CHAPTER 4

COMPARATIVE APPROACH TO CRIMINAL PROCEDURE ASPECTS

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1. *Setting the scene: introduction, methods, and purpose of the report*

The present report focuses on comparing rewarding measures for collaborators of justice in the field of terrorism offences in seven selected Member States of the European Union. The purpose of this specific report within the FIGHTER project is to compare the procedural aspects of rewarding measures to combat terrorism in the selected national legislations: namely, Belgium, Croatia, France, Germany, Italy, Luxembourg, and Spain.

This report aimed at describing national measures having in mind the development of a potential EU blueprint of rewarding measures in the field of anti-terrorism. In this light, we adopted a comparative law approach based on the commonalities and divergences narrated in the reports.

Data are extracted from seven national reports providing a multifold account on such legislation, based upon the questionnaire drafted by the main unit.

The EU Directive 2017/541 on combatting terrorism do not provide any indication on procedural requirements. Article 16 indicates the mere possibility for the Member States to reduce the penalty of the offender who "provides the administrative or judicial authorities with information which they would not otherwise have been able to obtain, helping them to: (*i*) prevent or mitigate the effects of the offence; (*ii*) identify or bring to justice the other offenders; (*iii*) find evidence; or (*iv*) prevent further offences referred to in Articles 3 to 12 and 14 (of the aforementioned Directive". The laconic provision only refers to the impact of the information obtained on the main proceedings but it does not allow a comprehensive analysis of national systems in detecting the larger group of rewarding measures.

To this aim, a working definition of the meaning of 'collaboration' is needed in order to identify the 'collaborator' and the related procedural statute. This delicate task is aimed at defining the procedural consequences of qualifying the offender as 'collaborator' in a double dimension: in her own proceedings and in the proceedings in which her statements should be used.

Collaborating with prosecutorial authorities generally means providing the necessary information in view of the dismantling of a criminal organization. The difference with an ordinary witness lies in the fact that a collaborator, "repentant" or "leniency witness"[1], was a former co-conspirator or an effective member of the organization. As in other instances of organized crime, the strength of a terrorist organization lies in the relationship of trust and mistrust built among the individuals cooperating to reach one or more criminal goals. Therefore, the State has the possibility to offer a way out to collaborating members of the organization through rewarding measures, enabling prosecutors to gain insight into criminal activities. This practice leaves unprejudiced any in-depth analysis into the existence of a proper internal remorse of conscience within the accused, at least in modern, laically oriented systems based on the rule of law. However, the authenticity of the collaboration might be inquired.

The current legal picture at national level seems to be strongly influenced by supranational legislation and related duties to implement it. However, the impact on national law – including rules of criminal procedure – depends upon the country's criminological background in terms of presence and dimension of certain criminal phenomena such as organised crime and terrorism.

From a historical point of view, different approaches emerge, depending on whether or not the Member State has a specific history with either national or international terrorism. The impact of international and supranational provisions on the development of terrorism norms was especially strong on those countries without a prior experience of domestic terrorism or organized crime. On the contrary, those same international and supranational instruments were influenced in their drafting by countries with a specific experience in countering this type of phenomena[2].

The mechanisms and tools for rewarding are still at a national level and not tantamount to a full-fledged European rewarding system, which would require cooperation among the different legal systems aimed at a common final result. This is in contrast with an exclusively national perspective, often still defended in some instances by legislators[3], despite the blatant need for a harmonized and transnational approach in several investigations in the field of terrorism.

The drafting exercise highlighted several obstacles in pursuing a harmonized effort toward an EU common framework on procedural requirements applicable to rewarding measures.

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[1] German report, p. XXX.

[2] E.g. Italy: Italian report, p. XXX (historical part).

[3] See *e.g.* the case of the Luxembourg concept of the transfer of jurisdiction; Luxembourg report, p. XXX.

First, there is an undeniable issue linked to the use of different legal lexicons, amplified by the lack of a single, all-encompassing term to define rewarding measures and many aspects of criminal procedure throughout Europe[4].

The second systemic obstacle is related to the huge differences among EU member States on prosecutorial powers. The cohabitation, among European criminal procedures, of systems of mandatory and discretional prosecution increases the difficulties in designing a common framework.

The existence of an extremely wide deformalized zone in countries characterized by the principle of discretion in State Prosecutors' actions has a strong impact. There, a whole part of criminal procedure does not follow strict rules in granting dismissals and leniency measures may rely on an entirely deformalized procedure linked to the prosecutorial discretion. This can be seen as a rewarding measure in cases of accused subjects collaborating with the investigating and prosecuting authorities[5]. National policies emerge as hardly harmonizable if some States allow their prosecutors to discretionally dismiss charges against collaborators and others are forced to prosecute in force of the principle of mandatory prosecution.

