arsaequi.nl/maandblad AA20240704

Lessons from Italy for a more effective use of crown witnesses in the Netherlands

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In recent years, crown witness deals have become one of the most debated topics in Dutch criminal procedural law. The Minister of Justice and Safety is turning to Italy as an inspiration to improve Dutch law. What lessons can be learned from this country? How can the success of the Italian legislation on collaborators with justice be explained, and what can be taken from it for the Netherlands? This contribution provides comparative insights, and extracts some important lessons.

1 Introduction

The use of crown witnesses (*kroongetuigen*) in criminal cases is one of the most discussed topics of Dutch criminal procedural law.[1] The popular term 'crown witness' refers to a crime suspect who offers to give an incriminating statement towards another crime suspect in exchange for certain benefits offered by the state.[2] It follows that there are always two criminal proceedings involved: one against the 'other person' (a crime suspect) and one against the crown witness.[3] Making use of incriminating evidence provided by criminals raises questions regarding the reliability of such statements and persons, as well as concerns regarding the risk of unacceptable, secretive proliferation of such deals.

The relevant Dutch legislation entered into force in 2006,[4] although the first crown witnesses already appeared in the 1990s.[5] The devastating 1996 report of the parliamentary Van Traa Commission – which indicated a thorough lack of legislation regarding various investigative methods, including the use of crown witnesses – initiated the development of the current legal framework.

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1 See recently among (many) other: K. van Nie, 'Getuigenbescherming. Het kind met het badwater weggooien is zelden een goed idee', *NJB* 2024/495; B. Groothoff, T.I. Castelijn & I. Bourahtouf, 'Denken als een boef om slimmer te zijn dan een boef. Een verkenning van de knelpunten bij een eventuele "verbreding" van de kroongetuigenregeling', *Strafblad* 2023, p. 76-85; Z.L. Moezel, 'Rechterlijke toetsing van de getuigenbeschermingsovereenkomst bij een kroongetuigendeal: de rechter-commissaris als waakhond', *AA* 2023, issue 2, p. 89-99 (AA20230089); S.L.J. Janssen, 'Getuigenbescherming op de schop?', *NJB* 2024/198.

2 Although the term crown witness is used in daily language, it does not cover the exact meaning of the phenomenon in the Netherlands, as this term is understood to exclusively cover deals where prosecutorial immunity is promised. Under the current legislation this is not allowed. Hereinafter the term will nevertheless be used for the purpose of readability and recognisability, and to distinguish the term from the Italian term 'collaborators of justice'. In the same vein, where 'he' is written, this covers also 'she' or any other gender.

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inadequate.[6] Acknowledging the urgency of the matter, the current (outgoing) Minister of Justice and Safety has announced a number of legal amendments and indicated that she is taking inspiration from the equivalent Italian legislation.[7] The Minister's focus on Italy is prompted by the country's decades-long experiences with the fight against serious mafia crime, the comprehensive legislation that has emerged there and, in particular, its positive experiences (both quantitatively and qualitatively) with crown witness schemes.

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In this contribution we consider which lessons can be learned from Italy in this regard. It is based on an analysis of the relevant legislation and jurisprudence. Furthermore, we obtained relevant insight information of experienced Italian and Dutch legal practitioners working with the respective legal schemes.[8]

Hereinafter, section 2 provides for a short overview of the Dutch legislation and its flaws. Section 3 will discuss the relevant features of the Italian legislation. In section 4 we compare the two legal schemes and present some interesting insights for the Netherlands. We conclude in section 5 with some thought-provoking closing remarks.

2 Dutch laws and experiences with 'crown witnesses'

From the current legal provisions it follows that the prosecution service can close a deal with persons who are accused of having committed a serious crime (or have been convicted thereof) and who decide to collaborate with the justice authorities by providing an incriminating witness statement against one or more other person(s) in exchange for certain benefits.[9] These agreements are only permitted in organised crime cases which, considering their nature and connection to other crimes committed by the accused, cause severe public disorder. They are also permitted in crimes with a statutory prison sentence of eight years or more.[10] Following additional prosecutorial guidelines, agreements with crown witnesses should be reserved for exceptional cases.[11] No agreements can be made with witnesses running the genuine risk of being sentenced to life imprisonment.[12]

