Universiteit Leiden
Criminal Law and Criminology

Collaboration with Justice in the Netherlands, Germany, Italy and Canada

A comparative study on the provision of undertakings to offenders who are willing to give evidence in the prosecution of others

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Leiden University, 2017

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Summary

One of the more far-reaching investigative tools in criminal cases is the instrument of collaboration with justice, the measure by which undertakings are made to otherwise unwilling 'offender witnesses', i.e. witnesses who themselves are suspected or who have been found guilty of committing a criminal offence, in order to persuade them to cooperate with the authorities, by giving (incriminating) evidence in the prosecution of others. While the instrument is generally viewed as a useful tool for penetrating the higher echelons of a criminal organization, it is not uncontroversial, entailing as it does the promise of 'benefits' to persons who themselves are suspected of, or who have been found guilty of, committing a criminal offence, thereby posing a risk to the reliability of the testimony as well as to the integrity of the proceedings and the criminal justice system more generally. This study aims to gain insight into the legal avenues available for making undertakings to witnesses in exchange for their evidence in several countries – the Netherlands, Germany, Italy and Canada –, ultimately with a view to drawing lessons from the comparative exercise for the Netherlands in particular.

The Netherlands has had a statutory provision since 2006 on collaboration with justice. In July 2013 the then (Dutch) Minister of Security and Justice sent a letter to the Lower House of Parliament in which he indicated that in the context of effectively combatting organized crime, he considered it necessary 'to widen the scope for working with members of the civilian population who themselves are – or have been – active in groups which are subject to investigation, or who are in some way closely related to members of such groups'. The statutory framework which currently applies to the instrument of collaboration with justice was felt to be too restrictive, in the minister's view. For these reasons he announced that a bill would be prepared 'that provides for a widening of the Public Prosecution Service's […] room to negotiate in order, in exceptional situations, to be able to make greater undertakings than are now possible.' As an example the minister referred to undertakings to reduce sentences by *more* than half, i.e. more than may currently be granted, without this amounting to an undertaking of complete immunity from prosecution, or providing financial compensation, which is currently forbidden. The minister also indicated that he wanted to make the instrument of collaboration with justice available for more offences than is currently possible under the statutory provisions. As part of the current legislative process for modernising the Dutch Code of Criminal Procedure, this topic is once again up for consideration by the Dutch legislator. In drawing lessons from the comparative exercise for the Netherlands, then, the more specific aim of this study is to provide input for the purpose of the determination of whether or not to introduce a new statutory provision on collaboration with justice or to refine the existing one. Given that the bill promised by the minister in 2013 aims to widen the scope for using the instrument of collaboration with justice, in selecting countries for the purpose of the comparative exercise, the logical solution was to consider countries where the possibility of making undertakings to witnesses appears at first glance to be greater than in the Netherlands. This is the case in all three of the countries selected.

In examining each of the four countries, it has been considered how the instrument has been legally framed, along with how it is applied in practice, and what kinds of problems and public debate that has engendered. Accordingly, this study is not only concerned with 'the law in the books', but also 'the law in action', and this is reflected in the research questions. Thus, the main questions that have been answered in this study are as follows:

a) How is the instrument of collaboration with justice (hereafter: 'the instrument') regulated in each of the countries under examination?
b) How is the instrument applied in practice in each of the countries under examination, and what are the experiences and results achieved in this regard?
c) How does the relevant law and practice in Germany, Italy and Canada compare to that in the Netherlands?

These main questions are subdivided into nineteen more concrete research questions, which fall into three main categories, reflecting the aforementioned 'law and practice' approach. The first category of questions concern the legal framework. In this regard the researchers looked at the legal basis and history of the instrument; the types of undertakings provided for; the types of offences in respect of which the instrument may be used; the responsibility for using the instrument; the relationship with other measures whereby private individuals provide information for the purposes of investigation and prosecution; and the relationship with the phenomenon of witness protection. The second category of questions addresses the functioning of the instrument in practice by asking what types of undertakings are actually used in practice; how often and on the basis of which considerations the instrument is used or not used; what the positive and negative experiences have been in practice with the instrument and the legal framework in this regard; what results have been achieved in individual cases by use of the instrument; which factors contribute to the successful use of the instrument and which factors form obstacles in this regard; and whether the rules on collaboration with justice achieve their objective in general. The third category of questions addresses the matters of scrutiny, transparency and debate by asking to what extent the use of the instrument is subject to (judicial) scrutiny; in how far the (use of the) instrument is publicly transparent; to what extent there is debate regarding the use of the instrument; and in how far and in what regard scrutiny, transparency and debate has led to changes in the regulation of the instrument. All of these questions have been answered for each of the four countries, eventually leading to the answers to the final two sub-questions: in which respect do the law and practice in Germany, Italy and Canada correspond to that in the Netherlands, and in which respect do they differ (sub-question 18); and which lessons can be drawn from the comparative exercise for the Dutch regulation of, and practice with respect to, the instrument (sub-question 19)?