A third obstacle refers to methodology and it is linked to the difficulty to draw a distinction between substantive criminal law and criminal procedure in the field of rewarding measures.

In the drafting of this report, we extrapolated data which could be of interest for the procedural report. According to the layout chosen by the coordinator and the analysis based on the structure of questionnaire, we focussed our efforts on two subparagraphs dedicated to procedural measures, specifically those on the conditions for the application of the measures and on the conditions for the use of the declarations obtained (probative value of declarations).

One might consider that the fine line between substantive and procedural criminal law in this field is hard to draw and often fades into a grey area. This is apparent if only one considers that, in several Member States, the substantive criminal law difference between an excuse (exonerating the accused) and an attenuating circumstance (granting a reduced sentence but without exonerating the accused) lies on whether collaboration occurred before or after a prosecution was initiated.

Setting aside substantive criminal law implications on procedural aspects, the issues relating to criminal procedure that have been selected and will be analysed in the following are: the rewarding measures in different criminal procedure phases (investigation, trial, post-sentencing); the conditions for applicability of rewarding measures; and the probative value of information obtained in exchange for rewarding measures.

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[4] For this reason, in this report, several terms, especially key words, are referred to in the original language used in the national system, rather than attempting a flattening English translation: *e.g.* Discharge - dismissal - *non-lieu*.

[5] In Belgium, for example, prosecutorial choices are based on vague criteria of necessity, proportionality, subsidiarity; Belgian report, p. XXX.

2. *The Gordian knot of mandatory v discretionary prosecution and other negotiations*

The first and foremost phase of a criminal investigation which might be relevant in terms of rewarding subjects who are accused of terrorism-related offences is undeniably the preliminary investigation phase. As we will see later on, the trial phase is often more concerned with debates on substantive criminal law tools such as the choice between excuses and attenuating circumstances. We will later focus on the post-sentencing phase, when a convicted person may decide to initiate a collaboration with public authorities.

As highlighted above, the main diverging point between different legal systems in the field of criminal procedure lies in the juxtaposition between mandatory and discretionary prosecution.

In the first type of systems, prosecutors' leeway in closing an investigation is extremely rigid. They have to opt to charge the accused with a crime anytime there is sufficient evidence to deem the *notitia criminis* (the information that a crime has been perpetrated) valid, regardless of any consideration on the "opportunity" of such prosecution. Among the considered MS, those adopting a mandatory prosecution principle seem to be: Italy, pursuant to Article 112 of its Constitution, which has a uniquely strong perspective on mandatory prosecution; Spain, according to Article 105 of its Code of Criminal Procedure; Croatia (with an exception in Article 206d of its Code of Criminal Procedure).

Instead, in the second type of systems, State Prosecutors enjoy wide discretion as to whether drop a case or prosecute a criminal offence, based on the principle of opportunity. The principle of opportunity seems to be adopted, among the selected Member States, by: Belgium, according to Article 28-*quater* of the Criminal Code; Germany, which adopts the *Legalitätsprinzip ex* art. 152 of the Rules on Criminal Procedure (*Strafprozessordnung* or StPO), but later leaves one wondering whether there is a public interest for the prosecution in the actual case under consideration in Article 153; France and Luxembourg, respectively pursuant to Articles 40 and 23 of their Codes of Criminal Procedure.

In the latter systems, an explicit provision of procedural rules on how to deal with collaborators of justice and on how to reward them is much less needed than in MS adopting a mandatory prosecution approach, often linked to a strict interpretation of the legality and equality principles. In fact, a one-sided dismissal of the case before charges are brought based on the will of the prosecution is always possible, and represents "the first and the most common form of rewarding measure, though informal"[6]. The possibility to modulate prosecutorial power offers an unique opportunity for national prosecutors to opt for a tailor-made solution of the specific case: renounce sic et simpliciter to prosecute to collaborator or rather cooperate with other MS in case of transnational cases, leaving to other countries the choice on rewarding measures. The obvious consequences of this setting are less need for formalized rules on rewarding measures and

[6] Luxembourg report, p. XXX.

(*ii*) less data on concrete exercise of this power because the deformalized procedures leave no record or are kept confidential among prosecutorial authorities. However, such decision is never final, as it is always possible for the State Prosecutor to reopen the case at a future time, if the information provided is revealed to be false.

