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The legal institution of 'plea bargaining' in Hungary

'How the cooperation by the defendant works' in Hungarian criminal proceedings

I. Introductory thoughts

The current Hungarian Criminal Proceeding Act (Hungarian Act XIX of 1998; hereinafter referred to as the 'Criminal Proceeding Act') as adopted in 1998 and enacted in Summer 2003, has been amended at around 2,000 points by nearly 90 acts and several constitutional court resolutions, rendering this Act non-coherent. The Hungarian legislator has responded to the situation by developing the new Hungarian Criminal Proceeding Act (Hungarian Act XC of 2017; hereinafter referred to as the 'New Criminal Proceeding Act') which will become effective on 1 July 2018.[1]

In general, it is ascertainable that there is a high demand in society for the *fast and efficient completion of criminal proceedings*. The objective of such proceedings is to hold accountable the perpetrators of each and every criminal offence in fair procedures and with the lowest possible monetary and temporal efforts. The legislator aims to accomplish this objective with the help of the New Criminal Proceeding Act.

As far as the current Hungarian landscape is concerned, the statistics published by the Prosecutor General in November 2016 reveal that, overall, the duration of criminal proceedings has increased in the past few years.[2] The *average duration of investigations* of 162.9 days in 2007 increased to 243.7 days by 2015. The *average duration of prosecutor's office administration at first instance* (i.e. the time elapsing from the date of receipt of documents by the prosecutor's office to the date of filing of the formal accusation) of 26.1 days in 2007 increased to 35.6 days by 2015. Also, the average

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1 GÁCSI ANETT ERZSÉBET: *A terhelti együttműködés rendszere az új büntetőeljárási törvényben*. In: Homoki-Nagy Mária – Karsai Krisztina – Fantoly Zsanett – Juhász Zsuzsanna – Szomora Zsolt – Gál Andor (szerk.): Ünnepi kötet dr. Nagy Ferenc egyetemi tanár 70. születésnapjára. Acta Universitatis Szegediensis. Acta Juridica et Politica; Tom. 81., Szeged, 2018. p. 273.

2 http://ugyeszseg.hu/repository/mkudok4524.pdf

duration of the judicial phase (i.e. *the time elapsing from the date of filing of the formal accusation to the date of adoption of the final judicial decision*) of 356.8 days in 2007 increased to 390.8 days by 2015. In order to (hopefully) improve the timeliness of proceedings, the legislator has changed the current legislation at multiple points resulting in the New Criminal Proceeding Act giving special attention also to the cooperation by the defendant (i.e. the rules of 'plea bargaining' as applied in Hungary).

This study starts with a theoretical introduction (listing the reasons for changing the current regulation and some examples available to the legislator (for possible adoption into Hungarian law) including in particular the French model) which is followed by the presentation of how the cooperation by the defendant (i.e. 'plea bargaining') works in Hungary. This study has been made from the perspective of the right to a fair trial. Therefore, I have tried to find out how the principle of equality of arms (recognised as an essential element of the right to a fair trial[3]) may be enforced in the new legislation.

II. The 'ars poetica' of the legislation; examples and models; the failure of the institution of 'waiver of right to trial'

1. The 'ars poetica' of the legislation

The basic concept of the Hungarian legislator to be applied to the codification was that it would be reasonable to distinguish cases in which the defendant confesses the criminal offence from cases where the defendant denies the charge and the prosecutor has to prove the defendant guilty. The reason being is that the *confession* provides an opportunity to cooperate with the defendant which could serve the interests of every party involved in the proceeding: it helps the authorities save time and costs; it reduces the sanction to be given to the defendant; it allows the victim to feel compensated for sure; and it also conveys the message that the perpetrator of the criminal offence will effectively be held accountable. This perception is not alien either in the science of criminal proceeding law or in legal practices.[4]

2. Examples and models, including in particular French 'amicable settlement' type proceedings

Based on the legal institution of 'plea bargaining' as applied in the United States of America (U.S.A.), more and more European countries have been trying to expedite and simplify the proceedings as a significant part of their reformation efforts.[5] However, I think it is necessary to clarify in advance that the legal institution of 'plea bargaining'

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[3] COHEN, GÉRARD JONATHAN: *Aspects européens des droits fondamentaux. Libertés et droits fondamentaux*. Montchrestien, Paris, 2002. p. 115.

[4] GÁCSI 2018, pp. 274–275.

[5] FARKAS ÁKOS: *Konszenzuális elemek a büntetőeljárásban*. Magyar Jog 1992/8. p. 507.

does not effectively exist in the criminal proceedings in European countries in the same way as it exists in the criminal proceedings in the U.S.A. The reasons being are that the legal power of the prosecutor is more restricted compared to the U.S.A. model (for example, in amicable settlement in English criminal proceedings, the prosecutor shall not have influence on the type or extent of the punishment or not make any motion with respect to that[6]), and that the process of bargaining is restricted (for example, in the Italian amicable settlement model, the qualification of criminal offences constituting the subject matter of the charge is out of bargaining[7]). Therefore, in my opinion, it is better to describe the criminal proceedings in European law systems as 'amicable settlement proceedings that are based on the confession of the defendant and similar to plea bargaining' rather than directly using the term plea bargaining for them. (This is why the term plea bargaining is written with quotation marks in the title of this study.)

