National Reports. France

Julie Alix, Nicolas Derasse, Jean-Yves Maréchal, Clemence Quentin

CHAPTER 4

FRANCE

Julie Alix, Nicolas Derasse, Jean-Yves Marechal, Clémence Quentin

Summary: 1. Historical background of rewarding legislation (where existing). – 1.1. Socio-political reasons. – 1.2. Legislative evolution. – 1.3. Case law evolution. – 2. Current rewarding legislation (where existing). – 2.1. Applicability conditions. – 2.1.1. Persons concerned. – 2.1.1.1. Author of an attempt. – 2.1.1.2. Author of a consummated offence. – 2.1.2. Infringements concerned. – 2.1.3. Offences exempt from punishment. – 2.1.3.1. Offences under the Criminal Code. – 2.1.3.2. Offences under the Defence Code. – 2.1.3.3. Offences under the Code of Military Justice. – 2.1.4. Offences giving rise to a reduction of sentence. – 2.1.4.1. Offences under the Criminal Code. – 2.1.4.2. Offences under the Defence Code. – 2.1.4.3. Infractions of the Code of Military Justice. – 2.1.4.4. Infractions of the Internal Security Code. – 2.2. Types of rewarding measures. – 2.2.1. Rewarding measures that exclude or mitigate the penalty, initiated at the pre-sentencing stage. – 2.2.2. Rewarding measures that exclude or mitigate the penalty, initiated at the sentencing stage. – 2.2.3. Rewarding measures that exclude or mitigate the penalty, initiated at the post-sentencing stage. – 2.3. Counterpart of rewarding measures: the obligations of the repentant. – 2.4. Revocation of rewarding measures. – 2.5. Conditions for the application of the measures (procedural aspects). – 2.5.1. Conditions for the application of the texts of the Criminal Code. – 2.5.2. Conditions for the application of the exceptional penalty reduction. – 2.6. Conditions for the use of the declarations obtained (probative value of declarations). – 2.7. Measures for the protection of the repentant. – 2.7.1. General measures for the protection and reintegration of the "repentant". – 2.7.2. Authorization to use a borrowed identity. – 2.8. Evaluation and control of the measure. – 3. Current relevant case law (where existing). – 3.1. Application of the texts relating to the exemption from punishment. – 3.2. Application of the texts relating to the reduction of sentence. – 3.3. Probative value of the declarations of the beneficiary of a reduced sentence. – 4. Conformity of the current rewarding legislation to art. 16 of Directive 541/2017/EU (where existing).

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

1.1. *Socio-political reasons*

Although highlighted today by the problem of terrorism, the status of "repentant" has not been ignored in our previous legislation. But, the references that concerned it, such as the comments it has elicited from the doctrine, remain few. It is almost futile to try to find references to this notion, or to what may be related to it, in the writings of the criminal lawyers of the Ancien Régime. Indeed, few authors follow the path, still poorly marked, traced by Cesare Beccaria on the subject. In his Traité *Des délits et des peines* (ed. 1766, p. 102 ff.), the Italian Marquis mentions, in Title XIV of the book (*Des crimes commencés et des complices*), judicial decisions offering "im-

punity to the accomplice of a great crime, who betrays his companions". Such practices, which he considers to be denunciation, give him more criticism than reasons for satisfaction. In this way, "the Society," he said, "authorizes betrayal, even hated by villains among themselves. It therefore contributes to introducing "crimes of cowardice, which are more harmful to a nation than crimes of courage". When it "uses" such means, justice "discovers its uncertainty, and the law shows its weakness, imploring the help of the very person who offends it".

However, Beccaria does not want to keep the silent about the benefits of the approach. He insists on the prevention of "major crimes" and the observation of a practice that seems to "reassure the people who fill themselves with fear, when they see crimes committed, without knowing the perpetrators". He remains in his role as a reformer when he calls for the adoption of a "general law that promises impunity to any accomplice who discovers a crime", much more "preferable" to a particular declaration in a particular case, because it prevents the union of the bad guys, inspiring each of them to fear exposing themselves alone to danger". Moreover, such a text, if adopted, "would not give boldness to villains who see that there are cases where they are needed". Finally, "such a law, he concludes, must combine impunity with the banishment of the legislator" (*ibid.*).

At that time, Italy, through Beccaria was already setting the tone for a practice. Although it raised a certain number of reservations, it has helped gain the support of the population. As J.-F. Gayraud noted (*La dénonciation*, Paris, 1995, p. 264), the fact of questioning "the interest of granting impunity to criminals in terms that are still relevant" makes Beccaria's remarks very precursory, with a "desired objective" that is "always to disintegrate criminal organizations".

In 18th century France, criminal doctrine focuses more on the mechanism of active repentance ("To raise the problem of active repentance is to ask whether an offender who has spontaneously repaired or contributed to repairing the consequences of the offence he has committed can benefit from acquittal or a reduction in penalty", P. Savey-Casard, "Le repentir actif en droit pénal français", *Revue de science criminelle et de droit pénal comparé*, 1972, No. 3, p. 515) and the means offered by the justice system to the accomplice to reduce the penalty that may be imposed against him in the context of a criminal action. If they are not legally established, these means are not dismissed by the authors, who keep in mind this type of situation of which they may have been aware but for which the sources of the law seem incomplete.

The illustration can be provided here by lawyer Claude-Joseph de Ferrière in one of his passages on the "Crime" section in his *Dictionnaire de droit et de pratique* (ed. 1769, vol. 1, p. 406). If this jurisconsult specifies first of all that "he who has concerted to commit a crime, and who can commit it, by a real remorse of conscience has withdrawn from his undertaking", he also evokes the interest shown in the question of "repentance" by the following words: "As if someone who has conceived the plan with others to assassinate a Private Individual, through true and effective repentance, discov-

ers everything that is going on against him, declares his accomplices, gives him the means to arrest them and secure his life, he cannot be followed as a consequence of the will he had to commit an assassination. Indeed, projects that are not followed by any effective action are not within the competence of human justice. Since the society is not interested in wishes that are not followed up, the Society does not punish them.

In the Age of Enlightenment, comments remain too infrequent and nourished to encourage the deputies of the French Revolution to legislate on the subject. In any case, the period does not seem to be the right time for this approach. Indeed, both the principle of the legality of offences and penalties recognized in articles 7 and 8 of the Declaration of the Rights of Man and of the Citizen of 26 August 1789 and the sanction of complicity, punished by death in the Criminal Code of 1791, not to mention the lack of consideration of mitigating circumstances in the latter text, cannot lead to any value being given to "repentance".

However, this is not the case under the Consulate and Empire regimes. The organized plots against the Emperor undoubtedly contributed to greater attention being paid to those who, through the information they could provide, made it possible to thwart crime plans or have the perpetrators arrested if they had actually committed the crime. This is therefore an important first step with the 1810 Penal Code.

1.2. *Legislative evolution*

In France, the first legislative provisions concerning the status of the "repentant" seem to find a place, in the current state of our research, in the Criminal Code of 1810. The articles concerned can be considered, as Paul Savey-Casard (*op. cit*., p. 518) noted, as "legal exceptions" to "the rule of ineffectiveness of active repentance". Here, Parliament is interested in"cases where the offender's subsequent conduct in relation to the offence he or she committed is taken into consideration". The latter, "for example, […] collaborated in the repression of the crime".

This scenario is already present in article 108 of this Code, which clearly reflects the context of the plot, which is very clearly perceived during the Napoleonic period. This article provides that "Exemptions from punishment shall be granted to perpetrators of conspiracies or other crimes against the internal or external security of the State who, before any execution or attempt to execute such conspiracies or crimes, and before any prosecution is initiated, shall have first informed the authorities mentioned in Article 103 (namely the Government, the administrative or judicial police authorities) of such conspiracies or crimes and their perpetrators or accomplices, or which, even since the commencement of the proceedings, have resulted in the arrest of such perpetrators or accomplices". The legislator already provides here for the two scenarios that may arise, i.e. when a co-author or accomplice decides to inform the constituted authorities, whether this occurs either before the preparation of a plot or after the execution of this crime, by providing sufficient evidence to arrest those who committed this crime. In either case,

article 108, paragraph 2, states that"The perpetrators who have given such knowledge or made such arrests may nevertheless be sentenced to remain for life or in time under the special supervision of the high police".

The same measures may be applied, as provided for in article 138 of the 1810 Penal Code, against persons guilty of the crimes referred to in articles 132 and 133" – i. e. the crime of counterfeiting – again with an exemption from penalties which may be decided in the cases described above, but also with the implementation of a "special surveillance of the high police" (security measure), whether perpetual or in time. The status of the "repentant" is further strengthened by article 144, according to which the provisions just described are also "applicable to the crimes mentioned in article 139", which refers to "those who have counterfeited the State seal or made use of the counterfeit seal; those who have counterfeited or falsified, either one or more national stamps, or the State hammers used for forest marks, or the stamp or stamps used to mark gold and silver materials, or who have made use of falsified or counterfeit papers, effects, stamps, hammers or stamps […]".