Instead, where prosecution is mandatory whenever the commission of a crime emerges, as is the case of Italy, formal mechanisms to avoid, divert or reduce prosecution need be provided for in legislative provisions.

Discretionary prosecutorial powers are not limited to the basic choice to either prosecute or dismiss the case. Other interesting instruments that can be employed in the different scenarios, though always within the investigation stage, go beyond a mere dismissal.

Another tool in the hands of prosecutors of certain MS is the possibility to requalify or even decriminalize cases based on a series of criteria, including collaborating with investigating authorities[7]. The rationale behind this choice is to provide prosecutors with an additional instrument to review their initial investigatory findings over time with flexibility and common sense. However, in the context of collaboration between the accused and the prosecuting authorities, the possibility to bargain on charges is discretionary in its essence.

Additionally, the peculiar situation of Luxembourg, a small State with little to none investigations for terrorism-related crimes (except, perhaps, those related to terrorism financing and money laundering instances), led them to devise the possibility of a so-called "transfer of jurisdiction". This allows them to transfer the transnational case to another Member State with more expertise in fighting terrorism and/or where the biggest bulk of information is located if it is somehow linked to that same criminal offence according to the different linking criteria[8].

Plea agreements represent another option available during the investigation phase, and also well into the early stages of trials. These legal instruments are applicable to the less serious offences tied to terrorism, due to the existence of rigid seriousness limits in most European legislations. They emerge out of ordinary criminal procedure, where they have been gradually introduced through transplants from the Anglo-American tradition. Such examples, with striking divergences, include the Spanish tool of *conformidad* (Articles 655, 787 of the Criminal Procedure Rules)[9]; the Italian *patteggiamento* or "*applicazione della pena su richiesta delle parti*", *i.e.* imposing a sentence upon request of the parties (Article 444 ff. of the Code of Criminal Procedure); in Croatia, the judgment based on the agreement of the parties, potentially including a partial procedural immunity of witnesses *ex* Article 362(1) of the Criminal Procedure Act (CPA)[10]; the French *plaider-coupable*

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[7] In French-inspired systems, with a three-fold distinction among criminal offences (*contraventions*, *délits*, *crimes*), one needs to distinguish between *'décriminalisation'* (dealt with, in the Luxembourg Code of Criminal Procedure, in Art. 132 Ccp) and *'décorrectionalisation'* (separately dealt with in Art. 132-1 Ccp); Luxembourg report, p. 4.

[8] Luxembourg report, p. XXX.

[9] Spanish report, p. 13-14.

[10] Croatian report, p. 20.

(Articles 495-7 ff. of the Code of Criminal Procedure); the German *Absprachen* (§ 257c of the German Code of Criminal Procedure); Belgian plea agreements *ex* art. 216-*bis* of the Code of Criminal Procedure; the Luxembourgish *"jugement sur accord"* (Articles 563 ff.)[11].

Even though negotiating tools in criminal justice were not conceived aiming at terrorism cases nor to potential collaborative practices in this domain, they perfectly fit the scope of alleviating the sanction for minor offences related to terrorism, especially when those practices are allowed from the very beginning of the investigation and do not require the validation of a judge.

Rewarding measures that are applicable during the trial phase – *i.e.* once the person has been charged with a crime-, are mostly related to substantive criminal law[12]. Nevertheless, there are interesting procedural implications of those measures that we will briefly analyse.

Repentants might be rewarded with excuses or attenuating circumstances. While excuses totally exonerate the accused, attenuating circumstances only grant her or him a reduced sentence and are applied in the sentencing phase of trials.

3. *Conditions for the applicability of rewarding measures*

This third section examines what is necessary for a collaborating offender in proceedings for terrorist crimes to be granted rewarding measures, not in terms of the type of rewarding measure (again, this issue relates more to a substantive law approach) but more as concerns conditions for any rewarding measure to be applied in each actual case.

From an overview of the Member States under consideration, it seems that four classes of criteria can be identified by bringing together the different national legislations, aiming to draft a comparative scheme: the degree of severity of the offences committed (3.1); the moral and material interest shown by the repentant towards the victims of the crime (3.2); the ascertainment of a proper or authentic repenting (3.3) and, above all, the truthfulness and usefulness of the information provided by the repentant (3.4).