A crown witness deal entails two separate agreements: the witness statement agreement, and the witness protection agreement. The first-mentioned agreement focuses solely on the offer to make a witness statement by the witness-suspect in exchange for the prosecutor's offer to demand a mitigated sentence.[13] The proposed sanction reduction cannot be more than fifty percent of the penalty that would normally be requested in similar cases.[14]

The process of drafting the witness statement agreement consists of negotiations between the prosecutor and the potential crown witness. Thereby, the prosecutor ought to follow a strict approval process within the prosecution service.[15] Importantly, the positive advice of the Internal Review Committee on the use of special investigative measures (CTC) and the permission of the Board of Procurators General – which heads the Dutch prosecution service – are required to validate the prosecutor's commitments. Then, the agreement is assessed by an investigating judge, who examines the lawfulness of the intended agreement and the witness' reliability. In case of a positive evaluation, the investigating judge enacts a motivated court order.[16] After the prosecutor and witness have signed the agreement, it is included in the case file and the suspect may be given access to the relevant documents.[17] Finally, the crown witness is examined at trial. The trial judge must independently assess the lawfulness of the agreement and the witness' reliability. Additionally, there must be sufficient corroborating evidence.[18] The agreement does not impose any obligation upon the trial judge, who therefore is not bound by it. Thus, the trial judge is free to disregard the agree-

3 See extensively on the definition: J.H. Crijns, M.J. Dubelaar & K.M. Pitcher, in: J.H. Crijns, M.J. Dubelaar & K.M. Pitcher (eds.), *Collaboration with Justice in the Netherlands. A Comparative Study on the Provision of Undertakings to Offenders who are willing to give Evidence in the Prosecution of Others*, The Hague: Eleven International Publishing 2018, p. 25 ff.

4 Wet Toezeggingen aan getuigen in strafzaken, *Stb.* 2005, 254.

5 On the discussions regarding these first experiments, see P.J.P. Tak, 'Deals with criminals. Supergrasses, crown witnesses and pentiti', *European Journal of Crime, Criminal Law and Criminal Justice* 1997, p. 2-26.

6 See (among others) the literature mentioned under footnote 1, and the Letters to Parliament of the Minister of Justice and Safety of 4 November 2022 (*Kamerstukken II* 2023/24, 29911, nr. 380) and 3 July 2023 (*Kamerstukken II* 2023/24, 29911, nr. 423 in which the minister suggests a number of improvements.

7 See among others the Letter to Parliament of the Minister of Justice and Safety of 3 July 2023, *Kamerstukken II* 2023/24, 29911, nr. 423, and V. Bartels & J. van den Heuvel ,'Yesilgöz wil regeling kroongetuigen ondanks kritiek nog dit jaar uitbreiden: "Geen tijd te verliezen"', *De Telegraaf* 15 March 2024.

8 We made use of interview findings obtained in the context of a recent research on Italian antimafia legislation where the topic of collaborators with justice was explicitly addressed and evaluated (L.J.J. Peters, *Hoofdlijnen van de bestrijding van maffiacriminaliteit in Italië. Een verkennende studie voor het debat over de bestrijding van criminele samenwerkingsverbanden in Nederland* (WODC Rapport 3370), Zutphen: Uitgeverij Paris 2023). These interviews were held with four judges, four prosecutors and four lawyers from Italy, and four judges, four prosecutors and four lawyers from the Netherlands. Additionally, we made use of the contributions of two specialised legal practitioners who spoke at the conference 'Lessons from Italy for the fight against organised crime in the Netherlands', organised by the University of Groningen on 14 March 2024.

9 Art. 226g par. 1 of the Code of Criminal Procedure (*Wetboek van Strafvordering*, or Sv).

10 Art. 226g lid 1 Sv.

11 Section 3.2 of the Instructions on Commitments to Witnesses in Criminal Cases (*Aanwijzing toezeggingen aan getuigen in strafzaken*), *Stcrt.* 2020, 28135: there must be an urgent need and no other means to obtain the statement.

12 Art. 44a of the Criminal Code (*Wetboek van Strafrecht*, or Sr).

13 Art. 226g par. 1 in conjunction with art. 44a Sr. Also, the reduction of the

amount of illegally obtained profits to be confiscated has been accepted as a legitimate promise by the Amsterdam Court of Appeal 29 June 2017, ECLI:NL:GHAMS:2017:2497.

