) or
to find evidence (Art. 16 *b*) III);

or

– external (preventive) collaboration to prevent further crimes of terrorism (Art. 16 *b*) IV).

This reward mechanism obviously stands in the tradition of similar provisions that have been implemented in many jurisdictions – especially in I – for offences related to organised crime.

However, it is not clear whether these utilitarian reasons work in the same way they do in organized crime, an issue that needs to be addressed since in some MS the tools for the rewarding measures related to terrorism crimes stem from earlier regulations drafted for organized crime.

Especially, we should consider that due to the ideological nature of terrorist activities (perpetrators consider themselves to be complying with a moral duty when entering terrorist activity), and as the Italian example in the 1980 years show, any public disengagement of the terrorist activity poses a severe threat to the internal cohesion of ideology-driven organizations as terrorist groups are, on one hand, and offer a theoretical approach to the specific wrongfulness of terrorist crimes (the so-called "political" or "expressive" element of terrorism), on the other.

In this line of thought, it is to be stressed that from the beginning it seems clear, even sharing a completely utilitarian approach for both areas when it comes to rewarding measures, that this approach must be specific for terrorism, as the phenomenon of terrorism – although it is a collective context in both cases – is qualitatively different from organised crime.

On a theoretical level, we should consider that certain elements of the offender's crime – the "attack on the democracy and the rule of law" – (whereas 2 Directive and an express element in some national legal definitions of terrorism), that is, the expressive, political and factual meaning of future menace to the State and its citizens, vanishes as terrorist offenders abjure their activity (especially important is the experience in I, whose regulation in the 1980 – and its rich case law – years explicitly targeted dissociated individuals, Saulus-Paulus cases). In this line, the (mandatory) element of "renouncement" implies this as a starting point, even if the Directive does not include means of deradicalization –an omission that has been a target of criticism – in its framework. It is obvious that other elements of the committed offences remain unaltered: the harm done to individuals, which of course does not weaken with a change of mind of the offender. But it also seems clear that, for instance, a no longer existing terrorist organization poses different problems to sentence enforcement than an currently acting terrorist group.

However, from this point of view, the tendency of some MS to allow an important participation of victims in proceedings (including the enforce-

ment stage, as in E, I) could prove a serious obstacle to the function of rewarding measures.

b) Historical and political context

Beyond this general utilitarian starting point, there has been a completely different evolution and origin of the rewarding measures regarding terrorist offences in the concerned states: in some cases, rewarding measures stem from experience in combating (common) organised crime, or simply resort to traditional rewarding means – created in completely different historical circumstances –. In others, the existing rewarding measures are due to a specific traumatic terrorism activity (this is the case of B (former regulation), D, E, F, I). Finally, in some MS, the regulation is a direct consequence of the EU harmonization process, as they fortunately lack practical experience with terrorist activity, at least in recent times (B: new regulation; HR; L).

These different paths have led to different types of regulation. These differences should be tracked in detail. The situation is completely different regarding the public debate on rewarding measures: from MS where this is completely out of politics, a technical debate and question (for instance, this seems to be the case in L; HR) to countries where this problem is at the very heart of a harsh political conflict (as in E).

c) Practical application

An important difficulty for any assessment of the different options in the concerned MS arises from the fact that there is no or very little case law. This implies an enormous difficulty to come really to know what the real scope of the respective regulation is.

The national reports show that the only relevant body of case law in the concerned MS is the one produced in I 1980-2000, related to past terrorist organizations (especially, the *Brigate Rosse*), which were part of a very different "wave" of terrorist activity in their ideological, geographic, and operational characteristics. However, even in I there is no recent case law; in most MS there is little or no case law (B [regarding current legislation drafted in 2018]; F; E; HR).

d) Need for a comprehensive analysis

As already pointed out by the Report II of the L-team on procedural aspects, it is very difficult to measure what the real situation in the MS is without considering different levels and features of practice of rewarding measures.

Therefore, we have to distinguish first between tools located in substantial, procedural (investigation and pre-trial proceedings) and penitentiary law, and, perhaps more important, between overt and somehow clandestine practices, especially, when the negotiation prior to court proceedings is located in the realm of "private" activities of the prosecutor's office. This is especially difficult to see in the case of informal agreements on charges or

prosecution that could take place in any given procedural system (whether there is a legality principle system or an opportunity system on prosecution).

Of course, the latter "clandestine" actions are especially difficult to track when they take place (as it is often the case) even in a prior stage, before the prosecutor's office is involved: in the hazy mist of intelligence, be it more openly by the internal intelligence (for instance: D with its *V-Leute*-system) or completely out of public survey (as e.g. in E, where there is no organizational separation between military and police and internal and external intelligence services, all activity being concentrated in the *Centro Nacional de Inteligencia*).

Secondly, it would be necessary to identify clearly the real weight of rewarding practices both in general institutions (as it is the case, for instance, especially in D) and specific tools designed for terrorism cases.

In any case, it seems clear that an approach to the real situation demands this thorough multi-level analysis, as there are evident functional equivalents between different stages.

This can be seen, for instance, in the example of I and E. In both MS, certain general legal possibilities in penitentiary law are used in a post-sentencing stage to counter strong restrictions of substantial or procedural law (this happens because of political reasons: in E, because these measures are the only way to "normalize" enforcement conditions that stem from a very restrictive substantial and procedural regulation, as any sign of some kind of "benevolence" towards terrorist perpetrators is immediately thrown into public debate depicting the executive that acts in this line as weak or even accomplice of the terrorists).

In the following, some selected substantial law issues will be addressed to try to compare the situation in the different jurisdictions depicted in the national reports (2.). On this basis, some concluding remarks and provisional assessments can be formulated (3.).

2. *Selected substantial law aspects*

a) Eligible offences

The scope of the eligible offenses for any rewarding measures depends on the regulation being terrorism-specific or more general (see *infra*, *e*); MS with measures restricted to terrorism will identify coherently terrorism offenses as eligible ones.

This implies that there will be huge differences in the MS depending on how the circle of specific terrorism offences has been drawn in the respective Code (and as long as the obligation to consider them "terrorist" offences established in art. 3, 14 of the Directive has not been met yet): from regulations as the one in E, where almost all severe offenses of the special part of the code can be "terrorised", that is, conceived as (aggravated) terrorism offenses, to MS where this legal label ("terrorism offence") is restricted to organization crimes (in the German terminology: offences that consist of having a certain relationship to a terrorist organization, i.e., membership or collaboration offences), as is the case in D.

MS with an approach that includes the use of general institutions for of rewarding measures present of course a broader scope.

The regulation in B lists a numerus clausus (held to be much too broad by the Focus Group) of severe crimes; also D, with an application of general measures in sentencing, lists a series of serious offenses;

b) Types of collaboration

Departing from the distinction in art. 16 Directive between internal (punitive) and external (preventive) forms of collaboration, the reports show that all MS incorporate both forms (with different requirements, though: see *infra*, *d*).

c) Relationship between the repentant's offense and the offense on which collaboration takes place

Some MS do not specify any requirements on this relationship besides that they have to be terrorist offenses (E, L, HR).

Other MS require expressly a proportionality analysis of both offenses (B), the existence of some relationship of the offense on which the information is given to the own offense of the repentant (D), that both offenses are "related and of the same nature" (F) and that they were committed for the same "purpose" (I).

d) Requirements for the information furnished by collaboration

The requirements regarding the quality of the information the repentant provides are different in formulation, but converge in the information being truthful, relevant and effective: in B's regulation, the information has to be "significant, revealing, truthful and complete"; in D, that it constitutes a "substantial contribution to discovery" or leads to the completion of the offense to be averted, and is given "voluntarily and timely"; in E, "decisive", effective and complete (as to the offenses committed by the repentant).

e) Specific or general regulation

Most MS establish a specific collaboration regulation for terrorism offenses (E, F, L, HR); in D, there is a mixed model, since general rules for sentencing are combined with terrorism-specific provisions (limited to selected offenses).

f) Scope of the consequences of collaboration: mitigation or exemption

E only provides for mitigation (which however can imply that e.g. in offenses of membership of or collaboration with a terrorist organization the resulting penalty in cases of sentence reduction would not imply necessarily an effective prison term); also, HR's regulation only covers mitigation (which is esteemed to be almost impossible in practice by the national report).

D allows exemption only for the crime of membership in/collaboration with a terrorist organization (up to a penalty of three years of prison term); F establishes the possibility of exemption before prosecution takes place (including organization offenses); I allows exemption if especially high require-

ments on the quality and effects of the information are met; L's regulation has both possibilities before and after prosecution.

g) Renouncement requirement

D, F, L do not require that the repentant has renounced his or her terrorist activity (although for the specific exemption rules regarding organizational offenses it is necessary that the repentant presents an effort to prevent the continued existence of the organization); B, HR establish that the repentant must not be a recidivist offender; E, I, HR require renouncement of the collaborator, with different degrees of intensity (including E the option that the repentant contributes to hinder not only the activities of the terrorist collective, but also its "development").