3.1. *Degree of severity of the offences committed*

First of all, our comparative analysis reveals divergent approaches to the controversial issue regarding the seriousness of offences committed by the repentant. In fact, on the one hand we have countries where the applicability of rewarding legislation is merely limited to terrorist or subversive offences, without any mention to seriousness limits. On the other hand, however, some national legislators introduced general rewarding provisions, whereby applicability of rewarding measures requires the offence committed by the repentant to fulfill certain procedural conditions depending on its de-

[11] Belgian report, p. 22.
[12] See comparative report on substantive criminal law. To be completed.

gree of seriousness. Thus, in some legislations, such as Belgium and Croatia, the punishment prescribed for the criminal offence committed by the collaborator must be lower than that prescribed for the offence in respect of which s/he is testifying[13]. Moreover, the degree of severity of the acts committed by the collaborator may become relevant also in determining how far the penalty can be reduced, as the more serious the offences are, the more sentence reduction must be limited[14]. In German legislation, the repentant is required to have committed an offence that is punishable by an "increased minimum sentence of imprisonment" or a "life sentence of imprisonment"[15].

Finally, it is also interesting to notice that some national legislations set out certain conditions concerning the seriousness of the offence on which the repentant provides information. In certain countries, such as Germany and Belgium, rewarding measures can only be applied if information regarding a predetermined catalogue of serious criminal offences is disclosed: this catalogue is usually given by reference to procedural provisions that originally aimed to determine offences for which phone taping is authorised[16].

The table below illustrates different conditions that the offence committed by the repentant needs to fulfill for the purpose of applying rewarding measures.

IT Applicable to the most serious crimes (at post-sentencing stage, relevance of the crime the "repentant" committed + criminal attitude will be considered).

D Limited to serious crimes.

E *All* of the felonies under Chapter VII of Title XXII of Book II entitled "*On terrorist organisations and groups and on felonies of terrorism*".

HR The punishment prescribed for the criminal offence for which the witness would not be prosecuted must be less than that prescribed for the offense in respect of which s/he is testifying, and must not be punishable with imprisonment of ten years or more – Article 286(4) CPA.

BE The principle of proportionality does not authorise collaboration if the offence committed by the informant is more serious than the crime informed upon.
The more serious the offences are, the more sentence reduction must be limited.

LU Reward measures do not have a general nature but are applicable only to specific offences: organized crime and terrorism.

F Applicable to serious offences against the person (Book II of the Criminal Code), to serious offences of damage to property (Book III) and to offences against the Nation, the State and public peace (Book IV).

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[13] See Croatia report, p. 15. See Belgium report, p. 8.
[14] See Belgium paragraph 2.2.1.3.
[15] See Germany report, para. 3.2.1.1, p. 22.
[16] See Belgium report, paragraph 2.1. See Germany report, paragraph 3.2.1.2.

3.2. *Proper/authentic repenting*

The second procedural condition that is normally taken into account for the purpose of granting rewards is the ascertainment of a proper or authentic repentance. From a comparative analysis of the relevant jurisdictions, what emerges is that an authentic repenting – at least in its ideological and subjective meaning – is almost never deemed necessary for a collaborating subject in proceedings for terrorism crimes to be granted rewarding measures. This means that the inner sphere of the repentant and the adherence to the values expressed by the institutional and legal framework are not relevant for the purposes of granting benefits[17].

On the contrary, and according to a more objective understanding of repentance, most national legislations subject the applicability of rewarding measures in the field of terrorism to distinct conditions depending on behaviours of the repentant that are indicative of the unequivocal willingness of the repentant to actively cooperate with the legal process and to abandon the terrorist goals. In this light, the most common indicators taken into account to opt for a reduced sentence are the analysis of whether the choice to cooperate with the legal process came from a voluntary behaviour of the repentant – i.e. without any form of external compulsion[18]; the full confession of criminal activities as the principal obligation in order to benefit from the reward[19]; the disengagement or dissociation of the collaborator, that's to say the reversibility of the severing of ties with criminal organizations and the definitive renounce to the terrorist or subversive goals[20].

In sum, the idea of proper repentance that emerges from the abovementioned conditions is merely utilitarian and objective, and it aims at assessing those tangible and positive collaborative behaviours that are indicative of the repentant's willingness to usefully cooperate with the legal process in an antithetical way to the collaborating subject's continuity in the terrorist organization.

The table below illustrates indices of repentance which are deemed necessary for the purpose of granting reward measures.

IT	Full confession of all crimes (but what crimes? Only terrorism-related). Disengagement. Case law: no need to enquire on "the inner sphere of the repentant" v. "proof of moral redemption, a critical review of the offender's past life and an aspiration to social reintegration".	Artt. 2-3 L. 304/1982

[17] See Italy report, paragraph 1.3.3.