To determine the legal framework and how it was arrived at, an analysis was carried out in the form of desk research of the relevant legislation and regulations, the case law, the literature on the topic and the policy documents and parliamentary documentation available for each of the countries included in

the study. It was also attempted – insofar as possible – to gain insight into how often the instrument is used and what variations there may be in the undertakings given. Further, in all the countries concerned semi-structured interviews were conducted with various practitioners in the field including public prosecutors, police officers, judges and defence lawyers. These interviews focused on: 1) determining the common methods in practice insofar as these are not clearly described in public or other documents; 2) providing insight into how often the instrument is used; 3) highlighting the problems encountered and successes achieved, and; 4) creating an inventory of the views held and perceived needs in the practice with regard to the use of the instrument. For the Netherlands a focus group was also organized in which representatives of the various professional groups were brought together to reflect on the results of the study in the Netherlands and the countries compared. This offered an opportunity, on the one hand, to validate and probe more deeply into the perceptions surrounding the instrument of collaboration with justice in Dutch practice and, on the other hand, to examine how representatives of various professional groups view the legislation and the methods used in the countries compared.

The report comprises an introduction (Chapter 1), a more detailed consideration of the instrument of collaboration with justice as such (Chapter 2), four country reports (Chapters 3 to 6), a comparative law analysis (Chapter 7) and a concluding analysis in which the findings from the Dutch practice and the comparative law analysis are brought together, in an attempt to provide input for the determination of whether or not to introduce a new statutory provision or to refine the existing framework in the Netherlands (Chapter 8).

Following the introduction to the research project and its exact scope and methodology in Chapter 1, Chapter 2 looks more closely in general terms at the subject of this comparative law study by describing in more detail the instrument of undertakings to witnesses and its aims. The risks and objections associated with the use of this instrument are also discussed and the question of when the use of the instrument may be deemed a success was also considered, along with the perspectives which need to be taken into account when answering this question. This paved the way for the country reports in which the legislation and the practical implementation of the instrument of undertakings to witnesses are set out for each of the four countries included in this study. Finally, brief consideration is given to the jurisprudence of the ECtHR in this regard, in terms of the right to a fair trial (Article 6 ECHR).

The country reports in Chapters 3 to 6 – in which the aforementioned sub-questions are addressed for each of the four countries involved in this research – are largely structured in the same way although the emphasis may be placed in different areas and the problems which arise in practice may differ. Each of the country reports first considers the development of the legal framework. Various aspects of the scheme are then further examined, followed by an examination of the practice. The individual country reports make no comparison with the Netherlands. In other words, the law and practice in the various countries were described entirely independently, without reference to the Dutch situation. In light of the richness of the various country reports it is impossible to summarize them all here, but the answers to the research questions in the annexes to the country reports provide a good first

insight into the findings relating to each country. Regarding the Netherlands (Chapter 3) it was concluded that since the introduction of the current legislation in 2006, the use of the instrument has been limited. Nevertheless some satisfying results appear to have been achieved in individual cases with the aid of this instrument. At the same time, it became apparent that there are significant legal and practical obstacles to the (successful) use of the instrument. Among other things, this is reflected in the fact, as shown by the empirical research, that while exploratory talks with potential witnesses for the purpose of determining whether or not an agreement could be reached have taken place much more often in recent years, the majority of these talks produced no result. It also appears that the scheme is most favourable to those accused of more serious crimes, who find themselves facing a long (or very long) prison sentence, while originally the scheme was intended mainly for witnesses who are accused of relatively less serious crimes. It also appears that several questions and problems which arise in practice cannot be adequately resolved by reference to the legislation. Examples of this include the ongoing discussion regarding the permissibility of certain undertakings, the sometimes unclear relationship in practice with the agreements concerning witness protection, and the lack of clarity concerning the scope of the scrutiny of the proposed agreement by the investigating judge.