3. *Conclusions and provisional assessment*

a) General issues

aa) There are, as is well known in legal scholarship (and some national reports reflect, see especially the D report), a whole battery of lines of general or fundamental criticism on rewarding institutions based on arguments related to the rule of law, regarding the culpability principle, the principle of equality, and the effects of their function on the nemo tenetur-axiom that bars any pressure towards self-incrimination.

However, it must be stressed that these criticisms might present themselves in a different way in the area of terrorism offences, where the abandonment of a terrorist ideology ("renouncement") could imply a retrospective reduction of the expressive (political) contents of the wrongfulness of the crime committed (if no personal harm was done), as e.g. the exemption rule only for membership activities in D shows (or other general processes of collective de-escalation as the one led by the UK after the 1998 Good Friday Agreement in Northern Ireland might imply).

bb) A general difficulty in assessing the quality of harmonization provided by Art. 16 of the Directive lies in the piecemeal approach typical of UE criminal law harmonization: a certain criminalization standard or, as it is here the case, the possibility of a mitigation is established, and launched on the national legislators. But this is done without a proper prior analysis of the situation in every jurisdiction (and without a proper follow up to the implementation of the harmonization rules). This means that the house is being built beginning by the roof, as it is very difficult to grasp what the real effects of such measures in every national system are if procedural, sentencing and penitentiary law are brushed under the carpet and there is only a (fragmentary) focus on substantial law.

cc) Especially interesting seems in this context the problem – which has been out of the central focus of our approach – of the coordination of rewarding measures with the general institution of withdrawal/voluntary abandonment in the MS's legislations, in particular regarding organization

offenses (membership and collaboration; here there is a practice in some MS, e.g. in E and HR, not to use this institution in terrorism offenses; some national reports – for instance, F – stress that the practice of withdrawal in this area is very unclear; in I, some specific regulations were deemed to be special cases of withdrawal).

dd) An important field of the current wave of terrorism, especially in the EU, is the activity of isolated perpetrators without real organizational ties to a terrorist organization (so-called "lone wolves"). The design of Art. 16, requiring renouncement *and* information (or, in other words, the absence of a substantial law approach to de-radicalization) excludes this important group of offenders.

4. *Compliance with the harmonization standard*

aa) In general, it can be said that the national regulations are in line with the model designed by the Directive regarding the eligible offences, the relationship between the offences committed by the repentant and the ones on which he informs, the requirements on the nature and quality of the information provided by the offender, and the option for mitigation and/or exemption (Art. 16 does in our opinion not bar the possibility of the latter). However, the intensity of the requirements may lead to a situation where the regulation complies formally with the Directive, but the requirements make it virtually impossible to come to be effectively applied (this is the case of Spain: surrender + complete confession + renouncement + broad information).

bb) But the absence of the requirement of renouncement/abandonment of the terrorist activity, as pointed out in some national reports, seems a major failure to comply with the standard set by Art. 16, in our opinion. It is true that we are dealing with a facultative harmonization standard. But when engaged in introducing such a regulation, it seems that this element – as said before: essential to the area of terrorism because of its ideological bias – is an basic element of the model of rewarding measures designed by the Directive. To comply with it, national legislations need to incorporate this element (the L report offers a different interpretation of the scope of the harmonization obligation and holds that compliance is possible even without the renouncement element).

SECTION III

A “EUROPEAN MODEL” OF REWARDING MEASURES

CHAPTER 1

A MODEL OF REWARD MEASURES

LUDOVICO BIN

1. *Introduction*

The creation of a model of reward measures to be transposed in all national legislations in order to set up an effective strategy complementary to the traditional repressive one as well as favouring, by virtue of the approximation, judicial cooperation between authorities belonging to different Member States, required a deep preparatory analysis.

Accordingly, during phase II of the research, a comprehensive analysis of the common features and main differences between national legislations constituted a first inevitable step. Such an analysis, whose object was represented by the questionnaires completed by all units during phase I of the project, has been carried out by the Spanish unit for the substantive law aspects and by the Luxembourgish unit for what concerns the procedural aspects. Secondly, European law limits and criminological peculiarities had to necessarily be taken into account, in order to grant feasibility and efficiency to the model: these tasks have been carried out, respectively, by the Croatian unit, which provided for a deep analysis of the EU criminal law competences, and by the Belgian unit, which thoroughly examined the socio-criminological aspects of the potential subjects of the measures here at stake, *i.e.* modern jihadist terrorists.

Upon the findings of the research carried out by the units of Belgium, Croatia, Luxembourg and Spain it is now possible to draw some conclusions and draft a proposal.

2. *Feasibility*

As mentioned, an important premise of this research, since its original draft, has been the assessment of the concrete feasibility of any proposal regarding the exploitation of reward measures.

Given the harsh debate occurred in those States in which reward legislation has firstly been resorted to (namely Italy and Germany) and the ethical dilemma that negotiation with terrorist evidently brings with, a first obstacle to be addressed was represented by the possible political opposition to such type of strategy, following the notorious American catchphrase "*We don't negotiate with terrorists!*"; and this even more considering the major role of national Parliaments in the current "post-Lisbon" EU legislation procedures on the matter[1]. Furthermore, the reward strategy so far applied was targeted to subjects different from those of the present days: modern jihadist terrorists do significantly differ from the strictly political ones of the "Years of Lead". Therefore, the sensibility and vulnerability of such new targets needed to be ascertained before any proposal could be forwarded.

With respect to the first issue, it has been noted that the conflict between the "justice to be made approach" and the "utilitarian approach", i.e. between the need to grant a just punishment to such despicable offences and the need to effectively contrast terrorism, has somehow been resolved in all States analysed, expressly or implicitly, in favour of the latter approach[2], as demonstrated by their adoption also in those States in which the former 'national terrorism' was not experienced[3]. Indeed, although many States provide for reward measures not specifically targeted on terrorism, terrorism-related offences always fall within their scope[4]. Moreover, while the EU seems to possess the necessary competences to legislate on the matter[5], reward legislation does not seem to produce the same conflicts with fundamental human rights produced by the repressive counter-terrorism legislation[6].

With respect to the second issue, an in-depth analysis has been conducted on the peculiar features of modern terrorists[7], whose aim could of course not be that of guaranteeing a full certainty of the concrete effectiveness of reward legislation but rather eliminate the full certainty of its ineffectiveness. Notwithstanding the increased difficulty to treat with some types of modern terrorists, and although it could be maintained that a more effective solution would consist in collective measures such amnesties instead of individual negotiation[8] (whose outline falls however outside the scope of this research), many factors have been traced that might make the terrorist offender much inclined to cooperate (e.g.: disappointment for the

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[1] See Section II, Ch. 3, § 4a.
[2] See Section II, Ch. 5, § 1a.
[3] See e.g. Section I, Ch. 6, § 3; Section I, Ch. 2, § I.1.
[4] See Section II, Ch. 4, § 3.1.
[5] See Section II, Ch. 5, §§ 4a, 6; see also Section II, Ch. 1C, § 2.
[6] For an overview, see Section II, Ch. 5, § 5.
[7] See Section II, Ch. 2, § III.2.
[8] See Section II, Ch. 2, §§ III.3.1, III.3.3, *Conclusion*.

actual behaviour of other members) and both material and symbolic gains to which he/she might be sensible to; moreover, negotiation has been deeply studied through the years and many 'tactics' have been by now developed[9].

3. *Brief summary of the comparative analysis*

While the very concept of terrorism is not univocal nor uncontroversial[10], also the field of reward legislation is characterized by the «use of different legal lexicons, amplified by the lack of a single, all-encompassing term to define rewarding measures»[11]. In this restricted sector, however, unlike that of traditional repressive criminal provisions, harmonization has not been convincingly pursued: there are in fact several differences and only few similarities in the current reward legislation on terrorism in the EU Members States. Such differences may be broken down in different categories: according to their 'substantive' or 'procedural' nature, to the procedural phase in which they come into play, to the type and degree of reward, to the conditions for their application.

The first differentiation, however, appears to be not so satisfying, as – apart from the difficulties in tracing a clear-cut line between these two "natures" – only those measures that may be enrolled in the pre-trial phase do actually possess a clear procedural nature, while the others generally regard the sanction and therefore enjoy a fully substantive nature[12]. Furthermore, Directive 541/2017/EU does not provide for any procedural provision. Hence, given that the procedural or substantive *nature* of a measure does not produce here any relevant consequence (unlike as for the issue of the choice of the proper legal basis to use in case a further harmonisation will be pursued), a greater attention will be paid to the *effects* that such measures produce.