[18] See Germany report, para. 3.2.1.4, p. 24.

[19] This is the case for Italy, Germany and Spain, where the repentant is obliged not only to disclose information about offences committed by a third party, but also about all crimes committed by himself; however, it is not necessary to confess crimes that are completely unrelated to terrorism and subversion, as only the terrorist experience of the offender can be considered pertinent and relevant. See Italy report, p. 8. See Germany report, p. 28. See Spain report, para. 2.1.

[20] See Spain report, para. 2.1. See Italy report, p. 13.

D	Voluntary (no external compulsion) disclosure of information about an offence under Section 100a para. 2 StPO.	Section 46b StGB
LU	No requirement to "renounce to future criminal or terrorist activities".	
E	Double requirement: voluntary quitting (renounce to the goals) + confession.	Art. 579-*bis*, III C.p.
HR	Factual and credible testimony, tell the truth, not withhold any information known to him/her about the criminal offence of which s/he is testifying and the perpetrator of that offence.	Art. 286(3) CPA
F	No general obligation on the person enjoying the status of repentant applies, but certain obligations may be imposed as part of the protection mechanism provided for by the law.	Artt. 706-63-1 CCP

3.3. *Moral and material interest shown in the victims of the crime*

Adopting a balanced approach in between objective and subjective meanings of "repentance", some national legislations also seem to take into account the moral and material interest shown by the repentant in the values which have been breached by the commission of the crime and, more specifically, in the victims of the crime. As regards the assessment of the requirements to grant conditional release, Italian case law sometimes takes into account victims of terrorism and the interest shown by the collaborator in the ethical and social values that have been breached and in the victims of the crime, as well as the restoration of its damages and consequences and the assistance, altruism and solidarity shown[21]. Moreover, as regards for instance the Belgian rewarding system, the obligation to compensate for damages caused is supplemented by a provision stipulating that the promise made to an individual who does not compensate for damages can be revoked[22] However, even though victims' failure to forgive is almost never an obstacle to granting rewarding measures, the effects of the offence on the latter may constitute an important element in determining how far the penalty can be reduced, as stated in the German legislation[23]. Conversely, in Croatia there is a general duty to previously obtain the consent of the victim before reaching a plea agreement in serious crimes[24]. Most notably, the acknowledgement of the facts and the victims' reparation have recently acquired a significant importance within the Spanish Restorative meetings experience, which, though initially conceived as entailing purely personal consequences for the parties (i.e. meetings between victim and perpetrator),

[21] See Italy page 16.
[22] See Belgium paragraph 2.3.2.
[23] See Germany page 18.
[24] See Croatia page 11.

informally started to have an impact on the granting of permits, the lowering of the penalty and the granting of probation[25].

Most jurisdictions provide more or less articulated systems of protection of endangered witnesses. It often appears that these persons are in serious and current danger due to the collaborative conduct in relation to certain crimes, including those committed for the purposes of terrorism. However, some witness protection laws come with important deficiencies. For instance, the Spanish legislation proves to be inadequate and obsolete insofar that it does not cover co-defendants[26].

The table below illustrates the relevance attributed by each Member State to interests and values which are safeguarded or sacrificed by collaboration for the purpose of granting rewarding measures.

IT	For conditional release: interest shown in the ethical and social values that have been breached and in the victims of the crime, as well as the restoration of its damages and consequences and the assistance, altruism and solidarity shown.
	No need for forgiving by victims.
D	General duty, when deciding on the exact severity of the penalty, to take into account the effects of the offence on the victim (Sec. 46 StGB).
BE	Obligation to provide compensation to victim (Art. 216/2 c.p.p.) (failure to do so might constitute a ground for revocation)
HR	Consent of the victim needed for plea deals in serious crimes.
	Protection for endangered witnesses.
E	Inadequate/obsolete witness protection law (does not cover co-defendants).
	Restorative meetings experience – informally started to have an impact on the granting of permits, the lowering of the penalty and the granting of probation.
LU	No witness protection program. Possible to ask for other MS' cooperation if relocation is needed. No case law.