14 Partially converting a prison sentence into an alternative penalty is also legitimate on the basis of art. 44a par. 2 Sr.

15 Art. 7 of the Instructions on Commitments to Witnesses in Criminal Cases, *Stcrt.* 2020, 28135.

16 Art. 226h par. 3 Sv

17 Art. 226j par. 3 Sv.

18 Art. 344a Sv.

19 Art. 7 of the Witness Protection Decree (*Besluit Getuigenbescherming*), *Stb.* 2006, 21. On the basis of art. 6 of the Decree, in urgent cases temporary protection measures can be applied in an earlier stage of the process.

20 Art. 226l Sv.

21 The Witness Protection Instructions (*Instructie getuigenbescherming*). See extensively on witness protection the report of the Procurator General at the Supreme Court, entitled *Zorgplicht en getuigenbescherming*, Den Haag 2024.

22 Presumably not more than twenty. See also Crijns, Dubelaar & Pitcher 2018, p. 81.

23 See also the above-mentioned report of the Procurator General from 2024.

24 On this issue: Moezel 2023; S.L.J. Janssen, *De kroongetuige in het Nederlandse strafproces*, Den Haag: BJu 2013, critically discussed by P.J.P. Tak in *DD* 2014/74.

25 The report of the Investigation Council for Security (*Onderzoeksraad voor Veiligheid*) revealed serious shortcomings in the protection of three liquidated persons close to crown witness Nabil B. in the infamous Marengo-case. This is a case against 17 leading members of an extremely violent Dutch-Moroccan criminal organisation, who were sentenced for murders and attempted murders. Crown witness Nabil B. played a key role in the convictions. Report of the Onderzoeksraad voor Veiligheid (OVV), *Bewaken en beveiligen. Lessen uit drie beveiligingssituaties*, Den Haag 2023.

26 At the time of writing this contribution it is not known whether the content of this bill will change after the formation of a new government; for the time being and considering current developments, there are no indications that the ideas presented so far will fundamentally change.

27 Letter to Parliament by the Minister of Justice and Safety of 4 November 2022, *Kamerstukken II* 2022/23, 29911, nr. 380.

28 Law Decree of 15 January 1991, n. 8, then converted into the Law of 15 March 1991, n. 82.

29 Law of 13 February 2001, n. 45.

30 These are: mafia-type association; association for the purpose of drug trafficking; association for the smuggling of tobacco products; associa-

ment, even when the declarations provided by the witness are used as proof, or to alter the penalty reduction envisioned. Nonetheless, in practice judges tend to accept the arrangements as they are, in order to preserve the appealing effect of the scheme for future crown witnesses.

The witness' safety and protection is regulated through a separate agreement between the crown witness and another, specialised department within the prosecution service. The necessary protection measures are formally ordered by the Board of Procurators General, based on a threat analysis carried out by the police, and upon advice of the CTC. In principle these measures will only take effect after the formalisation of the (civil law) witness protection agreement and by consensus of the crown witness.[19]

The legal basis for the witness protection agreement consists of one section in the Code of Criminal Procedure,[20] a decree and an unpublished document with internal prosecutorial guidelines which contain mainly procedural rules.[21] The protection arrangements are secret; they are not inserted in the case file, nor subject to any judicial overview. The contents of the arrangements are thus mostly left to the discretion of the legal practitioners involved, although they must exclusively regard the witness' protection and the consequences of non-compliance to the measures by the witness. The agreement may cover financial compensation for the necessary protection of the witness, however, any financial rewards for closing the witness statement agreement are prohibited.

The number of crown witnesses in the Netherlands has always been relatively low, although they are generally considered to be an effective tool in the fight against organised crime.[22] Over the years, various authors have pointed to problematic aspects of the present legislation. In particular, the regulation of witness protection arrangements has been strongly criticised.[23] The absence of any external control has given rise to concerns about illegitimate deals with high financial rewards and witnesses being able to put pressure on the prosecution.[24] Further, the protection system itself was recently found to function inadequately.[25]

Although the Minister's bill with modifications has not yet been published, the Minister has already revealed her plans to widen the type of criminals with whom crown witness deals are permitted and to expand the maximum sanction mitigation in order to render this instrument more effective.[26] She also suggests creating additional rules with standardised financial arrangements to be used for witness protection agreements, and a reinforcement of external expertise within the CTC.[27]