Leaving for the moment unaddressed the post-conviction phase (which will be further elaborated *infra*, § 7.2), where differences are even higher, what clearly emerged from the analysis is that the main difference most of all dividing the legal systems examined consists in the mandatory or discretionary nature of prosecution: in some States (notably Belgium, France, Luxembourg and Germany) discretionary prosecution allows a significantly wider possibility to cooperate with the perpetrators, allowing actual "negotiations" which range from the re-qualification of the fact to the charge dismissal, without a full control by the judge, including also the possibility to transfer the jurisdiction to another State; in other States the judicial control may never be diverted and the concession of a reward measure is conditioned to the satisfaction of some formal requirements. Furthermore, among the latter, not all Member States allow for forms of extinction of the penalty, limiting the possibilities to a reduction of its entity or to other benefits in the phase of penalty execution[13].

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[9] See Section II, Ch. 2, § III.3.3.
[10] See Section II, Ch. 2, § I.1.1.
[11] See Section II, Ch. 5, § 1.
[12] See *Ibidem*.
[13] See Section II, Ch. 5, § 2.

Besides the "type" of measures, huge discrepancies characterize also the conditions for their application: although all legislations require similar conditions for what concerns the *quality* of the information that the collaborator must supply to the authorities – which shall always be truthful, relevant and effective[14] – only some States require dissociation[15], whereas some States require the actual dismantlement of the whole terrorist organization[16] or a high number of cumulative requirements[17]. Moreover, some States are concerned about the dangerousness of the offender[18] and take into greater consideration the role of the victims[19].

Relevant differences also regard the scope of the measures, which are not always specifically targeted to terrorist offenders but extend to all (or many other) crimes. In addition, some States do provide only for specific terrorist-related offences, while other States provide for aggravating circumstances able to "transform" any common crime in a terrorist-offence; and this produces a notable disparity considering that in some States only some selected terrorist offences may be eligible for the application of provisions on collaboration[20].

Lastly, although almost all legislation in which reward measures are provided for do not differentiate between "internal" (i.e. in relation to the offence for which the collaborator is prosecuted) and "external" (i.e. in relation to other offences) cooperation, but do encompass both forms, only some States require a further analysis in cases of external cooperation, aimed at assessing the proportionality between the offence for which cooperation is supplied and the offence committed and on which the reward shall produce its effects[21].

4. *Preliminary considerations for a common model of reward measures*

4.1. *The relevance of judicial cooperation potential issues*

A first preliminary remark to be taken into account before examining what model of reward measures should be spread between all Member States regards the "purpose" that must be taken into account: the measures should in fact be modelled keeping in mind the necessity to facilitate judicial cooperation between authorities of different Member States. However, this does not mean that only actual transnational facts – *i.e.* facts that have been committed in the soil of more than one Member State – shall be addressed, while facts fully committed on a purely national territory should be devoid of relevance[22].

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[14] See Section II, Ch. 5, § 2d; Section II, Ch. 5, § 3.2.
[15] See Section II, Ch. 5, § 2g.
[16] See Section I, Ch. 3, § 3.3.2.
[17] See Section I, Ch. 7, § 2.1.
[18] See Section II, Ch. 5, § 3.1.
[19] See Section II, Ch. 5, § 3.3.
[20] See Section II, Ch. 5, § 3.1; Section II, Ch. 5, § 4aa.
[21] See Section II, Ch. 5, § 3.1.
[22] The question of the importance of a fostered transnational judicial cooperation across the EU in the field of reward legislation will here not be further examined, but rather

Notwithstanding the fact that the resort to EU legislation for the harmonization of the national criminal legislation seems to be justified only among cases of cross-border dimension, it is nonetheless to be noted that this "dimension" in relation to which art. 83 TFEU allows criminal law approximation is defined by that very disposition as «resulting from the nature or impact of such offences or *from a special need to combat them on a common basis*». Accordingly, and as already maintained[23], art. 83 TFEU does not only refer to crimes that are committed in more than one "national soil" but could also encompass those cases whose perpetration has been carried out in a single country, as long as they may be reconnected to a common threat (or fight) such as 'modern' terrorism[24], whose transnational dimension is not generally due to the modalities of factual commissions but primarily to the preparatory acts[25].

Indeed, the very concept of approximation in the criminal law sector is arguably justifiable only inasmuch as it does effectively foster judicial cooperation. Outlining a model without considering such fundamental aspect would instead lead to concede a considerably wide margin of appreciation to the Member States, because of the disparities already existing in the individual criminal law systems – e.g., and above all, the mandatory/discretionary prosecution – which obviously require different types of measures. This is the evident reason why art. 16 of Directive 541/2017/EU has been featured as only optional; however, such a model of reward legislation risks increasing national disparities instead of reducing them[26].

Hence, the necessity to ensure a smoother and more effective judicial cooperation requires a model of reward legislation non-optional and aimed at overcoming the many differences that inevitably characterize the different national legal systems.

4.2. *Limits of EU law and the need for 'substantial' approximation*

On this perspective, the most relevant issues for judicial cooperation would evidently derive from the profound differences currently existing for what concerns mandatory or discretionary prosecution. Secondly, among the legal system in which prosecution is mandatory, also the difference between mere reduction and full exclusion of the penalty, as well as the differ-

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taken for granted, as the whole research has been justified upon it during the proposal draft. On the fundamental importance of cooperation between different national offices and forces in Italy during the fight against the national terrorism of the Years of Lead cf. Section I, Ch. 1A, § 1 (and, for what concerns the fight against modern terrorism, § 4).

[23] See Valsamis Mitsilegas, EU Criminal Law after Lisbon: Rights, Trust and the Transformation of Justice in Europe, Hart Publishing, 2016, Chapter 3; Petter Asp, The Substantive Criminal Law Competence of the EU, Jure, 2013; Hester Herlin-Karnell, EU Competence in Criminal Law after Lisbon, in Andrea Biondi, Piet Eeckhout, & Stefanie Ripley (eds.), EU Law after Lisbon, Oxford, 2012, Chapter 16.

[24] Which is indeed listed among the key areas of the European Agenda on Security. On the European and not-merely-national relevance of terrorism see Section II, Ch. 5, § 4a.

[25] On the typically transnational nature of modern terrorism cf. Section II, Ch. 2, § I.2.2. For a concrete overview in the Italian experience see Section I, Ch. 1B, § 2.

[26] See Section II, Ch. 1B, § 4.1. On the "blatant need" for a much more harmonized and transnational approach to terrorism investigation see Section II, Ch. 5, § 1.

ences in the conditions for application of the measures do increase the risk of a refusal to the cooperation request: the authorities of a State in which a less-favourable measure is consented could refuse to cooperate with the authorities of a State in which the suspect could be acquitted without even being brought before a judge, because the national law would instead require a conviction; and, on the opposite, the authorities of a State in which prosecution is discretionary could refuse to cooperate with the authorities of a State in which the suspect would be inevitably convicted, because this would involve a less efficient 'negotiation'.

However, although the best solution would arguably consist in aligning all national legislation to the most beneficial measure already existing – *i.e.* the possibility to concede a dismissal already in the phase of preliminary investigation, by decision of the sole prosecutor – it must be noted that mandatory/discretionary prosecution depends on the outset of the single national legal system and is not disputable by EU law. Imposing a change upon the general rules of criminal prosecution goes far beyond the EU competences and is therefore not a pursuable option.

Therefore, given these irreducible – at least on the short/medium term – disparities, the search for a minimum set of measures that could be implemented in all Member State should be pursued keeping in mind the "substantial goal" of approximating the reward system, at the expense of the "formal equality" between the measures which grant such rewards: what is necessary is to provide for measures that do allow to reach the same effects, although they will be obtained through different 'formal' paths, according to the peculiarities of each national legal system.

5. *Searching for a "minimum common" measure*

5.1. *The transversal effect of penalty-excluding measures*

From the comparative analysis – and indeed at its basis, given the structure of the questionnaire distributed to the units[27] – emerges a clear differentiation of the currently existing measures according to the stage of the criminal proceeding.

As already noted, the most relevant differences between legal systems arise in the pre-trial phase. Here, the rewards mainly consist in the choice of the prosecutor to dismiss the case or reformulate the accuse under a different, more lenient offence[28]. On the opposite, in those States in which prosecution is mandatory, the rewards take generally place "inside" a plea agreement (although such tool is generally limited to less serious offences and the judge usually needs to approve it[29]). Although a comprehensive analysis would imply a deeper consideration of the role of secret services in States where prosecution is mandatory, on the grounds that secret services could to

[27] The questionnaire structure generally coincides with the summaries of the Chapters of Section I.

[28] See Section II, Ch. 5, § 2.

[29] *Ibidem*.

some extent manage a negotiation without being subject to any jurisdictional control[30], this seems to be incapable of putting the two types of systems at the same level: secret services do not always nor everywhere enjoy freedom of action[31] and such a solution would evidently not cover those cases in which cooperation starts after the prosecutor has initiated the investigations.

At the sentencing stage, the differences are less marked, as the types of measures are generally twofold: an extenuating circumstance or a ground for exclusion of the penalty. Besides the different requisites for "accessing" the measures – which require a further and deeper analysis – the "typological" differences here only reside on the possibility to reach an acquittal or not.

As already mentioned, the measures operating in the pre-trial phase arguably possess a procedural nature; but they also produce a substantive effect: the requalification of the fact produces a decreasing of the penalty, while the case dismissal ends up in excluding it all along.