3.4. *True and useful information provided. Voluntary disclosure and time limits*

Last but not least, the most common indicators taken into account to opt for a reduced sentence is the assessment of the quality and quantity of the information provided by the repentant. To this aim, it is paramount that the informative statements provided by the repentant are proved to be com-

[25] See Spain page 15.
[26] See Spain page 24.

plete, true and useful. More specifically, within the criminal justice system, the quality of information obtained through rewarding mechanisms might carry a twofold meaning: on the one hand, they might be useful in discovering and prosecuting other serious offences whose existence was previously unknown to the investigating authority; on the other hand, they can be used to prove in full or in part other crimes whose investigations and/or trials were already ongoing. Moreover, most national legislations also provide for some consequences in case the information turns out to be reticent or false. In this respect, it is necessary to distinguish between two cases. On the one hand, if the repentant has been granted early dismissal, s/he will remain under the risk that a new case can be opened if hints of falsehood in the statements later emerge. On the other hand, when the case has been closed with a final judgment, if there is no explicit ground for revocation, the repentant will be safe from any subsequent governmental check. There might also be a different case if the information was not useful in a prosecution but the fault of this lack of usefulness could not be placed upon the repentant (generally because she or he was a low-ranked member of the criminal organization and/or the criminal structure was a rigidly compartmentalized one). Most of the developments in case law – particularly in the Italian one[27] – indicate that the contribution could be acknowledged, even just to help in deradicalization and disengagement processes.

The table below illustrates how each Member State defines the type of contribution they require of repentants and whether there is a formal chance to revoke the rewarding privileges, should it later emerge that the information provided was forged or simply incorrect.

IT	Evidence that the author, after having voluntarily prevented the event (even without dissociating), must provide to the authority to reconstruct the fact and to identify any accomplices (*decisive*, *complete*, and *truthful*).	Artt. 5-16-*quinquies/septies* D.L. 8/1991 Artt. 2-3-10 L. 304/1982
	Duty to sign the minutes of declarations.	
	Possibility for revocation of rewarding measures in case the information turns out to be false or reticent (before or after a final judgment).	
DE	It must be a useful contribution to the investigation.	S. 164 para. 3 StGB
	Possible revocation.	
BE	Information on an offence listed in article 90-*ter*, § 2-4 c.p.p. which has to be suitable in order to achieve "disclosure of the truth". Collaboration must be indispensable to impart criminal justice.	Art. 216/1 c.p.p.
	Possibility for revocation of rewarding measures.	

[27] See Italy para. 2.6.

HR	In order to obtain witness immunity, a person must state that s/he will testify in criminal proceedings as a witness and that s/he will not withhold any relevant information.	
LU	Duty to provide to the authorities information either on the existence of acts preparing the commission of the offences related to terrorism listed in the said provision, or on the identity of the authors of those acts; or of the existence of the group and, at the same time, the names of its leaders or deputies. No formal possibility for revocation.	Art. 135-7, 135-8 c.p.
E	*Collaborated actively with the authorities to prevent the felony taking place or effectively aids the obtaining of decisive evidence* to identify or capture the others who are responsible, or to prevent the action or development of the terrorist organisations or groups to which he has belonged, or with which he has collaborated (risk of applicability only to leaders of terrorist groups). No special revocation provisions.	Art. 579-*bis*, III c.p.
F	No explicit ground for revocation[28].	

4. *Relevance of the timely occurrence of the collaboration: pre- and post-sentencing*

4.1. *Reduced sentencing*

Even though it can be generally said that the assessment of the truthfulness and usefulness of information disclosed by the repentant is a procedural condition common to all relevant jurisdictions and, consequently, may be very easy to harmonise, nonetheless it may produce unwanted consequences in terms of temporal sequence of different criminal proceedings linked by the existence of declarations coming from a repentant. As already mentioned, in the trial phase, before sentencing occurs, the contribution of the repentants' declarations and admissions, as well as implications of other subjects, will have to be proved, in terms of their use in other proceedings. However, the proceeding in which the repentant is to be sentenced often comes to a conclusion much earlier than those other proceedings in which her or his declarations may be used as evidence against someone else. So, there is an *ex ante* judgment in the absence of an effective assessment of the usefulness and truthfulness of those statements. A suggestion for the legisla-

[28] French report, p. 16.

tors for a more efficient tool might be a suspension of her or his sentencing, under several conditions, including a later check of the use of the declarations in the other proceedings.

4.2. *Post-sentencing*

When it comes to the post-sentencing phase, several tools have been put up in order to deal with the possibility that a subject who has already been convicted might decide to start testifying against her/his former co-conspirators and/or fellow members of criminal organizations. Rewarding measures including the tempting opportunity to obtain a reduction of the sentence or a special conditional release (on parole) after the conviction occurred[29]. Whenever this decision is made during a prison stay, the repentant is informally referred to as "prison snitch", often conveying to the prosecution information about what the convict learns within the prison itself (not only about her/his previous criminal activities).