Article 285 of the 1810 Code also confirms, but to a lesser extent, the interest of the Napoleonic legislator in denunciation. The reference here concerns "offences committed through writings, images or engravings, distributed without the name of the author, printer or engraver". The text states that "if the printed text contains some provocations to crimes or offences, criers, billboards, vendors and distributors will be punished as accomplices of the provocateurs, unless they have made known those from whom they hold the text containing the provocation". Paragraph 2 of this article provides that "in the event of disclosure, they shall be liable only to imprisonment for a term of six days to three months […]". Unlike the previous articles, the qualification of the facts leads to a mitigation and not to an exemption from punishment. As Paul Savey-Casard (*op. cit.*, p. 518) notes, "this encouragement to denounce is surprising. The drafters of the Code used it for purely practical purposes. They saw it as a way to more easily seize the main culprits and prevent offences that are highly dangerous to public order.

During the 19th century, legislation on the status of the "repentant" seemed to remain relatively static, at least until the time of the anarchist attacks. In this context, a first law of 2 April 1892 amended article 435 of the Criminal Code. It now provides that persons guilty of "wilfully destroying in whole or in part or attempting to destroy by mine or any explosive substance buildings, dwellings, dikes, roadways, ships, boats, vehicles of all kinds, stores or construction sites or their outbuildings, bridges, public or private roads and generally all movable or immovable objects of any kind whatsoever", "shall be exempt from punishment if, before the consumption of these crimes and before any prosecution, they have informed and revealed the perpetrators to the constituted authorities, or if, even after the prosecution has begun, they have provided for the arrest of the other perpetrators. They may nevertheless be subject, for life or in time, to the residence ban established by article 19 of the law of 27 May 1885.

A second law dated 18 December 1893 – which is one of the famous rogue laws adopted to repress the anarchist movement in France – amends

article 266 of the Criminal Code. Paragraph 3 of this article concerns "the persons who have committed the crime referred to in this article (more specifically art. 265: "any association formed, whatever the duration or number of its members, any agreement established for the purpose of preparing or committing crimes against persons or property […]")". These persons "shall be exempt from punishment if, before any prosecution, they have disclosed to the constituted authorities the agreement reached or made known the existence of the association".

In terms of legislation, the 20th century seems to have been mainly marked by the texts adopted during the 1980s and 1990s. Since the late 1970s, France has been confronted with a proliferation of terrorist attacks that continued over the following decades. In this sensitive context, the law of 2 February 1981 "strengthening security and protecting the freedom of persons" replaces articles 265 to 267 of the Criminal Code with articles 265 to 268 of the same Code. The latter article provides that "shall be exempt from the penalties provided for in articles 265, 266 and 267 – in substance, participation "in an association formed or an agreement established for the purpose of preparation in the form of one or more material facts, one or more crimes against persons or property", participation "in an association formed or an agreement established for the purpose of preparation in the form of one or more material facts, of one or more of the following offences: 1° Pimping […]; 2° Aggravated theft […]; 3° Destruction or aggravated deterioration […].; (4) Extortion […]", complicity in the offences defined above when the person "has voluntarily provided, knowing that they were to be used for the action, means intended to commit the crime or crimes for which the association was formed or the agreement established – the person who, having committed one of the acts defined by these articles, has, before any prosecution, disclosed the association or agreement to the constituted authorities and has allowed the identification of the persons in question". As Bernard Bouloc points out, "this excuse requires that the denunciation allow the identification, but not the arrest of the perpetrators. It is not, however, reserved for the first whistleblower, but only concerns the offence of criminal association without having any influence on the crimes or offences that were the consequence of the criminal association" ("The problem of the repentant. La tradition française relativement au statut des repentis", *Revue de science criminelle*, 1986, p. 780).

A few years later, the law of 9 September 1986 "on the fight against terrorism and attacks on State security" was added to the system already in place. Article 6 of this text introduces the following provisions into articles 463-1 and 463-2 of the Criminal Code: Article 463-1, paragraph 1, provides that "Any person who has attempted to commit as an perpetrator or accomplice one of the offences listed in the eleventh paragraph of article 44, when in relation to an individual or collective enterprise whose purpose is to seriously disturb public order by intimidation or terror, shall be exempt from punishment if, having notified the administrative or judicial authority, it has prevented the offence from occurring and identified, where appropriate, the other perpetrators". Similarly, paragraph 2 provides that "Any person who,

as an perpetrator or accomplice, has committed one of the offences listed in the eleventh paragraph of article 44, when in relation to an individual or collective enterprise whose purpose is to seriously disturb public order by intimidation or terror, shall be exempt from punishment if, having notified the administrative or judicial authority, it has prevented the offence from causing death and permanent disability and has made it possible to identify, where appropriate, other offenders". As for article 463-2, it provides that "Except in the cases provided for in article 463-1, the maximum penalty incurred by any person, author or accomplice to one of the offences listed in the eleventh paragraph of article 44, when it was in relation with an individual or collective enterprise whose purpose is to seriously disturb public order by intimidation or terror, who has, before any prosecution, permitted or facilitated the identification of the other perpetrators or, after the initiation of the prosecution, permitted or facilitated their arrest, shall be reduced by half or, where the penalty prescribed by law is life imprisonment, to twenty years". This law confirms the implementation of an exemption from punishment but also a reduction of punishment for those who will work to "repent".

On the eve of the adoption of the New Penal Code, which came into force on 1 March 1994, the mechanism of repentance has already found its place in French legislation. As J.-F. Gayraud (*op. cit.*, p. 267 *et seq.*) noted, however, the French system differs from neighbouring models. Indeed, "Unlike the status of repentance established in certain foreign laws, which takes into account the confession made by an offender for release during the investigation phase, or certain laws which allow the investigating courts to assess the existence of mitigating circumstances for disqualification, under French law, impunity is granted in the form of a mitigating or absolute excuse and falls exclusively within the jurisdiction of the court of judgment". Nevertheless, this excuse "never exempts the appearance in court and therefore never authorizes the investigating court to dismiss the case[… The offence is constituted and the offender remains criminally responsible".

1.3. *Case law evolution*

In the current state of research, it is not easy to highlight, in the case of France, any change in case law relating to the status of the repentant. Investigations need to be conducted more broadly here to determine any developments in how this still incomplete piece of our criminal legislation is applied.

In the past, we can mention a few rare decisions handed down on this subject of "repentance", in particular a judgment of the Court of Cassation of 18 August 1820 (*Bulletin criminel*, 1820, p. 325, Ferchaud and Cobourg). The court thus decides that "When, on the request made by individuals accused of making counterfeit money, the jury is asked a question as to whether the exemption from punishment provided for in article 138 of the Criminal Code should be applied to them, in favour of those accused of this crime who have denounced the other perpetrators, the criminal court shall reject this request by deciding 1°. That the crime was consummated; 2°. That

the non-consumption of crime is an essential condition for the application of the said law, it commits, on the one hand, usurpation on the functions of the jury in deciding the fact of the consumption of the crime; then, it makes a false application of the law, the accused having, even after the consumption of the crime, the right to have the said question asked".

We can also note the very late emergence in France of a modern conception of "repentance" that is not quite identical to that implemented in Italy, where priority is given to the fight against organized crime. The main target, at a time when French criminal legislation on the subject was becoming clearer in the 1980s, was undeniably terrorism. In this respect, it also appears that "The first French repentant was a repentant: Frédérique Germain, member of the organization Action Directe" and doctor of law. "Arrested in 1984, she confessed to several crimes and "gave" names and facts. Charged with criminal association, she was released in 1986" (J.-F. Gayraud, *op. cit.*, p. 270; «Les accusés de la fusillade de l'avenue Trudaine aux assises de Paris – Le repentir de Frédérique Germain, ex-" Blond-Blond"», *Le Monde*, 12 juin 1987).

2. *Current rewarding legislation (where existing)*

2.1. *Applicability conditions*

Several texts of the French Penal Code and the French Code of Penal Procedure concern the status of the "repentant". The latter is generally defined by article 132-78 of the Criminal Code, but this text is applicable, not to any crime or offence, but exclusively when a particular provision so provides, which raises the question of its scope of application (see 2.1.2). In addition, the specific texts, specific to certain offences, sometimes deviate from the letter of the general text, which may modify the scope of the enactment, as will be seen.

2.1.1. *Persons concerned*

With regard first to the definition of "repentant", the first target is the person who has attempted to commit a crime or misdemeanour and who, having notified the administrative or judicial authority, has made it possible to avoid the commission of the offence and, where appropriate, to identify the other perpetrators or accomplices.

Secondly, the person who has committed a crime or misdemeanour and who, having notified the administrative or judicial authority, has made it possible to bring the offence to an end, to prevent the offence from causing damage or to identify the other perpetrators or accomplices. The text adds that it still concerns the person who has made it possible either to avoid the commission of a related offence of the same nature as the crime or offence for which he was prosecuted, or to bring such an offence to an end, to prevent him from causing damage or to identify the perpetrators or accomplices.

The repentant person is therefore, in all cases, the perpetrator of an offence that has been committed or at least attempted. Only the perpetrators of crimes and offences are concerned, it being recalled that under French law, the attempt to commit a crime is always criminalized, whereas the attempt to commit a crime must be expressly provided for in the criminalization text.