Such "nominalistic" considerations partly work also the other way around and highlight an important consequence. Among the measures that have so far been 'placed' in the sentencing phase there is in fact a pivotal difference between those that do attenuate the penalty and those that allow for its full exclusion: while the first possess only a substantive effect – that on the final penalty – the second do also produce transverse procedural effects.

A cause that excludes the penalty does indeed affect the criminal proceeding to a much greater extent with respect to a mere attenuating circumstance, insofar as it generally precludes the very continuation of the proceeding. When a cause of exclusion of the penalty applies, the proceeding generally stops and the case is dismissed, even – and foremost – in those legal systems in which prosecution is mandatory. In such systems, the extinguishing effect rises as soon as the conditions are met, and this could be at the end of the proceeding but also at its very beginning. Hence, by virtue of this measure the dismissal of the case could be obtained by the prosecutor also in the pre-trial phase, and although a control by the judge in such cases is generally inescapable, it would most likely amount to a regularity check by a magistrate in strict contact with the investigation, that would presumably most often not bar this possibility: if the request is accepted, it would *formally* produce the involvement of the judge, but the effect would *substantially* be the same of a case-dismissal due to the discretionary decision of the prosecutor.

Therefore, while it may be argued that art. 16 of Directive 541/2017/EU already allows for measures aimed at reducing or even eliminating the penalty[32] – and keeping in mind the facultative nature of such provision – the minimum common reward measure able to overcome the unmatchable *formal* differences and reach a *substantive* approximation of the Member States legislation, thus favouring judicial cooperation without requiring re-

[30] See Section II, Ch. 5, § 1d.
[31] See e.g. the case of Italy: Section I, Ch. 1A, § 1.
[32] See Section II, Ch. 1B, § 3.2.2; Section II, Ch. 5, § 4aa.

forms that clearly fall outside the scope of EU competences, consists in a cause of exclusion of the penalty for the collaborator.

5.2. *Added 'communicative' value for those States in which prosecution is discretionary*

The mandatory implementation of a cause for exclusion of the penalty for terrorist offenders intending to cooperate would not only produce positive effects on those Member States in which prosecution is mandatory – which would indeed enjoy the possibility to bar the proceeding at the pretrial stage in a sufficiently similar way – but also in those in which prosecution is discretionary.

Here, in truth, such legislatively provided measure would probably be doomed to scarce practical application, since the prosecutor would enjoy extremely wide deformalized procedures[33]. However, the very existence of such measures in the written legislation would have an indisputable 'communicative' effect, inasmuch as it would let perpetrators know of the possibility to benefit of such measures in case they decide to cooperate, even prior to being arrested and approached by the investigators. Instead of being a mere possibility that the prosecutor may or may not propose or exercise, a legislatively provided cause for exclusion of the punishment would indeed ensure a greater legal certainty: if not even an actual right to obtain the reward, the perpetrator would at least unequivocally be granted that his/her collaboration will be taken into consideration. In fact, in case the prosecutor shall not deem the information provided sufficiently relevant and therefore initiate the trial phase, the existence of legislative measures would nonetheless ensure a further assessment by a judge.

6. *Conditions for application of the minimum common measure*

6.1. *Insufficiency of the current "state of the art"*

As stated by the Spanish unit, national legislations seem to be in line with art. 16 of Directive 541/2017/EU – and therefore homogeneous – for what concerns many aspects (although the concrete structure of these aspects in a given legislation may lead to substantial disparities)[34]: although reward measures are not always specifically tailored to terrorist offences, those listed by the mentioned Directive always fall within the scope of reward legislation; both the offence(s) committed and other terrorism-related ones may be object of cooperation; and the requirements on the nature and quality of the information provided is similar in all legislations.

However, besides the differences in the formal shape of other measures not falling within the scope of art. 16 (discretionary dismissal vs. plea agreements or cases of exclusion of the penalty; requalification vs. extenuating

[33] See Section II, Ch. 5, § 1.
[34] See Section II, Ch. 5, § 4aa.

circumstances, etc.), the current formulation of art. 16 does not clearly allow for exclusion of the penalty; moreover, national reward legislations also still differ for what concerns the requirement of 'renouncement' of the terrorist activity: some Member States do not in fact currently require such element (thus arguably embodying a major failure to comply with art. 16)[35]. Since this element represents not only a requirement embodied in art. 16 – whose transposition seems therefore mandatory for those States in which a mitigating circumstance is provided for terrorism-related offences – but also a common feature of the most experienced legislations[36], its necessity will be further analysed.

6.2. *The inopportunity of 'dissociation'*

Dissociation as a compulsory requirement for accessing a reward measure has characterized many counter-terrorism reward legislations[37]. The expansion of reward legislation outside the field of terrorism – especially towards that of organized crime[38], even though in some States the process has been reversed[39] – has however generally left behind such requirement.

The reason for the important role played by dissociation against the terrorist menace in the past years lies in fact in the peculiar nature of terrorist offenders, which is not present in other forms of crime. Arguably, terrorism is qualitatively different from other forms of organized crime because terrorist offenders consider their activities to be complying with a moral duty which is not comparable with the bond of any other kind organization[40]: the phenomenon of the s.c. *lone wolves*, acting on their own without any real 'human' contact with the organization other than the common moral purpose represents an indisputable example, not existing in other criminal organizations. Furthermore, dissociation was also justified on a much more theoretical level: the particular threat to "democracy and the rule of law" derived from terrorist offences, which contributes to legitimize a portion of the total penalty, vanishes as terrorist offenders abjure their activity: «it is obvious that other elements of the committed offences remain unaltered: the harm done to individuals, which of course does not weaken with a change of mind of the offender. But it also seems clear that, for instance, a no longer existing terrorist organization poses different problems to sentence enforcement than a currently acting terrorist group»[41].

Thus, on a theoretical perspective, the ideological nature of terrorist offences[42] should arguably make any public disengagement or dissociation a

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[35] *Ibidem*.
[36] See Section I, Ch. 7, § 2.1; Section I, Ch. 1, § 1.2.
[37] See Section II, Ch. 5, § 1a.
[38] See Section I, Ch. 1A, § 4.
[39] But on the basis of supranational acts that were strongly conditioned by the counter terrorism legislation already existing in the other Member States: see Section II, Ch. 5, § 1.
[40] See Section II, Ch. 5, § 1a.
[41] See *Ibidem*.
[42] See Section II, Ch. 2, § I.1.2.

severe threat to the internal cohesion of such ideology-driven organizations[43]; and even more considering that modern terrorism consists of not only a political, but also of a religious ideology[44]. Moreover, radicalization often presupposes the entrance into a group whose strength is built on a logic of solidarity[45], which boosts the whole process: the link of mutual dependence does not only strengthen the bonds within the group members, but also the tendency to radical violence[46]; plus, often family bonds also play a pivotal role[47]. Although the stronger these bonds are the less inclined to cooperate the offender will be[48], if negotiation is successful the consequent dissociation could perhaps weaken and deteriorate all the other still-existing bonds that are built in a similar way. The difficulties reside in convincing the offender, and obviously grow according to his/her degree of radicalization[49]; but cooperation is not impossible even in cases of persons previously disposed to their own sacrifice[50], and the outcome might be considerable[51], while reverse risk of strengthening other groups through the 'intergroup competition' logic does not seem decisive, as it may also work the other way around[52].

However, there are good reasons that suggest not to subordinate the access to reward measures to an actual "dissociation requisite" in this peculiar field of terrorism.

First and foremost, requesting for dissociation would probably prove to be counter effective, as it would most likely ingenerate a further perception of being discriminated not only among the arrested, but also with regard to all those who are even not yet fully radicalised: as it has been stressed out, the feeling of Islamic cultures being crushed by the occidental society is instead one of the main causes of radicalization[53]; this way, a legal provision imposing dissociation to all those who wish to cooperate would probably be perceived as a evidence that the State(s) aim at prevail upon enemy cultures[54]. The risk is that such an imposition, accompanied by the "blackmail logic" surrounding the reward measures, would not be seen as part of a conciliatory and far-reaching strategy but just like a part of the old mere repressive one, thus contributing to «reinforce the war logic that the terrorist strategy aims to create, potentially fuelling recruitment channels it wants to fight against»[55].

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[43] See Section II, Ch. 5, § 1a.

[44] See Section II, Ch. 2, § I.2.2, in which a political nature is also recognized to 'jihadist terrorism', and Section II, Ch. 2, § II.1 er seq., in which such ideology is broken down as well as the main reasons behind radicalisation. Cf. also Section II, Ch. 2, § II.2.2.2.

[45] See Section II, Ch. 2, § II.2.3.2.

[46] *Ibidem*.

[47] See Section II, Ch. 2, § II.2.2.2; Section I, Ch. 1B, § 7. However, families may also represent an obstacle or something to replace with the terrorist group: see Section II, Ch. 2, § II.2.3.2.