Notoriously, the post-conviction behaviour, including collaboration with public authorities, is taken into account within a whole series of behavioural assessments, from licences to reward permits, to alternative forms of detention to semi-freedom or even parole and conditional release[30].

The table below illustrates the wide array of potential post-sentencing benefits in the several Member States:

IT	Cumulation of sentences for terrorist offences.	Artt. 8-9 L. 304/1982
	Granting of special conditional release.	Art. 4-*bis*, 58-*ter* L. 354/75
	Prison benefits and alternatives to detention (double track: D.L. 152/1991 and 306/1992).	Art. 16-*nonies* D.L. 8/1991
	Protection measures granted to informants.	Art. 9, III, *ibidem*.
D	Protection for convicts deciding to testify.	Section 57 StGB
BE	Possibility for prosecutors to promise the suspension of the execution.	Art. 216/6 c.p.p.
HR	Reduction of sentence[3] Possibility for release the person on parole beyond the time limits that are prescribed by a special legislation.	Artt. 37(1) - 43(5) of the Act on Anti-Corruption and Organized Crime Prevention Office and Art. 497(2) CPA

[29] E.g. Croatian report, p. 18.
[30] Italian report, pp. 16-17; German report, p. 31.

E	Suspension of the penalty imposed as well as the granting of probation require the convict *to show unequivocal signs of having abandoned the ends and means of the terrorist activity and has also actively collaborated with the authorities.*	Art. 90.8 General Penitentiary Organic Law
	Pardon: suspend totally or partially the penalties imposed by final judgement, to those convicted of any offence, terrorism included (quite used until 1996)[3]	Law 18.6.1870, modified by Law no 1/1988
LU	Relevance in the behavioural assessment on prison benefits.	
F	Provides that an exceptional post-sentencing reduction of sentence.	Art. 721-3 c.p.p.

5. *Conditions for the use of the declarations obtained (probative value of declarations) in exchange for rewarding measures*

The third section of this report focuses on the probative value of declarations and statements made by repentants in exchange for rewarding measures (be they the reason of the dismissal, excuses or attenuating/mitigating circumstances). This analysis, based on the structure of the questionnaire, identifies the counter line of the use of information obtained through rewarding measures in other criminal proceedings.

To this aim, we distinguished between two cases, namely the case in which the repentant is treated as an *informant* and that in which s/he is treated as a *witness*. On the one hand, if the repentant is treated as an informant, the probative value of the information gathered through repentants is often limited, whose declarations are merely informative and cannot be directly used in the evidence-gathering phase of the proceedings. Among the instances emerging from the Member States' reports of cases where repentants are treated as informants, it is interesting to note that both Belgium and Luxembourg provide for the formal possibility to take into account information obtained by informants (referred to as *"indic"*), whose identity is not recorded or disclosed in the case file and whose hints cannot be used in any formal way but only as a way to direct the action of the investigative agencies[31]. In the Italian context, Art. 16-*quater* D.L. 8/1991 provides that all declarations by a single repentant must be made within a 180-day timeframe from the moment where the subject showed a willingness to collaborate. Statements made by the repentant after this deadline (and the minutes of the declarations related thereto) are to be kept secret, and not used in formal proceedings. However, those statements are not subject to a pathological prohibition (*inutilizzabilità*), and can still be used during preliminary inves-

[31] Belgian report, p. 15; Luxembourg report, p. 9.

tigations, in the preliminary hearing, and in those trials based on investigative materials (such as the "*giudizio abbreviato*", abbreviated trial)[32].

On the contrary, if repentants are treated as witnesses, or a form thereof, the especially low credibility features of these subjects mandates an added level of precaution, usually in the form of compliance with two procedural conditions. Among the conditions that States place upon the use of declarations obtained from the collaboration of a former member of a terrorism organization are the prohibition to use them as sole evidence, and the need for those declarations to be backed by other sources of evidence. Statements implicating other subjects made in exchange for any form of reward can only be used as evidence jointly with external supporting evidence and never on their own. Repentants are at risk of producing confessions and declarations to the sole end of obtaining a reward and, as such, are under a "relative presumption of unreliability" and require a "search for external feedback"[33].

In the table below are listed the precautions taken in each considered Member State to reduce the risk of false implications and, as a consequence, wrongful convictions.