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3 Italian laws and experiences with 'collaborators of justice'

The Italian law on 'collaborators of justice' (*collaboratori di giustizia*) developed in the sphere of fighting extremely serious mafia crime. A peculiar characteristic of mafia associations in Italy is their code of silence (*omertà*), which entails the prohibition to collaborate with justice authorities. It was the famous antimafia judge Giovanni Falcone who first realised that offering benefits to mafia associates to collect their testimonies was essential in order to understand the mafia phenomenon and the organisation of their networks. After having obtained extensive witness statements of mafia affiliate Tommaso Buscetta, the Palermitan antimafia squad was able to successfully prosecute a number of high positioned crime bosses of the Sicilian Cosa Nostra.

Falcone's vision and strategies lie at the heart of the current law, which entered into force in 1991.[28] Although the legal provisions were received with severe criticism, the number of collaborators grew fast. The system began to be overburdened and in combination with a number of shortcomings in the law, its legitimacy was weakened. To alleviate the strain and to guarantee a more rigorous and safeguarded system, the law was thoroughly amended in 2001.[29]

Under the current framework, any person accused or convicted of certain individually indicated serious crimes,[30] among which membership of a mafia-type association, can become a collaborator of

justice. It is important to note that the law provides for high minimum penalties for these crimes. Under certain circumstances a punishment constituting a very strict detention regime can be applied. This regime predominantly consists of isolation (the 'Article 41-bis regime').[31] The rationale of isolating the convicted person is to cut any ties between him and the associated criminal organisation, and thus to avoid any continuation of criminal activity in detention. The regulation on collaborators of justice is also accessible to crime suspects for which the law stipulates a lifelong prison sentence.

In exchange for providing incriminating information, the collaborator may obtain a milder sentence due to the non-application of aggravated circumstances or the application of certain mitigating circumstances, and certain penitentiary benefits. The sentence reduction lies between one third and half of the sentence that would normally be imposed for similar crimes, or 12 to 20 years in case of a lifelong prison sentence. The penitentiary benefits may consist of imposing alternatives to imprisonment or a milder detention regime.[32]

The process of drafting the witness statement agreement begins with a manifestation of the will to collaborate by a detained suspect. From this moment, the prosecutor is responsible for the timely and complete gathering of the statements and the assessment of the reliability of the collaborator. For his views on the collaborator's reliability, the prosecutor must draw upon prior knowledge of the specific criminal group and may request a non-binding opinion of the National Antimafia Prosecutor.[33] Meanwhile, the collaborator must provide all the information he possesses within a strict term of 180 days. This information covers both information related to crimes as information on properties, liabilities and financial status. This is considered essential in order to assess the collaborator's credibility, and to better understand the extent and nature of his ties to the criminal organisation.[34] The underlying rationale of the 180-day term is to better preserve the genuineness of the collaborator's contribution and avoid the risk of external influences or pressures to modify or adjust his statements, and to stop collaborators from saving important information during the initial interrogations and disclose it at a later stage.[35]

The law closely stipulates the benefits for the collaborator and does not give the prosecutor much room to make any promises, or to negotiate. If all criteria are met, the legal benefits offered by the state will be effectuated. These criteria entail among others that the collaborator's statements must include new and relevant information for the investigations and that there are no indications that the collaborator still maintains any contact with the associated criminal group.

The witnesses' statements must be fully recorded on audio and video, and documented in a special record, the *verbale illustrativo*. This record is inserted in the prosecutor's case file, which is accessible to the defence but not to the trial court.[36] The trial court can thus not use the collaborator's written testimony as proof; the latter must be orally cross-examined at the public trial. This course of events is attributed to Italy's hybrid, adversarial-inspired criminal justice system, whereby any evidence shall be presented in court orally to enable formal truth finding. Based on this (oral) confrontation and on corroborating evidence, the trial court draws conclusions as regards the credibility and reliability of the collaborator.[37] If the court considers that the collaborator's statements can be used, the court applies the legal benefits.[38]

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Alongside the process of obtaining witness statements, and completely independent of that, is the procedure to protect the collaborator. Until the *verbale illustrativo* is completed, the collaborator is kept in isolation, also from his family and close relatives.[39] In this context, isolating the

tion for the purpose of kidnapping; crimes committed through the mafia method, or perpetrated with the aim of assisting the activities of mafia-type associations; association for the purpose of enslavement; association for the purpose of child prostitution, child pornography and sex tourism; association for the purpose of human trafficking; association for the purpose of slave trade.