[48] See Section II, Ch. 2, § III.3.6.

[49] See Section II, Ch. 2, § III.3.1.

[50] Cf. the case reported by Section I, Ch. 1B, § 3.

[51] Cf. again Section I, Ch. 1B, *passim*.

[52] See Section II, Ch. 2, §§ II.2.3.2; III.3.6.

[53] See Section II, Ch. 2, § II.1.3.

[54] See Section II, Ch. 2, § III.3.3.

[55] See Section II, Ch. 2, § I.1.2.

Moreover, while disengagement/dissociation from a group and deradicalization are not synonyms[56], the first is a part of and presupposes the initiation of the latter, which consist of a complex medium/long-term process that requires specific competences – not usually at disposal of police officers or magistrates – and cannot reasonably reach its goal before the sentencing: a process of conversion to less violent and radical ideas is indeed likely to take years[57]. Requiring such a significant part of the process to happen already during the trial or even at the pre-trial stage would therefore most likely prove to be unrealistic and useless (as well as probably counter-effective). Dissociation should rather be considered in the post-trial-phase, where the deradicalization process is likely to take place with the due time and competence, without giving the impression of aiming at imposing a sudden change in the terrorist's belief system.

Lastly, an exclusion of dissociation from the reward pre-conditions does not seem to produce real negative effects. Dissociation usually consists in a concrete behaviour which is incompatible with a continuative loyalty to the terrorist group: a tangible betrayal. No full inner repentance and acceptance of the values expressed by the institutional and legal framework (subjective conception) is required in any national legislation, an objective conception being much more adopted[58]: indeed, the betrayal usually already consists in the very supply of relevant information[59]. Since providing for information represents the minimum indefectible threshold among the requirements for the application of a reward measure, some States also jointly demand for other complementary activities such as a full confession of the crimes committed or the spontaneousness of the will to cooperate, while only few require for a formal statement of dissociation[60]. While full confession – although "full disclosure" seems more appropriate – is likely to produce a tangible advantage at least for a first evaluation on the reliability of the repentant and of the information provided, dissociation would instead not compensate its risks with any tangible utility.

The most useful "place" in which to collocate dissociation seems therefore that of the execution phase, where the actual initiation of a deradicalization process could – and should – be followed, enhanced and controlled by competent experts. Notwithstanding the fact that fostering the undertaking of such processes is a priority at the European level, as well as the fact that deradicalization should somehow "award" to the undertaker at least penitentiary benefits, drafting reward legislation on the matter would require further detailed and comparative inquiries on deradicalization strategies, which fall out of the scope of this research (see *melius infra*, § 7).

Lastly, a strict term departing from the commission of the offence and beyond which no cooperation would be possible does not seem useful here:

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[56] See Section II, Ch. 2, § III.2.2.
[57] See Section II, Ch. 2, § III.3.2.
[58] See Section II, Ch. 5, § 3.2.
[59] See Section I, Ch. 2a, § III.2.
[60] See Section II, Ch. 5, § 3.2.

although some reward legislation did resort to such discipline[61], the context and the reasons behind this choice were too peculiar to be generalized and would not adapt to the above-mentioned criminological peculiarities of this sector, in which cooperation is likely to be initiated – without becoming useless – after quite some time. Furthermore, no "voluntary" requirement – intended as a request to cooperate arrived before the arrest – shall be maintained as necessary, insofar as it would significantly and unreasonably cut out the chances to cooperate for all those who did not surrender, thus strongly limiting the effectiveness of the whole strategy with no tangible trade-offs.

6.3. *'Utility' of the information provided: a first need for differentiation*

For what concerns the "minimum" indefectible element that shall be requested for the concession of the reward, *i.e.* the supply of relevant information, it has already been illustrated that all legislations seem to use similar criteria in order to evaluate the utility of the information supplied, which should – in sum – be true and useful[62]. However, for what concerns the criteria in order to ascertain the 'usefulness' of the information supplied, diversities arise and only some Member States adopt the same standard provided for by art. 16, which only accepts information that the authorities "would not otherwise have been able to obtain".

These differences highlight a fundamental basic question: whether cooperation shall be driven by a pure utilitarian logic[63] or spaces for sole reintegration purposes are also admissible. In other words, the logic of art. 16 gives no chances to the offender willing to cooperate, but devoid of relevant information, or maybe even in possession of relevant information but 'beaten on time' by another offender who possesses the same information.

In this perspective, allowing access to reward measures only to those who can provide the authorities with information that could not be obtained otherwise amounts to a condition that would not only require a quite difficult assessment by the authorities, but would also exclude from any form of cooperation people that might be willing to do so. Although the information they would provide might not be of extreme importance, they might still be useful to corroborate information provided by other subjects. Moreover, it must be considered that by virtue of the modern 'ways of radicalisation', which exploits much more than ever the means of internet, social networks and private messaging platforms, also the s.c. *lone wolves* might have something to offer in terms of investigative utility[64], even though not necessarily targeted to specific offences. Accessing specific social platforms from the inside could prove to be a quite useful tool of investigation, whose success does however not depend on the aspiring collaborator.

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[61] Such discipline was originally established in Italy: see Section I, Ch. 1, § 2.7.
[62] Cf. *supra*, § 3.
[63] See Section II, Ch. 5, § 3.2.
[64] Cf. Section I, Ch. 1B, § 7.

Furthermore, it must be considered that not only the information provided, but also the harmfulness of the offence committed by the cooperator may significantly vary from case to case (e.g., from mere financing or recruitment to actual attacks). A certain proportionality must be granted: as mentioned, some States provide for a legislative bond, according to which the reward may be granted only as long as the offence committed is less serious than the one in relation to which cooperation is supplied. However, such limit does not seem to be advisable, because an evaluation *in abstracto* (less relevant offence = irrelevant information) risks to produce undesirable consequences, inasmuch as it would most likely deprive of any possibility to access the reward those who committed serious offences but could anyhow furnish relevant information on other less serious, but still serious offences[65]. Proportionality should therefore be requested, but not presumed.

Lastly, in case the offender totally fails to provide information, no mitigation should be granted: not only for utilitarian (no actual gain deriving from the reward) but also for 'realistic' reasons (risk that the offender retains information he/she actually possesses). In this case, as for all other offenders, reintegration might still be pursuable in the post-sentencing phase, through penitentiary benefits (see *infra*, § 7).

6.4. *Timeliness of collaboration: a second need for differentiation*

A second issue regards the time in which collaboration takes place: while the early dismissal of the case due to information provided during the pre-trial phase does generally not preclude the reopening of the case if the information proves to be useless or false, when collaboration takes place during the trial phase, as it has been noted[66], no suspension mechanisms are generally provided for. Considering that usually the proceeding brought against the collaborator comes to an end before those against the persons regarded by the information provided, there is a high risk that false or useless information in this phase will provoke an unjust acquittal or reduced sentence without any further possibility to reopen the case, in the light of the *ne bis in idem* principle (the only possibility would be to proceed for the different offence of false testimony, which would however hardly compensate the penalty 'escaped')[67].

In this view, allowing the offender to benefit from a full penalty exemption would produce highly undesirable effects, as the offender would be induced to postpone the collaboration after the trial started and even to supply false information so as to obtain an unjust and irreparable acquittal. On the other hand, excluding those who truly could not cooperate before the trial started seems unreasonable, primarily in those cases in which the cooperator acquired the knowledge he/she wants to share with the authorities only at a later stage: therefore, exemption should not be simply excluded af-

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[65] Such risk exists for instance in Belgium: see Section I, Ch. 2, § 2.1.4.
[66] See Section II, Ch. 5, § 3.4.
[67] See e.g. Section I, Ch. 5, § 3.2.4.1.

ter the end of the pre-trial stage, a mixed system being preferable, as long as the risks are compensated by specific countermeasures such as the suspension of the trial.

6.5. *Proposal draft*

All the considerations above seem to indicate that a unique measure would be unable to address the different possible situations and therefore inappropriate or even counter effective. A differentiated model seems instead necessary.

A first differentiation shall be performed for what concerns the utility of the information provided: giving the same reward to those who provide for relevant information and those who don't is evidently dangerous, since the offender will be induced to retain relevant information or to supply false/irrelevant ones. On the other hand, depriving the latter of any possibility to cooperate seems despicable inasmuch as it would bar an important step maybe not for investigations, but at least for the deradicalization/reintegration process on an individual perspective and for the consequent weakening the cohesion of terrorist groups on a general perspective. Accordingly, penalty exemption should be conceded only in cases in which the relevance of the information provided is of the most important kind, while other relevant information should only consent a mitigation.

The relevance of information could be shaped following the current formulation of art. 16, which draws the possible types of suppliable information. In this perspective, helping authorities to find evidence and/or identify or bring to justice other offenders seems to be of such relevance as to justify only a mitigation of the penalty, while preventing or mitigating the effects of the offence or the commission of other offences (referred to in Articles 3 to 12 and 14, i.e. terrorism-related) could deserve the higher reward, according to their concrete relevance: preventing a minor offence or mitigating its scarcely damaging effects should not allow the exemption, while preventing or mitigating serious effects or further offence may be a fair trade.