IT	Cannot be used on its own to convict someone: "statements made by any defendant for the same offence for which proceedings are being carried out or for related or connected offences are assessed together with other evidence confirming their reliability"[3]	Art. 192, III-IV c.p.p.
D	declarations of the repentant made during the investigation process accusing another person do not automatically count as evidence in the main hearing.	Section 250 StPO
BE	Conviction can never be based solely, or to a significant extent, on testimony given under complete anonymity. The system of witnesses/collaborators as repentants for organized crime cases (in exchange for financial assistance) was approved by ECtHR in 2017. Then amended in 2018 to include terrorist cases.	Art. 189-*bis*, III c.p.p.
HR	Need for corroboration for witness immunity/ crown witness status to be granted (otherwise it can be revoked).	Artt. 286(6)-298 CPA
E	Corroboration standard. Overcoming of the sufficiency of co-defendants' declarations: Constitutional Court's judgement STC 153/1997, of the 29th of September 1997.	Case law

[32] Italian report, p. 38.
[33] Italian report, p. 39.

LU	Status of witness or defendant in criminal proceedings: lack of specific provisions. General rules governing the admissibility and assessment of evidence: statements made by a co-defendant cannot form the sole and decisive evidence of conviction; no anonymous testimony[34].	Case law
F	If the statements merely corroborate other evidence of the guilt of the persons charged, they may be taken into consideration by the investigating or trial courts, in accordance with the principle of freedom of evidence.	

6. *Conclusions*

From a comparison of the six national reports, it emerges that there are persistent and deep divergences in national criminal justice systems, even among Member States of the EU.

Firstly, it is undeniable that there are different rules depending on whether or not the Member State has a specific history with either national (*e.g.* Italy, Germany, Spain) or international (*e.g.* Belgium, France, Croatia) terrorism. At the same time, there are still countries (*e.g.* Luxembourg) with little to no case law, which have been implementing supranational obligations and duties to criminalize certain conducts without perceiving the urgency other countries, hit by terrorist attacks, cannot forget.

At the same time, it appears extremely hard to harmonize these norms among countries with discretionary and mandatory prosecution. In fact, countries whose criminal justice systems are based on the principle of opportunity wield discretionary dismissals more as one-size-fits-all measures and require less precise legislative interventions.

However, some similarities also emerge, leading to potentially harmonizable aspects. This is particularly apparent when it comes to the probative value of repentants' declarations: indeed, there is a rule of evidence in most Member States, in compliance with ECHR's case law, stating that those statements require external corroboration from other sources of evidence.

The structural differences in different legal systems cannot be solved through a partial harmonization, especially if one considers that the criminal procedure choice between a mandatory prosecution system and a discretionary one is highly political, based on utilitaristic conceptions of criminal justice and rooted in national history. This mandates a cautious and pessimistic overlook of the need and sense of harmonization attempts in this field. An elastic approach, able to blend in the different contexts without cultural clashes, will therefore be needed when dealing with transnational investigations expanding over several jurisdictions. That could be the case, in the French-inspired systems, of a transformation from a more serious type

[34] Luxembourg report, p. 9.

of criminal offence to a less serious one (*décriminalisation* or *décorrectionalisation*). This tool was typically considered rewarding as much as when it came to discretionally choosing whether or not to bring charges at all.

Another tool, employed by Luxembourg, is the transfer of jurisdiction, bringing the prosecution abroad and away from the Member State in which the investigation was first noted down in a criminal complaint. This is a partially useful empirical measure since the proceedings might continue elsewhere, in another country, if only the internal communication system between different Member States better served the needs of European and transnational criminal justice. This is a typical case of a doubt on the meaning of "rewarding", and specifically on whether it is limited to a single national system or, rather, whether one should consider the peculiar situation of supranational coordination to assess the "degree of overall rewards".

A further suggestion for the legislators for a more efficient tool in terms of reduced sentencing might be a suspension of her or his sentencing, under several conditions, including a later check of the use of the declarations in the other proceedings.

The sole threshold that can never be surpassed in the fight against any type of crime is the *ne bis in idem* principle, with a single trial and a single conviction, balancing all different interests at stake through the use of post-sentencing techniques as clearing houses, even in the case of more than one conviction to be implemented against a single person.

A last remark concerns the difference in approaching the rewarding measures in terms of high level of formalisation of the related procedures – such as Germany or Italy in which the procedural rules govern the type, the time and the quality of the statements – versus systems where the law is almost silent on procedural aspects – e.g. Spain or Luxembourg. Therefore, prosecutorial and judicial authorities enjoy a wide discretion in assessing the applicability of the aforementioned measures. This divergent approach makes more difficult to imagine an EU blueprint triggering a higher level of harmonization.