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

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-

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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: 1°) 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]; 2°) 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]; 3°) 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

[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

[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, 4°, *d*) of the Code of Criminal Procedure links back to article 216/3, § 1, 2° - 5° 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-

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 substitude 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 substitude 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-

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

[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

[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-

[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-

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[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.