In brief:

Type of information	Reward
identify or bring to justice the other offenders	mitigation
find evidence	mitigation
prevent or mitigate the effects of the offence	mitigation/exemption
prevent further offences referred to in Articles 3 to 12 and 14	mitigation/exemption

Of course, the choice between mitigation and exemption will have to be evaluated *in concreto*, by the prosecutor and/or the judge, since setting up a *in abstracto* list of information that may grant the exemption seems unreasonable and unrealistic; indeed, a concrete assessment would invariably be inescapable also for establishing the *quantum* of the mitigation. However, a sort of internal limit to the measure at stake should be displace already at the abstract level in order to avoid possible "blackmails" from the offender. In fact, giving him/her the possibility to obtain the exclusion of the penalty in case the information provided is directed at preventing the commission of an offence without any further limits would mean that the offender will be inclined to cooperate only as longs a full penalty exemption is granted, even in cases where the offence committed is more grievous than the one for which he/she is being prosecuted. In this perspective, limiting the penalty exemption to a strict *in abstracto* proportionality would have the effect of ensuring a certain proportion between cooperation and reward without the unreasonable consequence of excluding some offenders – namely, those who possess information on less grievous crimes – from the scope of application of the measure.

Moreover, a second differentiation should regard the moment in which cooperation is sought/accepted by the offender: given the much more relevant effects produced by a measure conceded once the trial has officially started, the offender should be prevented from 'waiting' this moment before cooperating and rather induced to cooperate in the pre-trial phase. The risk that false/irrelevant information is provided during the trial phase is even more remarkable by virtue of the above-mentioned inescapable necessity to assess their concrete relevance, jointly with the already mentioned general absence of mechanisms of suspension of the proceeding.

Therefore, the ground for exclusion of the penalty referred to in § 5 should be granted only insofar as the offender could not provide the authorities with it in the pre-trial phase; and the burden of proof should be posed on the offender. Preventing the penalty exemption if the collaborator fails to prove that the information provided during the trial phase could not be priorly provided (e.g. because known only at a later stage) should sufficiently contain the risk of 'clockwork' confessions without demanding the authorities from excessive burdens.

Lastly, given that the risks do not only regard the timeliness of the collaboration, but also the truth of the information provided, even in case the offender manages to prove the prior impossibility to collaborate with the authorities, it is highly advisable to provide for a mechanism of suspension of the proceeding aimed at consenting the judge to evaluate if the information was as true and relevant as promised, in order to avoid the possible backdrops connected to the exemption in the trial stage (see above).

In conclusion, the reward measures concerning pre-trial and trial phases that should be implemented in all Member States could be drafted as follows:

Art. X
Penalty mitigation and exemption

Member States shall take the necessary measures to ensure that the penalty for terrorism related offences may be reduced if the offender:

1) fully discloses the facts related to the committed or attempted offence(s);

2) provides the administrative or judicial authorities with information, helping to:

a) identify or bring to justice the other offenders;

b) find evidence;

c) prevent or mitigate the effects of the offence;

d) prevent further offences referred to in Articles 3 to 12 and 14.

2. Member States shall take the necessary measures to ensure that in cases under § 1, 2), *c*) and *d*), the penalty may be excluded if the information is of particular relevance and has been provided during the pre-trial phase or if the offender successfully proves that it could not be provided prior to the trial initiation. In such a case, the trial shall be suspended until the relevance of the information is concretely evaluable.

3. Member States shall take the necessary measures to ensure that if the information provided falls under § 1, 2), *d*), and the offence for which information is provided is less serious than the offence for which the offender is being prosecuted, no penalty exemption may be conceded.

7. *Model of reward measures in the post-sentencing phase*

7.1. *Preliminary remarks*

Before examining how to address offenders that formulate their wish to cooperate only during the post-conviction stage, a first difference must be traced between those who already possessed the information they wish to share with the authorities and those who obtained information only during the penalty enforcement. In the first case, in fact, reward legislation cannot be as "rewarding" as it would be if cooperation was sought and performed at a prior stage; otherwise, the offender would not be provided with any motivation to promptly seek cooperation. In the second case, cooperation would theoretically need to be treated without excluding any benefit; this possibility would be compensated by the fact that information of such utility as to justify a strong reduction or even the exclusion of the penalty would hardly be obtainable from a detained prisoner.

Moreover, as already mentioned, post-conviction represents the phase in which deradicalization programmes should be proposed to the convicted and concretely developed; however, to date, such programmes are far from being uniform in the Member States legislations. Since they do not just depend on a technical-juridical intervention in the post-sentencing criminal procedure national laws, but require a further, comprehensive and in-depth

analysis embracing not only jurists, but primarily sociologists, "islamologists", etc., modelling reward legislation in such phase cannot currently be pursued with reference to persons that joined deradicalization programmes. A need for a further comparative and multi-disciplinary inquiry is here absolutely necessary before drawing any common measure and is therefore strongly advisable.

What could be pursued, however, is a double-track structured reward legislation, which would treat separately convicted offenders that already joined the mentioned programmes and those who did not. The advantages of this division would go far beyond the immediate obtaining of a discipline that could partly cover the above-mentioned lack of knowledge: while it would make possible to obtain information also from subjects who do not want to join any programme, it would also comply with the strategy of not imposing any mandatory change of mind to the offender. Such imposition, as already stressed out, would in fact probably enhance the risk that radicalised or radicalization-undergoing people would perceive the State(s) as a dominating culture trying to oppress other cultures: thus, a radicalisation-fostering factor. Moreover, allowing perpetrators to cooperate even without imposing deradicalization could prove not only to be successful on this general-communicative level, but also to be an effective "intermediate step" for those who are still not ready to accept deradicalization; such a less-disruptive approach could indeed even prove to be highly useful for creating a connection between the offender and the State, that might induce the convicted to reconsider his/her refusal at a later time.

7.2. *Overview on the current national reward legislations in the post-sentencing phase*

Leaving for the above illustrated reasons still untreated the "track" regarding the convicted willing to access deradicalization programmes – to which the following measures could of course temporarily be extended – the proposal would now address the "track" concerning offenders that do not want to join such programmes.

A comparative overview of reward legislation on this phase shows a much more differentiated approach in the observed Member States legislation compared to the other phases. Only very few States do provide for specific terrorism-targeted discipline, while in most legislation terrorist offenders are treated according to the general discipline applicable to all crimes. This produces a first notable disparity, insofar general post-sentencing benefits are usually outlined as actual benefits for the cooperator, while where terrorist offenders are specifically treated – namely in Italy[68] and Spain (where, however, use of *pardon* has often been resorted to)[69] – the strategy works the other way around. Terrorists who (did not and) still do not wish to cooperate receive a way more disadvantageous treatment than the normal

[68] See Section I, Ch. 1, § 2.3.
[69] See Section I, Ch. 7, § 2.2.3.

standard: they are excluded from *parole* institutes or work permits and might even be subjected to the s.c. "hard prison".

On the other hand, while in Luxembourg no specific measures are provided for (cooperation could only be taken into consideration as a general favourable circumstance)[70], in France terrorists willing to cooperate at this stage may be awarded with a mitigation up to one third of the penalty[71], while in Croatia and Germany the case may be reopened and the cooperator may be granted even with the exclusion of the penalty[72]. In Belgium, it has been discussed if the Prosecutor could extend his/her discretion even to the opportunity to enforce or not the penalty, but the response is generally negative; however, penitentiary benefits related to modalities and place of execution may be granted[73].

Hence, national legislations on post-sentencing reward measures appear to be quite dishomogeneous, oscillating from the mere non-application of unfavourable measures to the actual mitigation or even exclusion of the penalty. Hence, considering that judicial cooperation may be (and often is) requested also after conviction and that in any case the illustrated notable disparity risks to favour the s.c. *forum shopping*, a need for harmonization is here particularly noticeable.

7.3. *Common aims and features of the currently existing terrorism-specific post-conviction measures (for cooperators not taking part to deradicalization programmes)*

Although the large part of national legislations seems to just apply general rules not specifically designed for terrorist offenders but directly depending on their general systems of sentence enforcement, the approximation in this sector shall not aim at changing their general systems: such operation would in fact evidently involve a huge series of reforms clearly exceeding the purpose of the fight against terrorism. Instead, keeping in mind that judicial cooperation does not require formal identity of provisions but a substantial assimilability, what seems much more feasible and efficient is fixing a functional objective that all Member States should be asked to reach adjusting their systems without having to go through general complex reforms; a functional objective that incarnates the main *rationale* to which the few currently existing terrorism-specific post-conviction measures are inspired, so that each Member State, although via formally different concrete implementations, could put in place disciplines that are substantially similar.