In Chapter 7 the Dutch law and practice is compared to that of Germany, Italy and Canada, with a view to being able to draw lessons from the comparative exercise for the Dutch law and practice. To this end, the law and practice of the different countries were compared within a framework of themes. It was seen that there are similarities and differences between the countries as regards the scope of the instrument itself, the (types of) offences in respect of which it is available and the benefits on offer in this regard, but also as regards the degree and nature of the regulation of the instrument (and the extent to which the legal framework in place can be depicted as an instrument at all), including the procedural aspects thereof, such as the degree of scrutiny to which the process by which an individual becomes a collaborator of justice and the reliability of the statements provided is subject. There were also significant differences between the countries with regard to the use of the instrument in practice, for instance in terms of frequency. While the general picture to emerge from the German, Italian and Canadian country reports is that of an instrument that is deployed on a (fairly) frequent basis, in the Netherlands the instrument has been applied in a handful of cases only since the introduction of the current legislation in 2006. And in terms of the basic attitude, the picture is that in the other countries the legal community appears to be more at ease with the instrument of undertakings to witnesses than it is in the Netherlands.

Chapter 8 addresses the question of which lessons can be drawn from the comparative exercise for Dutch law and practice, in an attempt to provide input for the determination of whether or not to introduce a new statutory provision or to refine the existing framework in the Netherlands. The more general picture presented by the comparative law study is that in terms of its scope and what is possible the Dutch legislation is more restrictive and gives rise to greater obstacles than the legislation in the various other countries. From this perspective, the comparative law analysis combined with the findings on the Dutch law and practice in Chapter 3 gives cause for reconsideration of several aspects of the Dutch scheme, for instance with regard to: the types of offences in respect of which the instrument is available;

the ability to make agreements with witnesses who themselves run the genuine risk of being sentenced to life imprisonment or who have already been convicted thereto; the open or closed character of the scheme with regard to the nature of the undertakings that may be provided; and the ability to make undertakings entailing full immunity from prosecution or total exemption from punishment. Further, this research gives cause to reconsider some procedural aspects of the current framework as well as the relationship between the instrument of undertakings to witnesses and the protection of witnesses and the responsibilities in this regard. However, the foregoing does not mean that the Dutch scheme is more restrictive than its German, Italian and Canadian counterparts in all respects. For instance, with regard to the amount of sentence reduction that may be granted, the Dutch scheme seems to be fairly in line with its Italian and German counterparts (at least in cases in which the collaborator himself is accused of more severe crimes). In conclusion, on the basis of the findings of the legal and empirical research set out in the Dutch country report in Chapter 3 and the comparative analysis in Chapter 7, Chapter 8 identifies aspects of the Dutch law and practice on collaboration with justice that give cause for reconsideration.

In reconsidering the Dutch scheme it should be borne in mind however that the selection of countries for the purposes of the comparative exercise was made on the basis of the impression that the legislation in these countries is more flexible and more widely applicable. While this impression was largely confirmed in this study, this is not to say that the Netherlands is lagging behind in this regard. Nor does it imply that the Dutch legislation *should* be widened. In this context it should be noted that in the past, Germany and Italy have amended their legislation to make it more restrictive, because the legislation in place was perceived to be 'too attractive'. In this context it should also be noted that the present study has provided only a limited view of the matter of how successful the various schemes have been in practice; it would therefore being going too far to conclude that the legislation in the various other countries is more successful than the Dutch legislation, simply because they appear to be wider in scope. The question of whether or not the Dutch statutory framework should be widened ultimately requires a political legal assessment which looks not only at the available options for widening the scheme, but also at the risks and objections to the instrument (and its wider application). Finally, the actual use and success of the instrument of collaboration with justice is determined only to a certain extent by the statutory framework (and its scope); the sentencing regime more generally and the 'supply' of cooperative witnesses from criminal circles, the capacity, expertise and experience within the police and the prosecutorial authorities and how the available opportunities are used, are equally significant.