2.1.1.1. *Author of an attempt*

In the first case (article 132-78, paragraph 1), the legislator refers to the author of an attempt, i.e., according to article 121-5 of the Criminal Code, the one who either started to execute the offence or performed all the acts of execution but failed, i.e. did not succeed in consuming the offence. This criminal or offender must notify a judicial or administrative authority and, through this approach, make it possible to avoid the commission of the offence and, if necessary, to identify the other perpetrators or accomplices. The doctrine has highlighted the difficulties involved in the application of this text. Thus, since the legislator only mentions the author of the attempt, it seems to exclude that the latter's accomplice may benefit from the mechanism provided for by the text, if one makes a literal interpretation of the latter. This analysis, which leads to a narrower definition of repentance, is generally rejected by the interpreters (V. C. Saas, Jurisclasseur pénal Code, article 132-78, fascicule 20, n° 24; A. Mihman, Exemption and reduction of sentence for repentant persons: contributions of the law of 9 March 2004 known as the "Perben II law", Criminal law 2005, study 1, p. 7).

The text poses another problem, linked to the very notion of attempted offence. Indeed, by targeting the person who attempted the offence and preventing its commission by notifying an authority, it raises the question of whether the "attempt" in question is indeed punishable. The fact of notifying a public authority and thus preventing the commission of the offence seems to imply that the perpetrator will have voluntarily interrupted the execution or will have voluntarily withdrawn, which means that the attempt would then not be punishable, making the text inapplicable. In other words, for the attempt to be punishable, it is necessary, according to article 121-5 of the Criminal Code, that the perpetrator of the acts does not succeed in consummating the offence because of circumstances beyond his control and the fact of notifying an authority and thus obstructing consumption, as provided for in article 132-78, paragraph 1, is inevitably a circumstance that depends on the agent's will. In addition, the text states that the effect of the warning given to the authority must be to avoid the commission of the offence. However, by hypothesis, the perpetrator of an attempt did not carry out the offence, i.e. he did not consume it and the fact of notifying the authority cannot have the effect of preventing the crime or offence from being committed. Either the perpetrator himself stops the execution of the acts and notifies the authority, but he will probably be considered as having voluntarily withdrawn, which will mean that the attempt will not be punishable and that article 132-78 will not be able to apply. Either the perpetrator does not voluntarily stop, being arrested by police officers before consum-

ing the offence, for example, and in this case the attempt will be punishable but the text will be equally inapplicable because the perpetrator can no longer, in this case, notify an authority in order to prevent the offence from being committed. In other words, in this case, it is not the fact of notifying an authority that prevents the offence from being committed, but the fact that the agent has not succeeded in doing so for a reason beyond his control.

The text of paragraph 1 of Article 132-78 therefore poses significant difficulties of interpretation, making it very difficult to apply (see C. Saas, above-mentioned article, Nos. 25 to 28).

During the the first Focus Group, practitioners also identified this obstacle to the application of the status. In practice, the general text cannot be applied because it is not compatible with the condition of interruption for reasons beyond the perpetrator's control.

2.1.1.2. *Author of a consummated offence*

In the second case (Article 132-78, paragraphs 2 and 3), the legislator refers to the person who has committed a crime or offence which, having notified the administrative or judicial authority, has made it possible to bring the offence to an end, to prevent the offence from causing damage or to identify the other perpetrators or accomplices.

It is therefore the perpetrator of a consummate offence who warns a public authority and thus causes three alternative consequences. The same question arises here as for paragraph 1, namely whether only the author himself or the accomplice is concerned. It should be noted here that some specific texts applying the provisions of article 132-78 of the Criminal Code apply not only to the perpetrator but also to accomplices. This is the case, for example, of article 222-6-2 of the Criminal Code, concerning acts of torture and barbarism, article 422-2, concerning acts of terrorism, or article 414-4, concerning attacks on the fundamental interests of the Nation. Since these particular texts are the ones that actually apply, it must be deduced that the author in the strict sense is not the only one targeted and that other participants, co-authors or accomplices, are likely to fall within the scope of the "repentant" status.

The action of notifying the administrative or judicial authority must make it possible either to stop the infringement, or to prevent it from causing damage, or to identify the other perpetrators or accomplices. The latter case does not pose any difficulty because it is a matter of the author denouncing the other participants. On the other hand, the other two, once again, pose a problem of interpretation. The text first takes into account the fact that the warning given to the authority made it possible to "bring the infringement to an end", which implies that it is likely to continue over time. It should therefore be understood here that only continuous offences, i.e. those whose consumption lasts for a certain period of time, by the will of the perpetrator, would be concerned. It can thus be imagined that the mechanism would apply to the case of the author of a sequestration committed by several persons and who notifies the authorities in order to have the persons deprived of their liberty released. It should also be noted that provision is in-

deed made for kidnapping (article 224-5-1, paragraph 2, of the Criminal Code). However, the specific texts, applying the operative provisions of article 132-78 of the Criminal Code, show that the legislator does not only refer to continuous offences, but also to the cessation of offences such as organized gang robbery (article 311-9-1 of the Criminal Code) or organized gang extortion (article 312-6-1 of the Criminal Code) which do not constitute continuous but instantaneous offences. It therefore follows that the rule that the authority's warning must have brought the infringement to an end must be understood very broadly.

Article 132-78 also takes into account the fact that the author who notifies the public authority prevents the offence from causing "damage". As this term is very vague, this damage could be either a necessary element of the offence or an aggravating circumstance of the offence, or another continuation of the offence, not taken into account in the context of the criminalisation. Again, the specific texts applying the mechanism provide valuable insights into it because they often specify which "damage" should be taken into account. Thus, article 224-8-1 of the Criminal Code grants a reduction of sentence to the author or accomplice of a misuse of a means of transport if, having notified the administrative or judicial authority, he or she has prevented the offence from causing "death of a man or permanent disability". However, if the death of a victim is an aggravating circumstance of the offence (article 224-7 of the Criminal Code), this is not the case for permanent disability. Similarly, article 225-4-9 of the Criminal Code, on trafficking in human beings, mentions the fact that the author, by notifying the public authority, must stop the offence or prevent it from causing death or permanent disability when neither of these two consequences constitutes an aggravating circumstance. It therefore appears that the "damage" referred to in article 132-78 of the Criminal Code may be any continuation of the offence and is not necessarily an element of the offence or an aggravating circumstance.

Finally, it should be noted that some special texts refer only to the fact that the agent, by notifying the authority, made it possible to stop the offence or to identify the perpetrators or accomplices, without mentioning the fact that it made it possible to avoid damage (See, in the field of money laundering, article 324-6-1, paragraph 2 of the Criminal Code).

In addition, article 132-78, paragraph 3, of the Criminal Code stipulates that the provisions of the preceding paragraph, i. e. those concerning the perpetrator of a consumed offence, are also applicable when the person has made it possible either to avoid the commission of a related offence of the same nature as the crime or offence for which he was prosecuted, or to bring such an offence to an end, to prevent him from causing damage or to identify the perpetrators or accomplices. This extension of the system therefore implies that the warning given to the administrative or judicial authority has no effect on the offence committed by the perpetrator who carried out this procedure but on another offence which must be both related and of the same nature as the offence committed. These criteria are again not very precise. Thus, connectedness is not precisely defined by the Code of Crimi-

nal Procedure, which is limited to providing illustrations. According to article 203, "offences are related either when they were committed at the same time by several persons gathered together, or when they were committed by different persons, even at different times and in different places, but as a result of a concert formed in advance between them, either where the perpetrators have committed some to obtain the means to commit others, to facilitate, to facilitate, to consummate their execution or to ensure impunity, or where things removed, misappropriated or obtained by means of a crime or offence have been concealed, in whole or in part". The notion, which implies close links between the different offences, depends on the factual circumstances assessed by the judges.

Similarly, the reference to the "nature" of the offence is vague. Thus, while it is easy to admit that offences such as theft and extortion are of the same nature, because they are property offences, it is difficult to know whether an offence such as procuring committed with torture or acts of barbarism (article 225-9 of the Criminal Code) is of the same nature as the crime of torture or barbarity (article 222-1 of the Criminal Code). Here again, there is a considerable margin of appreciation for the courts, which is likely to make it possible to extend the scope of the mechanism applicable to "repentance".

2.1.2. *Infringements concerned*

The scope of the regime applicable to "repentant" depends on the nature of the measures applicable to them.

Indeed, article 132-78 of the Criminal Code provides, on the one hand, for an exemption from punishment for the author of an attempt which, having notified the administrative or judicial authority, made it possible to avoid the commission of the offence and, where appropriate, to identify the other perpetrators or accomplices. On the other hand, the author of a consummate offence who, having notified the administrative or judicial authority, has made it possible to bring the offence to an end, to prevent the offence from causing damage or to identify the other perpetrators or accomplices, shall be entitled to a reduced penalty.

In both cases, the text indicates that these mechanisms do not exist for any crime or offence but only "in cases provided for by law". It is therefore appropriate to make an inventory of legal cases by drawing the distinction again, even if, for certain offences, both the penalty exemption and the penalty reduction mechanisms apply.

It should also be noted that, in the case of participation in a criminal association, the legislator grants, in an original way, an exemption from punishment, not to the author of an attempt, since the attempt to commit this offence is not incriminated, but to the person who participated in the group or agreement if, before any prosecution, he has revealed the group or agreement to the competent authorities and allowed the identification of the other participants (article 450-2 of the Criminal Code). The exemption from punishment therefore benefits here the perpetrator of a consummated and not only attempted offence (see *below* 3.1. for an illustration).