31 On this topic: L.J.J. Peters & S. Vanzan, 'Het verzwaarde Italiaanse detentieregime als voorbeeld voor de Nederlandse maffiabestrijding', *NTS* 2022/53 and S. Struijck, S. Meijer, P. Verrest & F. Calderoni, *Vergelijkend onderzoek Italiaans 41-bis detentieregime* (WODC Rapport 3379), WODC 2023, available at *wodc.nl*.

32 G. Nanula, *La lotta alla mafia. Strumenti giuridici, strutture di coordinamento, legislazione vigente*, Milan: Giuffrè Editore 2016, p. 197, who also discusses the relevant, additional limiting rules. Post-conviction benefits were introduced when it became clear that merely offering sentence reductions was not sufficient.

33 The National Antimafia Prosecutor exercises coordinating functions between the different investigations conducted locally within the sphere of organised mafia crime. See on this authority: A. Laudati & C. Sirignano, 'La proposta ed i pareri: il ruolo delle procure distrettuali e della procura nazionale antimafia e antiterrorismo', in: M. De Luca, A. La Marca, A. Laudati, A. Rotolo & C. Sirignano, *La tutela dei testimoni e dei collaboratori di giustizia*, Milan: Giuffrè Francis Lefebvre 2019, p. 5.

34 M.L. Ferioli & M. Caianiello, 'Collaboration with Justice in Italy', in: J.H. Crijns, M.J. Dubelaar & K.M. Pitcher (eds.), *Collaboration with Justice in the Netherlands. A Comparative Study on the Provision of Undertakings to Offenders who are willing to give Evidence in the Prosecution of Others*, The Hague: Eleven International Publishing 2018, p. 262.

35 Ferioli & Caianiello 2018, p. 262.

36 Art 16quater par. 3 of Law Decree 15 January 1991, n. 8.

37 See also extensively Ferioli & Caianiello 2018, p. 268-269.

38 Art. 16novies par. 4 of Law Decree 15 January 1991, n. 8.

39 Art. 3 of Ministerial Decree 2006, n. 144.

potential collaborator has the objective to both protect him from retaliations and to prevent any contact with others which may stop the person from collaborating with justice or to present untruthful declarations. In urgent cases, the Central Commission may implement a temporary protection program at the request of the prosecutor.[40] If at the end of the 180 days term the prosecutor finds the collaborator's statements valuable and credible, he files a request to the Central Commission for the application of (further) protection measures.[41]

The Central Commission is an external, centralised collegial body, instituted by the Ministry of Internal Affairs and thus entirely separate from the prosecution service.[42] It is presided over by an Under Secretary of State, and further consists of two magistrates and five state officials who are experienced in the field of organised crime.[43] The establishment of the Central Commission should safeguard professionalism on determining safety and protection issues, neutrality and uniformity as regards the application of the criteria of protection of collaborators across the entire territory. The Central Commission decides the necessary protection measures on the basis of objective and pre-established criteria, which are independent from the importance of the witness statements in the underlying criminal proceedings and the collaborator's compensation for them. Of importance is the three-levelled system of protection, which varies from light protection measures, more secure protection measures, and the placement in the high security witness protection programme.[44] These protection measures can also be applied to the collaborator's close relatives.[45] The application, modification or termination of the protection measures by the Central Commission is subject to review before an administrative court.[46]

The selection and application of protection measures are not subject to any negotiations between the Central Commission and the collaborator, although the latter must consent to live up to the measures and sign a civil law contract.[47] The measures have a duration of at least six months and not more than five years and can be modified or revoked in relation to the presence and seriousness of danger, and in case the collaborator breaches his obligations.[48] The law accurately prescribes the measures that may be adopted and the grounds to terminate them.

Over the last years, the Italian government put large financial investments in setting up an adequate protection system. The application and costs of witness protection measures is continuously monitored, and the results are periodically documented in a publicly accessible parliamentary report. This report also considers the status of the legislation and its functioning, and proposes modifications. For instance, the latest report showed 949 collaborators of justice in 2021, and suggests some modifications in the protection measure of changing the collaborator's identity.[49]

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4 Comparative insights

Returning to the Netherlands, the urgent challenges regarding the legislation on crown witnesses can be reduced to two questions: 1) how to increase its effectivity, and (thus) the number of crown witness statements in the fight against serious organised crime, and 2) more specifically: how to improve the law on witness protection agreements.