In this perspective, it appears that both Spanish and Italian disciplines are aimed at two complementary goals. First, inasmuch as they both provide for harsher measures compared to other 'common' perpetrators in case the terrorist offender did not cooperate, they clearly aim at an aggressive induc-

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[70] See Section I, Ch. 6, § 2.2.3.
[71] See Section I, Ch. 4, § 2.2.3.
[72] See Section I, Ch. 3, § 2.2.3; Section I, Ch. 5, § 3.2.2.2.
[73] See Section I, Ch. 2, § 2.2.2.

tion to do so, trying to break the convicted resistance through the enhanced heaviness of the penalty. Exclusion from parole institutes and work permits, as well as the possibility to harden detention conditions, do represent the other face of reward legislation: if the promise of an actual reward did not convince the offender, the State tries to promise the removal of a disadvantage that all other prisoners are not subjected to. This way, reward legislation is exploited to its very end.

The second aim emerging from the mentioned disciplines resides in the restraining of the offenders still-existing dangerousness. The inapplicability of any post-conviction measure somehow involving freedom (sentence suspension or probation) is clearly oriented to this purpose, as well as all measures restricting any possible communication with other people, not only outside but even inside the prison. As it has been stressed out, a conviction for terrorism-related crimes establishes an absolute presumption of dangerousness that may be overcome only if the convicted accepts cooperation[74].

Such a strategy, insofar as it involves a considerably enhanced heaviness of the sanctions imposed on the offender(s), may of course be considered legitimate and rationally justified only as long as the two complementary aims are actually pursuable. In this perspective, Italy's legislation already provides for an equiparation between those who decide to cooperate only at this stage and those who could not cooperate because they did not dispose of any useful information, if they were subjected to mitigating circumstances related to minor roles in the committed offence or to the restoration of the damage produced and show no still-existing link with the criminal organization[75]: in this case, no dangerousness presumption could reasonably be held still and thus no post-conviction penalty hardening may be imposed. Although the reference to specific mitigating circumstances could prove to hardly be adaptable to all different legal systems, the concept behind the provision seems to be reasonable, inasmuch as it aims at defining elements able to overcome the presumption of dangerousness, and should therefore be taken into account.

Lastly, it must be noted that the above illustrated measures would fully comply with the need – illustrated under § 7.1. – for attenuating the "rewards" for those who cooperate only after the conviction and with the need – illustrated under § 6.3 – to avoid the total exclusion of those not unwilling but objectively unable to cooperate.

7.4. *Proposal draft*

In light of the previous findings, the approximation of national reward legislations in the post-conviction phase should not indicate specific detailed measures but rather fix a functional objective to be pursued, leaving the Member States free to choose how to concretely satisfy it: the substantial similarity of the uniformed national legislations will plausibly suffice to

[74] See Section I, Ch. 1, § 2.3.
[75] Art. 4-*bis* of law 354/1975; see further Section I, Ch. 1, § 2.3.

overcome the impossibility to spread the same exact measures in all the different legal systems and the consequential inevitable formal differences that will emerge in the concrete implementation.

This functional objective should be built upon the pursuit of the two above illustrated complementary goals that animate the only currently-existing terrorism-specific post-conviction measures. Accordingly, the European request for harmonization in this sector could be drafted as follows:

Art. Y
Post-conviction measures

1. Member States shall take the necessary measures to ensure that the penalty for terrorism related offences is concretely enforced in such a way as to limit the dangerousness of the convicted, excluding the enjoyment of measures involving access to freedom and, in the most grievous cases, contacts with other people, outside or even inside the place of detention.

2. Member States shall take the necessary measures to ensure that the measures adopted pursuant to § 1 are not applicable if:

a. the convicted cooperates with the authorities in such a way as to fall within the scope of Art. X, § 1;

b. the following conditions are cumulatively met:

i. cooperation is impossible or irrelevant due to limited participation in the criminal act, ascertained in the conviction or, in any case, in light of the ascertainment of the facts and responsibilities established by irrevocable judgements.

ii. there are sufficient and certain elements attesting that no links with terrorist organizations are still existing.

Such a disposition will supply a general rule applicable to all terrorist offenders, leaving the EU and the Members States free to add in the future a derogation specifically designed for those who intended to join deradicalization programmes; a derogation whose discipline should be deeply examined and possibly drafted at the EU level.

CHAPTER 2

EXPLOITING ART. 16 OF DIRECTIVE 2017/541/EU

Ludovico Bin, Francesco Rossi

1. *Introduction*

In the previous pages a model of reward measures, whose transposition should be imposed to all Member States, has been drafted, and the possibilities currently conceded by art. 16 of Directive 2017/541/EU have been examined. The last step of the research consists in the merge of these findings: the *in abstracto* results regarding art. 16 will be applied to the concrete measures embodied in the model, in order to ascertain to what extent art. 16 currently allows to implement the drafted model even without any further EU legislative act. Should the implementation result possible, a second analysis will focus on the redaction of some guidelines aimed at facilitating such operation in the examined Member States, according to the peculiarities of the individual legal systems.

2. *Brief summary of the previous findings: the proposed model of reward measures and its comparison with Art. 16*

The model of reward measures drafted in Section II is composed of two main sets of measures: one operating in the trial and sometimes also in the pre-trial phase, whereas the other one operating in the post-sentencing phase.

The first set of measures, consisting in a mitigating circumstance that may, in some cases, be converted to a cause of exclusion of the penalty, partially overlaps the measures embodied in art. 16. However, although exclusion of the penalty may to some extent be maintained as complying with art. 16, their scope of application significantly differs. First, while the types of information to provide are the same, unlike art. 16 the model does not require that the information itself could not be obtained otherwise; moreover, art. 16

requires renunciation as an inescapable condition for the application of the measure, which the proposed model does not require; in both cases, therefore, the model sets more favorable conditions to the aspiring cooperator. The model sets however also a more restrictive condition inasmuch as it requires a full disclosure of the committed facts for which the proceeding or the investigation is brought on.

For what concerns the post-sentencing measures, the model proposes differentiated sets of measures, depending on whether the convicted initiates deradicalization/reintegration programmes or not; in the first case, further studies are needed, and therefore no model has been drafted; in the second case, a reverse reward logic has been displaced, consisting in the menace of harder conditions than normal in the penalty enforcement if the convicted still refuses to cooperate.

In this regard art. 16 does not mention any measure related to penalty enforcement, thus making "more favorable" any possible reward measure; however, peculiar dispositions related to this phase are neither embodied in the rest of Directive 2017/541/EU, which means that the already existing national legislation shall be applied unaffectedly. Therefore, since the reward here does not provide for an actual benefit compared to the penalty enforcement standards applicable to the other forms of crime, but rather for the mere elimination of modalities that are more grievous than those established by the Directive, it cannot be maintained that the reward measures at stake attenuate the criminal obligations set forth by the Directive. Hence, no issues related to the restricted scope of art. 16 come here into play, the implementation at the national level of the reward measures proposed for the post-sentencing phase being consequently legitimate.

Upon conclusion, it may be maintained that only the reward measures proposed for the trial and pre-trial phase may raise issues of compatibility with art. 16 and with the obligations set forth by Directive 2017/541/EU, the current admissibility of such measures depending on the "nature" of art. 16.

3. *The possible natures of art. 16 and their consequences*

3.1. *Art. 16 as a flexible provision*

As argued in Section II[1], art. 16 may be intended either as directly equiparable to the "minimum rules concerning the definition of criminal offences and sanctions" referred to by art. 83 TFEU, or as a sort of "internal limit" to such minimum rules, that is to say to the other dispositions of Directive 2017/541/EU.

The first interpretation would allow any more favorable condition to the aspiring cooperator: therefore, any reward measure which guarantees more favorable conditions or greater benefits would be admissible. However, far from being directly derivable from the law, such an interpretation would

[1] See also *Introduction to a european project for «rewarding measures» to prevent terrorism*, §§ 2, 7, 9.

necessarily be based upon theoretical and teleological grounds whose *rationale* resides in the need for conceding the exemption from penalty to "secondary" offenders wishing to cooperate, because the entire system of counter-terrorism repressive criminal law is based on presumptions of dangerousness connected to the mere intentions of the authors, rather than to the facts committed.

In this perspective, the possibility to award the penalty exemption to such types of offenders is what prevents the whole system from violating fundamental rights. Therefore, this interpretation would include a reduction to zero of the penalty in the scope of mitigation[2]; however, this reasoning seems to affect only the type of benefit for the cooperator, without involving the conditions for the application of the reward. The interpretation according to which art. 16 does not fix strict and inescapable limits seems to justify the interpretation of *mitigation* as allowing also the *exemption* of the penalty: this does not seem to require any legislative modification in the national law.