2.1.3. *Offences exempt from punishment*

The offences for which the "repentant" can benefit from an exemption from punishment are found in the Criminal Code, the Defence Code and the Military Justice Code.

2.1.3.1. *Offences under the Criminal Code*

The exemption from punishment is provided, in the first place, for offences against the person, provided for in Book II of the Criminal Code. It is a question of:

– murder and poisoning (Article 221-5-3, paragraph 1, of the Criminal Code);

– acts of torture and barbarism (Article 222-6-2, paragraph1, of the Criminal Code);

– drug trafficking offences (article 222-43-1 of the Criminal Code);

– kidnapping (Article 224-5-1, paragraph 1, of the Criminal Code);

– the misappropriation of means of transport (Article 224-8-1, paragraph 1, of the Criminal Code);

– trafficking in human beings (Article 225-4-9, paragraph 1, of the Criminal Code);

– pimping (article 225-11-1, paragraph 1, of the Criminal Code).

The exemption is applicable, in the second place, for offences of damage to property, provided for in Book III of the Criminal Code. It is a question of:

– theft by organised gangs (Article 311-9-1, paragraph 1, of the Criminal Code);

– organized gang extortion (article 312-6-1, paragraph 1, of the Criminal Code);

– money laundering (article 324-6-1, paragraph 1, of the Criminal Code).

Finally, the exemption is applicable to offences against the Nation, the State and public peace, which are criminalized by Book IV of the Criminal Code. It is a question of:

– offences of attack, sabotage, treason or espionage, delivery of all or part of the national territory, armed forces or equipment to a foreign power and delivery of information to a foreign power (Article 414-2 of the Criminal Code);

– conspiracy (Article 414-3 of the Criminal Code);

– acts of terrorism (Article 422-1 of the Criminal Code);

– escape (Article 434-37 of the Criminal Code);

– counterfeit currency (Article 442-9 of the Criminal Code);

– the criminal association (article 450-2 of the Criminal Code).

2.1.3.2. *Offences under the Defence Code*

The exemption from punishment for the perpetrator of an attempt is provided for several offences. It is a question of:

– the offences provided for in Articles L. 1333-13-3 and L. 1333-13-4 and the first paragraph of Article L. 1333-13-6 of the Defence Code (Article L. 1333-13-9 of the Defence Code) with regard to the protection and control of nuclear materials;

– offences relating to biological or toxin-based weapons (Article L. 2341-6-1 of the Defence Code);

– offences relating to chemical weapons, as provided for in Articles L. 2342-57 to L. 2342-61 (Article L. 2342-75 of the Defence Code).

2.1.3.3. *Offences under the Code of Military Justice*

Article L. 333-5 of the Code of Military Justice provides that a person who has attempted to commit in time of war one of the offences provided for in articles 411-2, 411-3, 411-6, 411-9 and 411-10 of the Criminal Code and mentioned in article L. 331-1 of the Code of Military Justice is exempt from punishment if, having notified the administrative or judicial authority, it has prevented the offence from taking place and, where appropriate, identified the other offenders. These are offences such as treason or espionage, committed in time of war.

2.1.4. *Offences giving rise to a reduction of sentence*

The offences for which the "repentant" can benefit from a reduced sentence are listed in the Criminal Code, the Defence Code, the Military Justice Code and the Internal Security Code.

2.1.4.1. *Offences under the Criminal Code*

First of all, it concerns offences against persons in Book II of the Criminal Code. It is a question of:

– poisoning (article 221-5-3, paragraph 2, of the Criminal Code);

– acts of torture and barbarism (article 222-6-2, paragraph 2, of the Criminal Code);

– drug trafficking (article 222-43 of the Criminal Code);

– kidnapping (article 224-5-1, paragraph 2, of the Criminal Code);

– the misappropriation of means of transport (Article 224-8-1, paragraph 2, of the Criminal Code);

– trafficking in human beings (article 225-4-9, paragraph 2, of the Criminal Code);

– pimping (article 225-11-1, paragraph 2, of the Criminal Code);

The reduction of sentence is applicable, in the second place, for offences of damage to property in Book III of the Criminal Code. It is a question of:

– theft by organised gangs (Article 311-9-1, paragraph 2, of the Criminal Code);

– organized gang extortion (article 312-6-1, paragraph 2, of the Criminal Code);

– money laundering (article 324-6-1, paragraph 2, of the Criminal Code).

The reduction of sentence is provided for, lastly, for offences against the Nation, the State and public peace, as set out in Book IV of the Criminal Code. It is a question of:

– intelligence with a foreign power, the provision of information to a foreign power and the direction or organization of an insurrectional movement (Article 414-4 of the Criminal Code);

– acts of terrorism (Article 422-2 of the Criminal Code);

– passive corruption and influence peddling by public officials (Article 432-11-1 of the Criminal Code);

– active corruption and influence peddling by individuals (Article 433-2-1 of the Criminal Code);

– obstacles to the exercise of justice (article 434-9-2 of the Criminal Code);

– corruption and influence peddling of foreign public officials, both active and passive (Article 435-6-1 of the Criminal Code);

– corruption and influence peddling, both active and passive, by persons exercising judicial functions abroad and persons treated as such (Article 435-11-1 of the Criminal Code);

– counterfeit currency (Article 442-10 of the Criminal Code).

2.1.4.2. *Offences under the Defence Code*

Several offences criminalized by the Defence Code may result in a reduction of sentence in favour of the "repentant". It is a question of:

– the offences provided for in Articles L. 1333-13-3 to L. 1333-13-5 and the first paragraph of Article L. 1333-13-6 (Article L. 1333-13-10 of the French Defence Code) with regard to the protection and control of nuclear materials;

– offences provided for in Articles L. 2339-2 and L. 2339-10 (Article L. 2339-13 of the Defence Code) relating to the manufacture, trade and import of war materials, weapons and ammunition;

– the manufacture, without authorization, of an explosive or incendiary device or explosive product, or any other element or substance intended to be used in the composition of an explosive product (article L. 2353-4, paragraph 5, of the Defence Code);

– offences relating to biological or toxin-based weapons (Article L. 2341-6 of the Defence Code);

– offences relating to chemical weapons, as provided for in Articles L. 2342-57 to L. 2342-61 (Article L. 2342-76 of the Defence Code);

– the offences provided for in Articles L. 2353-5 to L. 2353-8 (Article L. 2353-9, paragraph 1, of the Defence Code) with regard to explosives.

2.1.4.3. *Infractions of the Code of Military Justice*

Article L. 333-6 of the Code of Military Justice provides for a reduction of sentence for the benefit of the perpetrator or accomplice of the offences provided for in articles 411-4, 411-5, 411-7 and 411-8 of the Criminal Code and mentioned in article L. 331-1 of the Code of Military Justice. These are offences such as intelligence with a foreign power or the delivery of information to a foreign power, committed in time of war.

2.1.4.4. *Infractions of the Internal Security Code*

Article L. 317-11 of the Internal Security Code provides for a reduction of sentence for the benefit of the perpetrator or accomplice of the offence, provided for in article L. 317-7 of the same Code, of possession of a warehouse of weapons or ammunition in category C, as well as weapons in category D.

2.2. *Types of rewarding measures*

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

The French legislator expressly provides, for the benefit of the "repentant", two types of measures: an exemption from or a reduction of the penalty. By definition, such a mechanism can therefore only be applied at the time of the imposition of the sanction, by a court of judgment which has previously found the perpetrator guilty, or at the time of enforcement of the sanction, by a court of enforcement of the sentences.

No other measures are explicitly provided for at the pre-trial stage, i.e. the stage prior to the referral to a criminal court. However, it cannot be deduced from this that the question does not arise, in particular at a time when the public prosecutor's office is called upon to decide whether it is appropriate to prosecute the perpetrator. It should be recalled that article 40 of the Code of Criminal Procedure states that "the public prosecutor shall receive complaints and denunciations and shall assess the action to be taken in accordance with the provisions of article 40-1". Article 40-1 specifies this principle by stating that "when he considers that the facts brought to his attention pursuant to the provisions of article 40 constitute an offence committed by a person whose identity and domicile are known and for which no legal provision prevents the initiation of public proceedings, the public prosecutor with territorial jurisdiction shall decide whether it is appropriate:

(1) to institute proceedings;

(2) to implement an alternative procedure to prosecution under the provisions of section 41-1 or 41-2;

(3) to close the procedure without further action if the particular circumstances related to the commission of the facts justify it.

The latter hypothesis, i.e. the consideration of "special circumstances", may apply to the case of a "repentant" who could therefore benefit from a classement sans suite. Indeed, the text of the Code of Criminal Procedure does not provide for a scope of application for the latter measure, which makes it conceivable even for serious offences. In other words, an offender who agrees to cooperate with the judicial authority, in this case the public prosecutor, could obtain, in exchange, such a preferential measure. The great rarity of the application by the courts of the texts relating to exemptions and reductions of sentence tends to confirm that the treatment of the situation of the "repentant" is more often carried out at this stage of the proceedings than at the judgment stage. This can have several advantages. On

the one hand, this practice is discreet and even undetectable, since it leaves no trace in the procedure. On the other hand, the discontinuance does not constitute a judicial decision, which means that it does not extinguish the public action. As it is only an "administrative" measure, the classification may not be final, which means that the public prosecutor may decide to reverse his decision, on the sole condition that the facts are still likely to be prosecuted and are not covered by the statute of limitations. This non-definitive character therefore presents a flexibility that is not found in the case of the exemption and reduction of sentence that are pronounced in decisions having the authority of res judicata.