In response to the first question, the Minister of Justice and Safety, as far as currently known, proposes to widen the type of criminals with whom these deals

40 Art. 13 of Law Decree 15 January 1991, n. 8 and Art. 4 of Law Decree 23 April 2004, n. 161.
41 Art. 11 of Law Decree 15 January 1991, n. 8.
42 Art. 10 of Law Decree 15 January 1991, n. 8.
43 Art. 10 par. 2-bis of Law Decree 15 January 1991, n. 8.
44 The Commission's powers are aimed at identifying the most appropriate measures, based on the relevant level of threat. De Luca, La Marca, Laudati, Rotolo & Sirignano 2019, p. 152.
45 Art. 9 par. 5 of Law Decree 15 January 1991, n. 8.
46 Art. 10 par. 2-quinquies of Law Decree 15 January 1991, n. 8.
47 The collaborator's obligations are to observe the security measures, agree to undergo any interrogation, declare their assets to the authorities. Art. 13-c of Law Decree 15 January 1991, n. 8.
48 Art. 13-c of Law Decree 15 January 1991, n. 8.
49 'Commissione parlamentare di inchiesta sul fenomeno delle mafie e sulle altre associazioni criminali, anche straniere', 2022, p. 63 (available at *parlamento.it*) and 'Relazione al Parlamento sulle speciali misure di protezione per i testimoni e i collaboratori di giustizia' (available at *camera.it*).

can be made by extending the sanction mitigation that can be offered.[50] As concerns the second question, the Minister seems to mainly propose implementing financial standards to limit the arrangements on financial compensation. Meanwhile, a number of experts has been added to the CTC.[51]

It follows from the previous section that the Italian type of criminals whose incriminating statements can be used is indeed wider than the Dutch scope. Unlike the Dutch regulation, the Italian legislation also applies to suspects who face the risk of a life-long imprisonment and to facilitators of serious crimes. In Italy, though, facilitating certain serious crimes is considered as serious as perpetrating them and facilitators of such crimes are punished with the same high minimum sanctions. Where inspiration on this point is taken from Italy, its different approach to sanctioning facilitators must thus be taken into account. Furthermore, it should be noted that in Italy plea bargaining is prohibited for a number of crimes for which a collaboration with justice is explicitly allowed, such as (facilitating) participation in a mafia type association.[52] Plea bargaining concerns the procedure in which the prosecution service promises to request a mitigated sentence or another benefit to be applied in the case against a defendant in exchange for a confession from, or other cooperation by the latter. In the Netherlands, plea bargaining agreements (*procesafspraken*) can principally be made in all criminal cases[53] and they are frequently made in cases regarding facilitators of criminal (drug) organisations. It follows that in case of a future extension of the crown witness regulation to these type of criminals, an alleged facilitator's option to enter a plea bargain may overlap with the option to become a crown witness. Since opting for plea bargaining means not having to betray one's criminal friends and to fear revenge, and not having to undergo possibly far-reaching protective measures, closing a plea agreement might be more appealing than becoming a crown witness.

Apart from these considerations concerning the scope of the regulation, the success rate of the Italian legal scheme itself can be explained by the stringency of the rules. Unlike in the Netherlands, there is little to no room for negotiations in Italy, and this regards both the process of obtaining witness' testimonies and the process of deciding on adequate witness protection measures. Especially Italy's strict time limit of 180 days is striking. This term serves, among others, to avoid that collaborators make the deal contingent on better quid pro quo from the state regarding their protection and safety by delaying their testimonies. This is a phenomenon that we have observed in the Netherlands as well.[54]

Also, Italian state authorities can fall back on more elaborate and stricter rules when it comes to the application of protection measures, and there is a clear and visible separation of state powers in the application of those measures. The Central Commission has a clear and sole focus on witness protection and it has no interest in the outcome of the underlying criminal proceedings. Conversely, in the Netherlands, there is plenty of room for consultations between prosecution and crown witnesses on adequate safety conditions, and relevant decisions ultimately resides with the same state authority that is involved in drafting the witness statement agreement, without any external overview over this process. While the existence of illegitimate protection deals can hardly be proved, this situation may well contribute to the appearance of illegitimate interests involved in the process. This provokes discussions about the unreliability of crown witnesses in the courtroom and carries the risk of eroding society's confidence in the use of crown witnesses as a legitimate tool to fight organised crime.

