

# Belgian criminal settlement regime declared partially unconstitutional by the Belgian Constitutional Court

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On 2 June 2016, the Belgian Constitutional Court ruled that a part of the Belgian criminal settlement regime (*transaction pénale/minnelijke schikking in strafzaken*) is unconstitutional. Currently, article 216bis of the Belgian Code of criminal procedure (*Code d'instruction criminelle/Wetboek van strafvordering*) allows the Public Prosecutor (*Procureur du Roi/Procureur des Konings*) to propose that the perpetrator pays a sum of money to stop the prosecution. The Public Prosecutor can, at his discretion, propose a criminal settlement at any stage of the proceedings, even when an investigating judge (*juge d'instruction/onderzoeksrechter*) is in charge of the investigation or when the case has been referred to criminal court. In these last two cases, Belgian law only allows the court to verify if the formal obligations for a criminal settlement had been met, but cannot rule on the opportunity of the settlement or on the sum paid. The Constitutional Court decided that this lack of scrutiny was unconstitutional, and that oversight of the legality and the opportunity of the criminal settlement is required, either by the investigating courts (*Chambre du conseil/Raadkamer*) or by the criminal court to which the case had been referred.

The Constitutional Court has decided that its ruling will only have effect from the date of its publication in the Belgian State Gazette, so that all previous criminal settlements remain valid.

Since the decision was rendered on a preliminary ruling (*question préjudicielle/prejudicële vraag*), the decision of the Constitutional Court only has binding effect on the case for which the preliminary ruling was raised and not on others. However, this kind of decision has a 'reinforced authority' over Belgian judges. As a consequence, until the law is amended, criminal settlements could be frozen once a judge is hearing a case. The press has already announced that the Belgian Minister of Justice is preparing a new bill to address issues of unconstitutionality.

This ruling does not jeopardize the entire Belgian criminal settlement regime. Indeed, the Constitutional Court confirmed important aspects of the regime, such as the discretionary power of the Public Prosecutor to propose (or not) a settlement and a perpetrator's lack of right to a settlement.

## Brief overview of the Belgian criminal settlement regime

A criminal settlement is the payment of a sum of money by a perpetrator to end a public prosecution. The criminal settlement does not equal a conviction, and does not appear on the criminal record of the perpetrator.

The Public Prosecutor has the option to propose a criminal settlement (or not). The perpetrator who expresses his/her intention to indemnify the victim can ask for a criminal settlement, which the Public Prosecutor always has the right to accept or refuse, without having to give reasons. The Public Prosecutor sets the conditions and arrangements of the criminal settlement. The amount of the criminal settlement should take into account the severity of the offense, with a maximum equal to the maximal fine, plus the cost of living mechanism (*décimes additionnels/opdecimen*). The amount can be augmented by the investigation costs already incurred. The victim should also be indemnified.

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A criminal settlement can take place at any stage of the procedure prior to rendering of a final judgment:

- The Public Prosecutor can propose a criminal settlement during his investigation (*information/ opsporingsonderzoek*);
- The Public Prosecutor can propose a criminal settlement once an investigating judge has been appointed;
- The Public Prosecutor can propose a criminal settlement while a court is hearing the case, up until a definitive criminal judgment has been rendered. In this case, the judge can monitor the formal legality of the criminal settlement, but not the opportunity of the settlement or the proportionality of the sum.

## Unconstitutionality for lack of judicial control

The case at hand concerned a person charged with executing allegedly illegal financial transactions. The perpetrator proposed a settlement to the Public Prosecutor, who refused. The appellate court of the investigating court (*Chambre des mises en accusation / Kamer van inbeschuldigingstelling*) of Ghent accepted to ask the Constitutional Court four questions in line with criminal settlements.

All four questions concerned the criminal settlement regime in place when an investigating judge or a criminal court is seized for the case (article 216*bis*, §2 of the Belgian Code of criminal procedure). The entire criminal settlement regime was thus not challenged.

The Constitutional Court first decided that the discretionary power of the Public Prosecutor to decide in which individual case he will propose a criminal settlement did not violate the principle of equality and non-discrimination.

However, the Constitutional Court decided that the right of fair trial and the independence of the judge require judicial scrutiny of a criminal settlement once an investigating judge is in charge or a criminal court is seized.

In case of an investigation performed under the auspices of an investigating judge, at the end of the investigation, an investigating court will decide on whether or not there are sufficient elements to have the case heard by a court. The Constitutional Court decided that, in cases of criminal settlement, the lack of control by investigating courts is unconstitutional. The Constitutional Court, however, confirmed that the principle of a settlement at this stage of the proceedings was not at hand: *“for motives linked to the celerity of the proceedings and the bottlenecking of courts..., it can be admitted in its principle that the legislator provides the possibility to conclude criminal settlement when an investigating judge is seized. Indeed, the Public Prosecutor can, at this stage, based on the results of the investigation, use more elements to better evaluate the opportunity of a criminal settlement”*.

When a judge is seized, the Constitutional Court noted that the legislator was aware of potential conflicts with constitutional law. This is explicitly why the Belgian legislator introduced limited control by the court of the formal requirements of the criminal settlement. Nevertheless, the Constitutional Court decided, based on the *Natsvlishvili and Togonidze v. Georgia* case of the European Court for Human Rights, that the competent judge must also be given sufficient control over both the legality and the proportionality of the criminal settlement. Therefore, the limited control provided in article 216*bis*, §2 of the Belgian Code of criminal procedure is unconstitutional.

The Constitutional Court stated that judicial scrutiny requires a motivated decision by the Public Prosecutor.

## Confirmation of the Belgian criminal settlement regime

### Discretionary power of the Public Prosecutor to offer (or not) a criminal settlement

In the second question, the Constitutional Court confirmed, in line with its decision 20/2013 of 28 February 2013, that the discretionary power of the Public Prosecutor to offer (or not) a criminal settlement does not violate the predictability of the criminal procedure.

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## Discretionary power of the Public Prosecutor to refuse a request for a criminal settlement

In the third question, based on the right to be heard by the judge designated by the law, the Constitutional Court confirmed that the perpetrator had no right to a criminal settlement. The Public Prosecutor has no obligation to justify any refusal, and there is no need for scrutiny by a judge of a refusal.

### The ruling does not affect previous criminal settlements

To avoid this ruling having influence on previous criminal settlements, the Constitutional Court decided that the ruling would only take effect from its publication in the Belgian State Gazette (which has not yet occurred).

As for pending and future cases, since the decision has been issued on a preliminary ruling, it is only mandatory for the jurisdiction that raised the questions and all future jurisdictions seized of the same question. This ruling opens a new 6-month period to file an annulment proceeding. Only the annulment will have a general effect (*erga omnes*).

However, even if there is no *stare decisis*, decisions of the Constitutional Court have what authors have defined as a reinforced authority: any judge should comply with the ruling of the Constitutional Court, but for raising new questions to the Constitutional Court.

As a consequence, until there is a judicial change to address the issues raised by the Constitutional Court, Public Prosecutors may be reluctant to propose new criminal settlements when a criminal judge or a court is seized of the matter. The press echoed that the Belgian Minister of Justice was already working on a new bill to address the constitutional issues.

## Conclusion

Despite the important media attention that this decision received in the press, this does not jeopardize the criminal settlement regime. The Constitutional Court confirmed important aspects of the existing regime. The legislator is highly likely to intervene to allow judicial scrutiny once a judge is appointed, in order to address the constitutional issues.

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