During the the first Focus Group, the police services pointed out, with regret, that they cannot promise justice collaborators a reduction/exemption from punishment and cannot use this in the negotiation phase. However, they believe that the possibility of offering the reduction or exemption from punishment, in order to be able to "deal" with the candidate, would be beneficial.

In France, this is not possible in practice, as only the sentencing judge can decide on the reduction or exemption from sentence. Making promises at the pre-trial stage would bind the judge at the trial stage. However, the Court of Cassation considers that the court is always free to set a sentence. Law cannot bind the judge on the application of a mandatory sentence, or on the benefit of a favorable status.

This practical impossibility is all the more true when individuals are tried for a crime before the Assize Court, since there is a real judicial hazard linked to the popular jury.

Furthermore, if at the pre-sentence phase, the police promise people a reduction in their sentence and provide protection, and if at the time of judgment there is no reduction in sentence, this discredits the system of collaboration and protection of collaborators. This is problematic, particularly in drug circles, where the value of using the statute is discussed. Offenders therefore do not want to talk and prefer not to be protected.

2.2.2. *Rewarding measures that exclude or mitigate the penalty, initiated at the sentencing stage*

All of the legislative texts previously listed provide for an exemption from punishment or a reduction of punishment, both of which may be applicable, in certain cases, to the same offence or category of offences. The common feature of these two mechanisms is that the person benefiting from them is found guilty and liable for the offence in question by a court of law. The difference is reflected in the fact that the exemption from punishment consists in excluding the imposition of any penalty for "repentance", as long as the legal conditions are met, and without the judges having any discretion as to whether or not to pronounce the said exemption (V. C. Saas, article cited above, No. 51). The reduction of sentence consists in imposing a sentence on the "repentant", which will be reduced in a proportion determined by the text providing for it. The special texts providing for a reduction in penalty set it at half of the maximum duration incurred (see, for example, for drug trafficking, article 222-43 of the Criminal Code or, for procuring, ar-

ticle 225-1-1, paragraph 2 of the Criminal Code). Here again, the mechanism operates as of right, which means that the court cannot modulate the reduction (see C. Saas, article 51 above). More precisely, since the maximum incurred is halved, judges can only impose a penalty equal to or less than half of this maximum.

The mechanism of sentence reduction at the trial stage must be combined with the principle of individualisation of the sanction, which requires the trial courts to take into account, in order to determine the nature, quantum and regime of the sentences imposed, the circumstances of the offence and the personality of its perpetrator as well as his or her material, family and social situation (Article 132-1 of the Criminal Code).

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

The French legislator has provided for a case in which a reduction of sentence may be granted after judgment and final conviction of the offender. Article 721-3 of the Code of Criminal Procedure provides that an exceptional reduction of sentence, the amount of which may not exceed one third of the sentence imposed, may be granted to convicted persons whose statements made to the administrative or judicial authority before or after their conviction have made it possible to stop or avoid the commission of an offence mentioned in articles 706-73, 706-73-1 and 706-74. Where these statements have been made by persons sentenced to life imprisonment, they may be granted an exceptional reduction in the probation period provided for in article 729 of the Code of Criminal Procedure, which may be up to five years. These exceptional reductions are ordered by the "Tribunal d'application des peines".

This mechanism is part of a more general mechanism, which is the reduction of custodial sentences that may be granted to persons who have been sentenced to a life imprisonment and are therefore serving their sentences (articles 721 to 721-3 of the Code of Criminal Procedure). In this case, it should be noted that the reduction provided for in favour of "repentance" can only apply in the event of conviction for offences covered by the criminal or organised delinquency regime, i. e. the offences listed in articles 706-73, 706-73-1 and 706-74 of the Code of Criminal Procedure, which does not cover the same hypotheses as reductions in sentence at the trial stage. For example, it is possible for a convicted person on the charge of destroying, damaging or damaging property in an organised gang as provided for in Article 322-8 of the Criminal Code, whereas the trial court could not order a reduction, pursuant to Article 132-78 of the Criminal Code, in the absence of a special text allowing it. This difference in treatment is difficult to justify.

In addition, and contrary to the reduction provided for at the trial stage, it is for the court enforcing the penalties to determine the extent of the reduction, without being able to exceed one third of the penalty imposed. Judges therefore have a discretionary power here that does not exist at the trial stage.

The Court of Cassation ruled, with regard to the scope of application of the mechanism, that the rejection of the request for an exceptional remis-

sion of sentence made by a convicted person was justified when the facts denounced by him, which amounted to rape, aggravated sexual assault and corruption of minors under 15 years of age, did not fall within the provisions of articles 706-73 and 706-74 of the Code of Criminal Procedure (Criminal Cass., 24 May 2006, No. 05-86.772; Bull. crim. No. 148).

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

The above-mentioned texts do not provide for any general obligation on the person enjoying the status of "repentant", but certain obligations may, if necessary, be imposed as part of the protection mechanism provided for in article 706-63-1 of the Code of Criminal Procedure (see *below*).

2.4. *Revocation of rewarding measures*

No grounds for revoking the status are expressly provided for in the texts. More precisely, as we have seen, if the person concerned is not prosecuted, he remains under the threat of prosecution because the discontinuation of the proceedings does not constitute a court decision or a cause of termination of the public proceedings. On the other hand, if it benefits from an exemption from punishment or a reduction of punishment, the favourable measure may not be withdrawn from it if it has been pronounced by a final decision. The same applies to the reduction of sentence granted after final judgment, since article 721-3 of the Code of Criminal Procedure does not provide any grounds for dismissal.

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

A distinction should be made here between the mechanism of exemption and reduction of sentence, provided for in the Criminal Code, and the mechanism of exceptional reduction of sentence, provided for in the Code of Criminal Procedure

2.5.1. *Conditions for the application of the texts of the Criminal Code*

The texts of the Criminal Code providing for grounds for exemption or reduction of sentence do not provide for any specific procedural modalities. It follows from this that the application for the favourable measure does not require any formal requirements. It can therefore be formulated at any stage of the proceedings, during the investigation, investigation or before a court of law.

In criminal matters, article 181, paragraph 3, of the Code of Criminal Procedure states that "the indictment order shall contain, under penalty of nullity, the statement and legal qualification of the facts on which the charge is based and shall specify the identity of the accused. It also specifies, where applicable, that the accused benefits from the provisions of article 132-78 of the Criminal Code. It can therefore be deduced from this text, which does not distinguish between exemption and reduction of sentence, that the in-

vestigating judge can, as early as the judicial information stage, establish the existence of one of these two mechanisms, the problem being to know what scope such a decision would have for the criminal court. In a judgment of the Criminal Division of the Court of Cassation of 16 November 2016 (No. 16-85.101, Bull. crim. No. 302), it was held that the decision of the investigating court concerning the application of Article 132-78 of the Criminal Code is not binding on the trial court, before which the accused may always, if he considers it appropriate, invoke the benefit of the provisions of that article. In the present case, the investigating judge had rejected the argument based on the application of the text on the grounds that the statements of the prosecuted person had not made it possible to avoid the commission of an offence. The question remains, however, whether, if the investigating court were to decide otherwise, the trial court would be bound by that decision, with the result that no special question should be put to the assize court, which would be obliged to apply the exemption or reduction of sentence (see, in this sense, H. Angevin, JurisClasseur Procédure pénale, Art. 347 to 354, fasc. 20, n° 221). The above-mentioned decision of the Court of Cassation does not resolve the difficulty.

If the investigating court does not mention in the transfer decision the existence of a ground for exemption or reduction of sentence, the plea may be raised before the assize court, before which a special question will then be asked. Article 349 of the Code of Criminal Procedure thus provides that, when invoked, each legal ground for exemption or reduction of the penalty must be the subject of a specific question.

In matters relating to tort, no specific procedural rules are provided for regarding exemption or reduction of sentence. Article 468 of the Code of Criminal Procedure merely states that if the accused person has a legal ground for exemption from punishment, the court shall find him guilty and exempt him from punishment, which confirms the automatic nature of the mechanism.

2.5.2. *Conditions for the application of the exceptional penalty reduction*

Article 721-3, paragraph 2, of the Code of Criminal Procedure states that the exceptional reduction it provides in favour of “repentant” persons is granted by the court for the enforcement of sentences in accordance with the procedures provided for in article 712-7. According to the latter text, the decision presupposes a reasoned judgment of the court for the enforcement of sentences seized at the request of the convicted person, at the request of the public prosecutor or at the initiative of the judge responsible for the enforcement of sentences to which the convicted person belongs. This judgment shall be delivered, after consulting the representative of the prison administration, after an adversarial debate held in chambers, during which the court shall hear the requests of the public prosecutor and the observations of the convicted person and, where appropriate, those of his lawyer. If the convicted person is detained, this debate may be held in the prison or by videoconference.