The willingness of potential witnesses to collaborate with the justice authorities in Italy is not only stimulated by offering sufficient benefits, but also – and perhaps even more – by rendering the option to not collaborate more disadvantageous

Lastly, the willingness of potential witnesses to collaborate with the justice authorities in Italy is not only stimulated by offering sufficient benefits, but also – and perhaps even more – by rendering the option to not collaborate more disadvantageous. The risk of a high penalty and of being placed in an extremely rigid detention regime will have a certain stimulating

50 Letter to Parliament by the Minister of Justice and Safety of 4 November 2022, *Kamerstukken II* 2022/23, 29911, nr. 380 and Bartels & Van den Heuvel 2024. The Minister proposes to create a legal sanction reduction of the entire period of the unconditional prison sentence for crown witness against whom the prosecution service would normally demand a maximum of six years of unconditional imprisonment.

51 Letter to Parliament of the Minister of Justice and Safety of 3 July 2023, *Kamerstukken II* 2023/24, 29911, nr. 423.

52 See art. 444 of the Italian Code of Criminal Procedure (*Codice di Procedura Penale*). This procedure is called *applicazione della pena su richiesta delle parti*.

53 See for this relatively new topic in the Netherlands the groundbreaking judgment of the Supreme Court of 27 September 2022, ECLI:NL:HR:2022:1252, and in literature (among others) L.J.J. Peters, 'Procesafspraken in strafzaken. Bespreking van actuele experimenten en in het bijzonder de vonnissen uit Limburg en Rotterdam', *NTS* 2022/21.

54 Among others in the Marengo-case, see *Parool* 21 June 2021. During the trial in first instance crown witness Nabil B. refused to testify because he was not satisfied with the level of protection of his family.

effect, even though any scientific research on this effect is lacking. The benefit of a milder detention regime is not possible under the Dutch law, and if it were, it would most likely not have the same incentivising effect, because even the current most stringent Dutch detention regime for extremely dangerous offenders is not comparable to Italy's rigid 41bis-regime.[55] Although a more sober detention regime is currently being implemented and discussed, its potential stimulating effect on the crown witness scheme has remained somewhat underexposed in current discussions. When drawing lessons from the Italian legislation on collaborators with justice this link should, however, not be overlooked. More generally, the Italian construct of fighting organised (mafia) crime must not be regarded as a collection of individual building blocks from which one can pick and choose, but as a – albeit still imperfect – solid structure. Through trial and error, Italy has developed a thoroughly thought-through perspective on how to (better) organise the state for the sake of an effective investigation and adjudication of serious crime on the one hand and respect for minimum rights of individuals on the other, while offering transparency towards society in order to preserve its legitimacy.

5 Closing remarks

Dutch culture is often praised for its pursuit of compromises and its fight for individual rights and liberties. These characteristics are also visible in its legislation regarding crown witnesses, where the individual retains a large say in the process of making statements and of receiving protection. Although individual rights and powers in criminal cases must be sufficiently respected, considerable room for individual crown witnesses to direct the course of criminal proceedings seems to come with a price in terms of the legitimacy and efficiency of the instrument. On top of shedding light on some fundamental differences in who dominates the process and to what extent, the above insight into the Italian framework provides for three relevant lessons. Firstly, a more stringent legislation provides for less obscure negotiations with criminals and offers a clear quid pro quo, whether this concerns witness statement arrangements or witness protection schemes. Secondly, a state's strength in fighting organised crime might increase when its powers are not concentrated in just one institution, but shared by different authorities and complemented by a transparent system of checks and balances. Lastly, a suspect's willingness to collaborate with state authorities could be stimulated not only by providing them greater benefits, but also by making the option to not collaborate less attractive. Even though comparative law can never be a mere copy-paste exercise, and each national context plays a crucial role for a successful implementation of foreign ideas, these lessons may be valuable for the Netherlands, as they may offer leads for further improving the effectiveness of its legislation on crown witnesses.

55 See Peters & Vanzan 2022/53 and Struijck, Meijer, Verrest & Calderoni 2023.