3.2. *Art. 16 as a strict limit and its possible derogations*

According to the second interpretation, art. 16 would rather represent a strict limit to the criminalization obligation set forth by the Directive. This would mean that any national provision eventually diminishing the unfavorable effects set forth by the minimum norms of the Directive would infringe the obligation contained therein. In this perspective, art. 16 carves a narrow space for national provisions whose effect – a mitigation of the penalty – goes to the benefit of the suspect/accused: as a result, national laws may provide for dispositions with favorable effect to the accused only insofar as they comply with the strict requirements embodied in art. 16, while more favorable dispositions, exceeding the scope of art. 16, would infringe the general obligation set forth by the Directive. Hence, the proposed model – for what concerns the measure regarding the trial and pre-trial phase – would comply with the Directive only where it poses a more restrictive condition, *i.e.* where it requires a full confession from the aspiring cooperator. On the other hand, where it requires less strict conditions – namely, no renunciation and no necessity that the information could not be obtained otherwise by the authorities – the proposed measures would exceed the scope of art. 16 in a more favorable way, thus colliding with the obligations set forth by the Directive.

Nonetheless, cases in which the strict scope of art. 16 could be derogated from have been investigated. First, it has been noted that a derogation from EU legislation may be justified by the necessity to avoid a violation of human rights or other EU fundamental principles. In this regard, while no human rights violations are seemingly involved, it may be argued that a derogation could here be justified in order to overcome the disparities in the national terrorism-related reward legislations, whose impact on judicial cooperation is one of the main reasons that justified this whole research:

[2] See *Introduction to a european project for «rewarding measures» to prevent terrorism*, § 9.

should art. 16 be recognized as a limit to the approximation of national reward legislations, and therefore to judicial cooperation, a derogation could hence be justified. Secondly, it has been noted that Directive 2017/541/EU only contains obligations referring to the restricted area of counter-terrorism; therefore, any reward legislation not specifically addressing this matter, but of a general relevance, could not be maintained *per se* colliding with the Directive (unless of course it is deemed to concretely frustrate the effectiveness and dissuasiveness of the counter-terrorism criminal legislation).

Hence, a further analysis of these two possible paths which would allow for an immediate possibility to transpose at the national level the proposed model of reward measures shall be carried out.

3.3. *The inopportunity of extending the model beyond modern terrorism - related offences. The resulting inadequacy of a Directive under art. 82 TFEU as the tool for a future binding model of reward measures*

Notwithstanding the abstract possibility to resort to a general national law aimed at extending the measures proposed to all forms of crime, such a solution seems not a viable option because of the peculiarities of the reward model.

In fact, although the application at the national level of the reward measures proposed does not amount to a *per se* illegitimate nor unfeasible operation, and notwithstanding the fact that reward legislation has been traditionally extended to many forms of crime, two main reasons seem to hinder such a solution.

First, the model has been outlined on the basis of a thorough analysis of contemporary (so-called 'jihadi') terrorism, aimed at highlighting the shortcomings and room for manoeuvre of rewarding policies with respect to the specific type of offenders and crimes that are tackled[3]. Moreover, the research findings have also been discussed – during the 2nd Italian Focus Group[4] – with skilled academics (namely, amongst sociologists of Islam[5] and lawyers[6]) and practitioners (notably, from the head of state police[7]) in the fields of prevention of radicalization and terrorism and of deradicalization in prison[8]. The goal of this debate was to understand what actually works as well as what yet needs to be changed in the cross-disciplinary and inter-agency operational approach towards disengagement, deradicalization and cooperation of terrorist offenders with administrative and judicial authori-

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[3] See for instance the specific criminological analysis in Section II, Ch. 2.

[4] Poster and agenda of the event are available at *www.fighter-project.eu*.

[5] Dr Mohammed Khalid Rhazzali (University of Padua).

[6] Dr Laura Sabrina Martucci (University of Bari).

[7] Alessandra Lanzetti (*Vice Questore Aggiunto*, *Polizia di Stato*) and her professional experience with deradicalisation programmes for minors convicted for terrorist offences: see her case study 'Le strategie di contrasto alla radicalizzazione violenta: il caso studio', *Osservatorio ReaCt 2021*, 25 February 2021 [*https://www.startinsight.eu/react2021-caso-studio-lanzetti-it/*].

[8] See the research & training project PriMED (*Prevenzione e interazione nello spazio Trans-Mediterraneo*), funded by the Italian Ministry of University and Research [*https://primed-miur.it/*].

ties[9]. This approach adds value to the research, which bases its legal findings also on valuable empirical and professional knowledge. Consistently, although the crossroads of the phenomenon at hand and other forms of (also organised) crime shall be further investigated[10], the need to tackle contemporary terrorism by means of measures tailored on both its manifold roots and the single terrorist trajectories seems to require adjustments and rules that might not work for different offenders and areas of crime.

Such a tailored analysis had a notable impact on the model. Dissociation, which was a pivotal feature of the reward legislation displaced against national terrorism, has not been inserted in the model, due to the peculiarities of the modern jihadi terrorists[11]. The types of information whose supply could grant access to the reward have also been selected taking into account this peculiar sector: supplying information about the accomplices has all another "appeal" when it comes to other criminal offences where the accomplices do not resemble as dangerous as terrorist offenders do.

These remarks highlight a second issue: in order to be maintained as an actual terrorism-unrelated discipline, the extended reward measures should address all crimes in a general way and not only few areas to be added beside terrorist offences. The derogation here at stake is in fact justifiable only inasmuch as it incarnates a general feature of the national legal system, whose modifications would fall outside the current EU competences. Therefore, its justifiability appears to be directly proportional to the broadness of its scope; but this would mean extending reward measures to criminal offences such as (terrorist-unrelated) homicide, theft, extortion, etc.: offences for which reward legislation is unmotivated and arguably unreasonable.

Hence, extending the applicability of the proposed reward measures to other types of offences would not only be inopportune but also potentially unjustified or even counter effective.

The above findings do also apply to the different issue of the legal basis to use for a future EU legislative act. In fact, Directives under art. 82 TFEU have so far been used for general reforms on EU procedural rights in criminal matters ('ABC Directives')[12].

Accordingly, the possible choice of a crosscutting EU Directive on rewarding measures under Article 82 TFEU should be scrutinized carefully.

3.4. *The impracticability of a derogation justified on judicial cooperation*

A derogation justified on the need not to hinder judicial cooperation seems also to be a non-viable option. As already stressed out[13], a derogation

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[9] See Section III, Ch. 1, § 6.1.

[10] On tre 'crime-terror nexus', see Peng Wang, 'The Crime-Terror Nexus: Transformation, Alliance, Convergence', Asian Social Science, vol. 6, No. 6, 2010, 11-20; Tamara Makarenko, & Michael Mesquita, 'Categorising the crime-terror nexus in the European Union', Global Crime, vol. 15, Iss. 3-4, 259-274.

[11] See Section III, Ch. 1, § 6.2.

[12] See Silvia Allegrezza, Valentina Covolo (eds.), *Effective Defence Rights in Criminal Proceedings: A European and Comparative Studies on Judicial Remedies*, Wolters Kluwer - Cedam, 2018.

[13] Cf. Section II, Ch. 1C, § 6.

from the tight limits imposed by art. 16 aimed at allowing Member States to introduce measures exceeding its scope cannot be justified under the necessity of avoiding possible obstacles to judicial cooperation produced by that very disposition, since such obstacles would derive from its facultative nature, which cannot be overcome anyhow by the model proposed. In other words, until any transposition of reward measures will have to "go through" art. 16, approximation in this field will never be ensured, because of its optional nature, that would leave open the possibility not to transpose the model.

Therefore, a derogation from the scope of art. 16 would never be able to grant an approximation, whose achievement is indeed what would facilitate judicial cooperation.

4. *The need for a tailored intervention and the possibility to amend Art. 16*

Conversely, a new short Directive based on Article 83 TFEU could be the most convenient way forward in the short term. This Directive could provide clarification (in the recital and in a first Title 'Subject matter and definitions', as this is a settled legislative practice at the EU level) on the definition of the terminology employed therein and import the model of rewarding measure outlined at the outcome of the research, setting forth its minimum rules as legally binding[14]. Thus, Article 16 of Directive 541/2017/EU would be amended and a new deadline for transposition of the shared model of rewarding measures in the criminal justice systems of the Member States would be set. To this effect, the choice of Article 83 TFEU also appears more consistent to the past exercises of the EU criminal law competence from the Maastricht Treaty onwards and thus politically sustainable for the EU negotiations and the current institutional balances. Another way forward, in order to address both the aforementioned issues and the need of improving mutual trust, mutual recognition and judicial cooperation, would be to resort to Articles 83 and 82 jointly, thus following the footsteps of Directive 2014/42/EU on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union[15]. On the long run, as it was again the case of the evolution of the EU legal framework on freezing and confiscation[16], more settled experience and practices in this field could pave the way for the issuing of a more ambitious proposal for the adoption of another EU instrument fully centered on mutual trust, mutual recognition and judicial cooperation in the field of rewarding measures based on Article 82 TFEU.

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[14] See Section III, Ch. 1, § 6.5.

[15] Of 3 April 2014, L 127/39.

[16] Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders [L 303/1]. See Alessandro Bernardi (ed.), Francesco Rossi (coord.), *Improving Confiscation Procedures in the European Union*, Jovene, Naples, 2019.

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