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

Article 132-78, paragraph 4, of the Criminal Code provides that no conviction may be handed down solely on the basis of statements made by persons who have been the subject of the provisions of this article. This provision is identical to that provided for, in the case of anonymous testimony, by article 706-62 of the Code of Criminal Procedure (see also, for statements made by judicial police officers or agents who have carried out an infiltration operation, article 706-87 of the Code of Criminal Procedure). It shows that the legislator does not give particular probative value to the declarations of the "repentant" while admitting that this value does exist. Thus, if the statements merely corroborate other evidence of the guilt of the persons charged, they may be taken into consideration by the investigating or trial courts, in accordance with the principle of freedom of evidence. This is also the position of the European Court of Human Rights, which considers that "the statements of the "repentant" must be corroborated by other elements; in addition, indirect testimonies must be confirmed by objective elements" (ECHR, 6 April 2000, Application No. 26772/95, Labita v/ Italy, § 158).

The difficulty, in practice, therefore, is whether the sentence is based solely on the statements of the "repentant" or also on other elements, which results, in principle, from the motivation of the decision, which must be particularly precise on this point (see *below* 3).

2.7. *Measures for the protection of the repentant*

The legislator provides various protective measures for the "repentant". Some of them, not specifically described, are intended to ensure, in general, the physical protection and reintegration of the person concerned. However, special provisions are devoted to the possibility of using an assumed identity.

In practice, protection always precedes exemption or possible reduction of the sentence, whereas the texts suggest the opposite, referring to Article 132-78 of the Criminal Code to determine who is likely to benefit from protection measures. More specifically, people who might be eligible for exemption or reduction in sentence first request protection at the pre-sentence stage before considering a beneficial measure under criminal law. The legal system thus appears to be completely out of step with criminological and judicial realities and should therefore be rethought on the basis of the latter.

Moreover, a major difficulty arises from the fact that, while the mechanism for exemption from punishment is automatic when the conditions are met (see *above*, No. 2.2.2), any reduction in sentence is at the discretion of the courts and can therefore never be certain for the beneficiary, which makes it difficult to obtain his or her cooperation at the stage of the police investigation or inquiry. In addition, there is a significant time lag between the moment of protection and the decision on guilt and sentence, which makes the benefit of awarding measure hypothetical.

Here again, a reform would be necessary in order to make the system more attractive, for example, the reduction in sentence could be acquired by

the repentant person, provided that his or her cooperation is effective and lasting, and awarding measures could be revoked if this is not the case. It could then be decided by the public prosecutor at the investigation stage or by the investigating judge at the judicial investigation stage, and, if necessary, be revoked later by a court trying the case or enforcing the sentence.

2.7.1. *General measures for the protection and reintegration of the "repentant"*

Under article 706-63-1, paragraph 1, of the Code of Criminal Procedure, "the persons mentioned in article 132-78 of the Criminal Code shall be protected, as necessary, in order to ensure their safety. They may also benefit from measures to ensure their reintegration.

The reference to article 132-78 of the Criminal Code suggests that only persons who have benefited from an exemption or reduction of sentence, by decision of a trial court, are concerned by the system. If this interpretation is adopted, it must be deduced that persons who are not prosecuted and are therefore dismissed without further action, after having provided information to prevent an offence, would not be able to benefit from it.

On the other hand, paragraph 5 of the article extends the protection system to family members and relatives of repentant persons.

It can also be observed that this protection is not automatic but only possible if it appears justified or necessary.

In practice, offenders immediately request protection. It is the risk of death that determines the entry into the protection system. In order to enter a protection programme, the threat on the person's head must be significant enough. The sacrifice (social death, change of place of residence, change of name, etc.) must be worthwhile.

The question of reduction or exemption of penalty is only raised at a later stage.

Protection and reintegration measures are defined, at the request of the public prosecutor, by a national commission which sets out the obligations to which the person must adhere and monitors the protection and reintegration measures, which it may amend or terminate at any time. In urgent cases, the competent services shall take the necessary measures and inform the National Commission without delay (Article 706-63-1, paragraph 4, of the Code of Criminal Procedure).

In practice, the philosophy of protection and reintegration is to offer applicants a life outside violence.

In France, this protection is difficult to apply to drug-related crimes and offences. Indeed, for someone who has a very high standard of living thanks to trafficking, the interest of entering a programme is nil from a financial point of view. It is not possible to provide the same lifestyle as in their previous life.

In such cases, protection cases are mainly about settling scores in mafia systems. The system is not used in the fight against terrorism.

The composition and functioning of the National Commission for Protection and Reintegration are determined by Decree No. 2014-346 of 17 March 2014. The Commission is referred to it by the public prosecutor in

charge of the case, or, where appropriate, by the investigating judge who notifies the prosecutor (article 6 of the decree). It may decide on any proportionate measures it defines, in particular physical protection and domiciliation measures, intended to ensure the protection of persons. It also defines, where appropriate, rehabilitation measures, taking into account in particular the material and social situation of the person concerned and, where appropriate, his or her family and close relatives (Article 14).

It can therefore be noted that the protection measures are not precisely defined but are left to the discretion of the committee, which ensures great flexibility for the system.

In practice, protection can also benefits family members. Some protection is provided abroad with the cooperation of Europol. There is no time limit on the duration of protection.

2.7.2. *Authorization to use a borrowed identity*

The legislator provides for the possibility of a special measure, which is the authorization to use the borrowed identity. Article 706-63-1, paragraph 2, provides that, in case of necessity, "repentant" persons may be authorized, by reasoned order issued by the President of the "Tribunal de grande instance", to use a borrowed identity.

Articles 18 to 25 of the Decree of 17 March 2014 describe the procedure for granting and withdrawing authorisation to use such a loan identity. The President of the "Tribunal de grande instance de Paris" is competent to rule on applications for authorization of use and withdrawal of such authorization. It shall be referred to it at the request of the President of the Commission, to which shall be attached the written request of the person concerned. The President of the court may decide to hear the person, this hearing not being public and not giving rise to the establishment of a record.

The order, issued without public notice, shall be notified to the President of the Commission and to the interested party by any means. The rejection of the application for authorization may be appealed to the first president of the Court of Appeal by the President of the Commission, the public prosecutor or the person who requested an identity loan. The time limit for appeal is fifteen days (Article 21 of the Decree).

According to article 24 of the Decree, only the inter-ministerial technical assistance service is authorized to create borrowing identities, to preserve all assigned borrowing identities and to reconcile borrowing and real identities.

Finally, article 25 specifies that in the case of criminal proceedings against a person with a borrowed identity, the person is sentenced under his or her borrowed identity. The conviction is entered in the criminal record under the borrowed identity. In the case of withdrawal of the authorisation to use a borrowed identity, the person shall be convicted under his or her real identity as soon as the withdrawal takes place before the conviction decision.

It should be added that article 706-63-2 of the Code of Criminal Procedure provides for the case in which the "repentant" authorized to use a bor-

rowed identity is brought before a court. The text states that where such appearance is likely to seriously endanger his life or physical integrity or that of his relatives, the court of judgment may, *ex officio* or at his request, order his appearance in camera or under conditions likely to preserve the anonymity of his physical appearance, including by benefiting from a technical device allowing him to be heard at a distance, his voice then being rendered unidentifiable by appropriate technical means.

2.8. *Evaluation and control of the measure*

The National Commission for Protection and Reinsertion may amend or terminate the protection and reintegration measures granted (article 15 of the Decree of 17 March 2014). It may also decide to withdraw the authorization to use a borrowed identity. It shall decide, at the request of the President of the Commission or the person concerned, when this measure no longer appears necessary, in particular when the committee terminates the protection and reintegration measures previously granted or when the person authorised to use an assumed identity no longer so wishes. This withdrawal may also be pronounced when the person receiving the authorisation engages in conduct incompatible with the implementation or proper functioning of the measure (Article 23 of the Decree).

In practice, however, a change of identity means that a person who changes his or her identity remains in the programme for the rest of his or her life, de facto, as this poses far too many problems in terms of civil and criminal law. The collaborator will have to stay in contact with the protection office all his or her life.

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

There is little case law on the application of the exemption and reduction of sentence mechanisms. Nevertheless, there are some illustrations of the implementation of certain specific texts establishing these rules.

3.1. *Application of the texts relating to the exemption from punishment*

The texts providing for an exemption from punishment almost always concern the perpetrator of an attempt and there is no known application of such a device, which seems to confirm that there is a problem of legal technique that prevents such a mechanism when the offence is attempted (see *above* 2.1.1.1.1.). On the other hand, in the case of participation in a criminal association, the mechanism applies to the benefit of the perpetrator of the crime consumed, the attempt not being incriminated.

There is a decision granting such an exemption from punishment, issued by a Court of Appeal (CA Douai, 4th Correctional Chamber, 20 January 2010, No. 08/02104). This decision is interesting because of its detailed motivation. The accused was therefore convicted of participating in a criminal association. The judges note that he provided information to a gendarme,

which led to the discovery of stolen car trafficking and the prosecution and conviction of the participants. Without the information provided by the defendant, the traffic would not have been updated. It adds that article 450-2 of the Criminal Code does not specify the extent or quality of the information provided to the competent authority required for the participant in the criminal association to benefit from the exemption from punishment. It states that the informant cannot be required to have provided a complete list of network members and the perpetrators of vehicle theft, as the data revealed by the accused proved sufficient to update and prosecute the members of the group. The judges conclude that the legal conditions for exemption from punishment are met.

