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

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PREVENTING INTERNATIONAL TERRORISM

PREVENTING INTERNATIONAL TERRORISM

EUROPEAN MODELS OF REWARDING MEASURES FOR JUDICIAL COOPERATORS

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JOVENE EDITORE

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A "EUROPEAN MODEL" OF REWARDING MEASURES

CHAPTER 1

ITALY*

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

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

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

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

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

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

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

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

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

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

1.1. *Socio-political reasons*

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

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

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

1.2. *Legislative evolution*

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

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

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

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

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

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

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

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

We shall now move on.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1.3.2. *The scope of application*

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

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

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

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

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

1.3.3. *Collaboration*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[16] See paragraph 1.3.3.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. *Current rewarding legislation (where existing)*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2.1. *Applicability conditions*

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

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

– *dissociation*;

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

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

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

– having prevented the damaging event;

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

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

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

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

2.2. *Types of rewarding measures*

The classification of rewarding measures is not easy.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

See § 2.1.

2.5. *Revocation of rewarding measures*

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

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

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

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

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

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

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

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

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

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

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

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

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

[39] *Ibid*., 172.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2.8. *Measures for the protection of the repentant*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2.9. *Evaluation and control of the measure*

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

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

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

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

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

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

2.10. *Revocation of rewarding measures*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3) the express waiver of the measures;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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