3.2. *Application of the texts relating to the reduction of sentence*

A case decided by the Court of Cassation illustrates the granting of a reduced sentence for drug trafficking and sheds light on the judges' assessment of the textual conditions. In this case, the accused was found guilty on the charges of unlawful importation, transport, possession, possession, offer, transfer, acquisition or use of narcotic drugs and benefited from the reduction by half of the penalty provided for in article 222-43 of the Criminal Code. The judges state that this text does not require either that the information provided by the offender be preliminary to the investigation or that the offender be bound by an obligation of result. They add that the accused promptly acknowledged the facts and provided all the information in his possession, making it possible to identify the sponsors and reconstruct the circumstances of the trafficking, and that "the cessation of the incriminated acts was within the power of the various foreign authorities concerned" and not within the control of the accused. The public prosecutor had lodged an appeal in cassation on the ground that the accused had not allowed all the co-authors and accomplices to be identified, but the Criminal Division of the Court of Cassation rejected this argument, considering that the conditions of the text were therefore met and that the Court of Appeal had made a sovereign assessment of factual circumstances (Cass. crim., 19 June 1997, No. 96-83.639).

Other illustrations can be found in Court of Appeal decisions. Thus, the reduction of sentence in the case of drug trafficking is allowed in a case where the detailed statements of the accused have been verified by investigations carried out on letters rogatory and have made it possible to identify the sponsor and reconstruct the circumstances of the updated trafficking. This defendant thus enabled the criminal court to convict an international drug trafficker (CA Chambéry, Correctional Chamber, 21 October 2009, No. 09/00347).

Similarly, the reduction of sentence was granted, in the same field, to the individual who, upon arrest, offered to assist in the arrest of other persons, giving their address and helping investigators to understand the recorded telephone conversations (C.A. Montpellier, 3rd Correctional Chamber, 12 December 2007, No. 07/01215).

Judges are more often led to conclude that the conditions for benefiting from the preferential measure are not met. Thus, in the field of drug trafficking, an accused who has not informed the administrative or judicial authorities of the existence of the drug trafficking in which he was involved but has confined himself, after his arrest, to claiming that two persons, one of whom could be identified, had forced him to participate in the facts, cannot be granted a reduced sentence (Cass. crim, 7 November 2001, No. 00-87.885; see also, Criminal Cases, 10 April 2002, No. 01-85.360; Criminal Cases, 20 June 1996, No. 93-82.187, 95-81.975, Bull. crim. No. 270).

In the same field, it was held that the defendant who, having contacted customs officials and then a police officer, did not follow up on his initial contacts, could not benefit from the reduced sentence because the information provided was far too imprecise and could not lead to arrest (Cass. crim., 17 December 1998, No. 97-86.451; see also CA Douai, 4th Correctional Chamber, 20 March 2008, No. 08/00005). Similarly, a Court of Appeal has ruled, with the approval of the Court of Cassation, that the commitment to cooperate provided for in article 222-43 of the Criminal Code must be active, constructive and fair and not be limited to answering only the questions asked by the investigators after the arrest (Cass. crim., 30 January 2008, No. 07-82.022).

Another Court considered, in refusing the reduction of sentence, that the information provided by the accused allowed investigations to be carried out on a third party appearing to be involved in money laundering activities related to drug trafficking but that it did not have the effect of preventing the commission of the offence or a related offence, nor to prevent the offence from causing damage, nor even to allow the third party to be identified as actually co-author or accomplice to the offence charged against the accused (CA Douai, 4th Correctional Chamber, 7 September 2011, No. 10/03660).

On the procedural side, a Court of Appeal, before which the defendant, who had invoked the reduction of sentence provided for in article 450-2 of the Criminal Code in matters of criminal association, had called a gendarme as a witness, refused to proceed with this hearing on the ground that the witness did not appear before it and that this hearing is only of relative interest. This decision was censured by the Court of Cassation, which considered that the Court of Appeal should better explain why the requested hearing was impossible or unnecessary to establish the truth (Cass. crim., 12 March 2008, n° 07-84.949).

3.3. *Probative value of the declarations of the beneficiary of a reduced sentence*

Another decision highlights the judges' reasoning regarding the probative value of the "repentant" statements. In this drug trafficking case, one defendant benefited from the reduction of sentence provided for in article 222-43 of the Criminal Code. With the resources provided by the investigators, he phoned a supplier to order heroin. At the scheduled appointment, an individual appeared whom the "repentant" identified and accused of having previously delivered heroin to him. This individual was prosecuted and con-

victed of drug trafficking and alleged a violation of the principle of fair evidence which, in his opinion, would prohibit judges from withholding "repentant" statements invoking the benefit of article 222-43 of the Criminal Code, obtained in questionable and irregular circumstances by police officers. The Court of Cassation rejected this argument on the grounds that the judges established the guilt of this accused on the basis of the statements of the "repentant" also prosecuted, themselves corroborated by the circumstances and presumptions resulting from the investigation (Cass. crim., 31 Oct. 2000, n° 00-82.362). This solution is in line with the provisions of Article 132-78 of the Criminal Code and the case law of the European Court of Human Rights (see above 2.6.).

4. *Conformity of the current rewarding legislation to art. 16 of Directive 541/2017/EU (where existing)*

Article 16 of Directive (EU) 2017/541 of 15 March 2017 on combating terrorism provides for cases where the penalties provided for in Article 15 of the Directive may be reduced. Member States may choose to reduce penalties in cases where the offender "renounces his terrorist activities and provides administrative or judicial authorities with information that they would not otherwise have been able to obtain, helping them to:

– prevent or Mitigate the effects of the offence;
– identify or bring to justice the other offenders;
– find evidence; or
– prevent other offences referred to in Articles 3 to 12 and 14».

Article 16 is optional as it states that "Member States *may* take the necessary measures […]". The European legislator does not require Member States to take measures to reduce the penalty in the event that the offender repents. Unlike the other mandatory articles of the Directive, it is left to the Member States to decide whether or not to introduce a specific regime for "repentant" people. A Member State wishing to establish or strengthen a regime applicable to the status of "repentant" is free to do so *via* the transposition process of the Directive. However, if a Member State decides to set up a regime governing this status, it must comply with European requirements.

As far as France is concerned, the French legislator did not wait until the directive was enacted before taking measures related to the status of "repentant". Indeed, as previously demonstrated, since 1986 and more particularly since 2004 there has been a wide legal arsenal governing this status in French legislation. There is a general article and special articles. Article 132-78 of the Criminal Code, which provides for the general regime applicable to the status of "repentant", and articles 422-1 and 422-2 provide for the regime applicable to "repentant" persons in the case of an attempted or actual commission of an act of terrorism.

It is therefore necessary to ask whether this French legal arsenal is in line with the scheme proposed by the Directive. In this respect, several remarks need to be made.

First of all, it should be noted that the Directive and the French Penal Code use the same mechanism, namely a reduction in the length of the sentence incurred in order to "reward" the "repentant" of the information he has given. Moreover, the two mechanisms have in common that they do not provide for any particular procedural modality. No details on the form or timing of the request are provided.

However, several elements differ between the French and European texts.

First of all, we can notice that there is a difference in the terms used.

The Directive uses the term "offence" while Article 132-78 prefers the term "crime or misdemeanor". The use of the generic term "offence" can be explained by the fact that the Directive is intended to be general and to be understood by all Member States in order to be accepted, through the transposition process, in each of the national legal systems. However, not all Member States have a tripartite categorization of offenses as in France.

However, this semantic difference has no substantive consequences since both French criminal law and the Directive of 15 March 2017 subject all acts of terrorism to a penalty involving deprivation of liberty. When reduced to the French tripartite classification, this excludes the possibility that terrorism could be qualified as a contravention. Consequently, the "offences" of European law are indeed the terrorist "crimes and offences" of French criminal law. Moreover, article 422-2 of the French Criminal Code expressly refers to "the penalty of deprivation of liberty".

This clarifies what is to be understood by the term "sentence". Thus, under French law, only the imprisonment sentences would allow an author or accomplice of an act of terrorism to benefit from the "repentant" regime, to the exclusion of other penalties, in particular complementary ones. Such a limitation is not contained in the Directive, which could suggest a reduction of the fine or an alternative or additional penalty. A question then arises: does not the harmonization of a "law of repentance" imply a prior harmonization of the law of penalties, at least in terrorist matters, beyond the provisions of the directive?

It should also be noted that the first condition proposed by management on 15 March 2017 is not included in any French text. The Directive states that "Member States may take the necessary measures to ensure that penalties[…] can be reduced when the offender *renounces his terrorist activities*". The Directive lays down two cumulative conditions for the reduction of sentence. The perpetrator must renounce his terrorist activities *and* provide information that the public authorities would not otherwise have been able to obtain. The French legislator does not envisage that such an action could be part of the conditions to be met in order to benefit from a reduced sentence. The absence of such a condition in French law seems surprising because it would mean, in theory, that an offender who commits a terrorist

offence could have his or her sentence reduced while continuing terrorist activities. In reality, it is the ambiguity of French law that distinguishes the "reward" attributed to the repentant from the regime of protection from which it benefits, which seems to imply a renunciation of any terrorist activity.

In this respect, French legislation should be amended to be fully compatible with European law.

It should also be noted that the Directive uses the generic term "offender". This can also be understood in the general purpose of the Directive. It is intended to apply in all domestic legal systems, so it does not precisely qualify the term "offender". It seems to have to be heard in its broadest sense. The regime provided for by the Directive would therefore apply both to the perpetrators of an attempted offence and to those of an offence committed or to accomplices. Section 132-78 is more specific than the directive since it refers to "the person who attempted to commit" and "the person who committed". As already mentioned above, the question of the accomplice then arises. Article 422-2 expressly provides for the possibility for an accomplice to benefit from the reduction of sentence provided for in this article. Thus, by articulating the texts of the Criminal Code, it would seem that the French status of repentant in the case of a terrorist act could apply to the same protagonists as those envisaged by the Directive. In this respect, the texts of the Penal Code would be in conformity with the European directive.

However, Article 16 of the Directive, unlike French legislation, does not distinguish between the offence committed and the offence attempted – and this is certainly welcome, given the difficulties of interpreting French law on this point (*supra*, 2.1.1.1.1). Thus, according to the European text, the same criteria should be met for the perpetrator, whether he has attempted to commit or committed an offence, to have his sentence reduced.

In this respect, the French system is more complex than the Directive since it provides for the possibility of exemption from punishment in the event of an attempt. Indeed, according to article 132-78, paragraph 1 of the French Penal Code, in the case where the person who has attempted to commit a crime or offence, and notified the administrative or judicial authority, has made it possible to avoid the commission of the offence, and if necessary, to identify the other perpetrators or accomplices, he could be exempt from punishment. This situation is not provided for in the Directive of 15 March 2017.

This exemption from punishment is possible in the event that the cumulative conditions referred to in the first paragraph of Article 132-78 of the French Criminal Code are met. These conditions are as follows: first, the person must have attempted to commit a crime or misdemeanor. Secondly, that it has notified the administrative or judicial authority. Thirdly, its action must have made it possible to avoid the commission of the offence and to identify the other perpetrators or accomplices of the offence. These conditions for exemption from punishment do not correspond to those of the Directive and are much more restrictive than those provided for in Article 16. In any case, this provision of French law is problematic and confusing, so it

should be repealed, in or outside the context of the transposition of the Directive.

With regard to the case of the consummated offence provided for in article 132-78, paragraph 2, of the French Penal Code, a reduction of penalty shall apply to the perpetrator who notifies an administrative or judicial authority and who has made it possible to bring the offence to an end, to prevent the offence from causing damage or to identify the other perpetrators or accomplices. It is therefore provided that an offender who commits an offence may have his sentence reduced if he notifies a public authority and thus causes three alternative consequences, whereas the European text considers four alternative consequences. French law, unlike European law, does not provide that assistance in finding evidence may result in a reduction of sentence. Nor does it clearly provide that preventing other offences referred to in Articles 3 to 12 and 14[of the Directive] from being committed.

It should be noted, however, that article 422-2 of the Criminal Code provides for a reduction in the penalty in cases where the author, having notified the public authorities, has prevented the offence from causing death or permanent disability. The fact of causing the death of a man or a permanent disability may be classified as a criminal offence under French law. Examples could include the offences of murder, murder or "deadly blows" for "death of a man" and intentional or involuntary violence for "permanent disability". Thus, the fact that the perpetrator of a predicate offence makes it possible, by transmitting information, to prevent the occurrence of a person's death or permanent disability could be associated with the condition laid down in the Directive since the aim would be to prevent other terrorist offences from being committed. However, the provision is too restrictive, since the Directive envisages rewarding the fact of having prevented any other terrorist offence, well beyond offences against the life or integrity of individuals. Consequently, French legislation is more restrictive than European legislation and does not seem to be in conformity with European law on this element either.

As regards the other conditions, those provided for in the Directive and those provided for in the Criminal Code are not identical. However, it is possible to make links between French and European conditions.

Indeed, article 132-78, paragraph 2, provides for the case where the person who has committed a crime or offence and who has notified a public authority has made it possible to bring the offence to an end or to prevent the offence from producing damage. If these two conditions are not expressly provided for in the Directive, it is nevertheless possible to link them to the first condition laid down in Article 16 of the Directive. The latter envisages the case where the offender has provided the public authorities with information that they would not otherwise have been able to obtain, thereby helping them "to prevent or limit the effects of the offence". Several remarks need to be made in order to understand the links between these different conditions.

The article of the Penal Code uses the term "damage" but the text of the directive uses the term "effect". These two terms are both very vague. As

demonstrated above, the term "damage" referred to in article 132-78 of the Criminal Code may be any continuation of the offence and is not necessarily an element of the offence or an aggravating circumstance. If we consider the common definition of the term "effect", it can be defined as the result, the consequence of the action of an agent, of any phenomenon. The two terms seem to have a very similar meaning and can be understood in the same way.

However, article 422-2 of the French Criminal Code, which specifies the regime of "repentance" in matters of terrorism, sheds light on the notion of damage by specifying which type of damage must be taken into account. Thus, it specifies that the penalty of deprivation of liberty of an author or accomplice to an act of terrorism is reduced by half if the information has allowed that "the offence does not result in the death of a man or permanent disability".

Where "effects" seem to be understood very broadly by the Directive, French legislation is extremely restrictive as to the "damage" that must be taken into account in order to benefit from the reduction of the penalty in the case of an act of terrorism.

Finally, the French text provides for the case where the information provided would make it possible to identify the other authors or accomplices. The European text provides for the case where the information would help him "to identify or bring to justice the other perpetrators of the offence" (Article 16, *b*), *ii*)). The Directive, unlike the Criminal Code, does not cover accomplices to the offence. It is possible to wonder whether the penalty reduction envisaged by the Directive could apply if the offender denounces an accomplice. In this respect, it is possible to refer to what has been said previously on the use of the term "offender" by the Directive, which must be considered in the broadest possible way. In any case, since the Directive is an instrument of minimum harmonization, States are free to adopt mechanisms that go further.

In addition, the directive provides for assistance to "identify or bring to justice". The second term does not appear in article 132-78 of the French Penal Code. However, we can ask ourselves whether this is necessary in the directive. Is it possible to help bring someone to justice without first identifying them, in other words, without denouncing them? We could consider assistance in bringing the other perpetrators of the offence to justice by other means such as the provision of evidence other than a denunciation, but this is expressly and particularly provided for in the Directive (Article 16(*b*)(*iii*)). Helping to bring a person to justice seems to have a consequential link to identifying that person. Thus, even if the French text does not refer to this condition, it would seem that it may be induced by the fact of allowing "the identification of other perpetrators or accomplices" (article 132-78, paragraph 2).

In the light of all these elements, a mixed conclusion must be drawn from this comparative analysis. Indeed, even if there are many similarities between French and European legislation and even if the French provisions predate the adoption of the Directive, the absence of certain conditions and

the existence of overly restrictive conditions in French repentance law suggest that French law would not be fully in conformity with European law if the reward clause for repentance were made mandatory and not optional.

In addition, there is considerable resistance to the deployment of collaborators of justice in the fight against terrorism.

Only one type of terrorism currently affects France: Islamic terrorism. In this area, there has not been a case where a defendant has benefited from a reduction or exemption from sentence. Nor is there any protection file open in this area. According to the French Anti-Terrorist Prosecutor's Office, this is explained, on the one hand, by the fact that 98% of cases, an offense has already been completed (which implies that the Anti-Terrorist actors refuse to protect an accused person after the offense, whereas the law would allow it). On the other hand, the profile of the accused is particular: the individuals involved are not afraid to die and do not want any protection. According to counter-terrorism authorities, detainees in terrorism cases experience prison as a divine experience (which may only be true for those who are truly involved in the commission of an attack, but leaves out peripheral protagonists, sometimes with little or even no radicalization).

Moreover, still according to the Anti-Terrorist Prosecutor's Office, the individuals in question are involved in a process of cover-up (taqyia), so that it is not possible to establish a relationship of trust, thus ruling out any collaboration.

On the other hand, the anti-terrorist services recognize that it is not impossible that people may give information about attacks, but this remains extremely theoretical in France today. This is all the more so as the French text is inapplicable since it provides for the case of an attempted attack and, here again, it does not work with voluntary withdrawal.

With regard to the protection of collaborators of justice in terrorism cases, practitioners consider that it is in practice very complicated to integrate a radicalized person into such a programme. Currently in France, counter-terrorism actors consider that we are facing a failure in terms of deradicalization, so that it would be very difficult to get people to completely abandon the radical ideology that leads to violent extremism.

Both the National Commission for the Protection of the Repentant and the magistrates in charge of anti-terrorism are not in favor of using the system of collaborators of justice in the fight against terrorism. They also fear that this would involve the protection programme in managing too many cases, when the system is not designed to do this and is only viable for a very small number of cases. Today, in France, about 50 people are protected. The opening to terrorist litigation (returnees) would potentially concern hundreds of people, what would create a risk of asphyxiation of the system.