Even though the Hungarian legislator had the opportunity to look at the amicable settlement systems applied in several countries as examples (including the systems applied in the aforementioned countries, the Spanish *conformidad* as well as the German, Austrian and Swiss amicable settlement systems), I will focus on the solution applied in French criminal proceedings in the following part of this study. One of the reasons for choosing the *French model* is that, based on legal historic traditions, the establishment of the system of French criminal proceedings [starting from the French Code of Criminal Instruction of 1808 (originally titled 'Code d'Instruction Criminelle' in French)] was a proven milestone in the evolution of European criminal justice services.[8] One of the distinctive features of the 'amicable settlement proceedings that are based on the confession of the defendant and similar to plea bargaining' is that, in contrary to the Hungarian legislation, the French criminal proceeding follows the principle of opportunity as a general rule. However, as elaborated later in this document, the legal institution of 'plea bargaining' (i.e. real amicable settlement addressing all matters) does not effectively exist in this legislation either, due to the distinctive features of the continental (civil law) legal system.

There are two types of amicable settlements that are similar to plea bargaining and currently applied in French criminal proceeding law: *composition pénale* and *plaider coupable*. Below are the descriptions of these two settlement types.

2.1. Composition pénale

For a long time, French law resisted the implementation of amicable settlement proceedings that are based on the confession of the defendant and similar to plea bargaining. It was not until 1999 that the first amicable settlement proceeding was incorporated into French criminal proceeding law (however, it was not effectively applied before 2001) with the title of *composition pénale*, meaning amicable criminal

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[6] HERKE CSONGOR: *Megállapodások a büntetőperben*. Pécsi Tudományegyetem Állam- és Jogtudományi Kar, Pécs, 2008. p. 102.

[7] Farkas Krisztina: *Az eljárás gyorsításának lehetőségei a német, a svájci, és az olasz büntetőeljárásban*. PhD Thesis, Miskolc, 2016. pp. 172–179.

[8] PÁPAI – TARR ÁGNES: *A büntetőeljárás gyorsításáról.* Gondolat Kiadó, Budapest, 2012. p. 12.

law settlement (refer to Sections 41-2 and 41-3 of the CPP).[9] The essence of this legal institution (that is often called 'French plea bargaining' in French bibliography due to its nature) is that "the law prescribes that the prosecutor, prior to the formal accusation being filed, shall have the discretion to propose an amicable criminal law settlement (i.e. criminal law 'sanction') to the defendant provided that certain conditions are met (only applicable to minor offense or misdemeanour, where the type of punishment is equal to or less than 5 years of imprisonment) and that the defendant confesses themselves guilty in committing one or more criminal offences or regulatory offences". The settlement takes place only if the defendant accepts the prosecutor's proposal. In this type of proceeding, the role of the judge is restricted to a formal approval.[10]

The scope of legal consequences that the prosecutor may propose (as a criminal law sanction) includes but is not limited to the following: the defendant to make payment for a specific amount of fine not exceeding the maximum amount of fine specified for the particular type of criminal offence committed; the defendant to hand over the asset or assets either used as means to commit the criminal offence or created as a result of the criminal offence; driver's licence or hunting permit to be withdrawn temporarily; the defendant to participate in some form of medical or disciplinary treatment offered in a healthcare institution (refer to Section 41-2 of the CPP).[11] The prosecutor shall have discretion to select from the aforementioned options and also from the taxative list of options defined in Section 41-2 of the CPP.

As it can be seen from the definition, another important element of this legal institution is the *voluntary confession of the defendant*. The defendant may either accept or decline the proposal made by the prosecutor but may not initiate any kind of bargaining. (The defendant may request that a defence counsel be involved in the proceeding. However, it is to be noted that amicable criminal law settlement is not a case of obligatory defence.) If the defendant does not accept the proposal, then the prosecutor shall file a formal accusation in accordance with the rules for normal proceedings and conduct the proceeding within the framework for normal proceedings.[12] If the defendant accepts the proposal made by the prosecutor, it shall be recorded in a minutes and such minutes shall be submitted to the acting court.[13]

The *judge shall not modify the substance of the amicable settlement* but shall verify its legitimacy (and may hold a non-public hearing for that purpose). If the amicable settlement is legitimate, the judge shall approve it, and if the amicable settlement is not legitimate, the judge shall decline it (no legal remedy shall lie against either of these

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[9] Loi no. 99-515 du 23 juin 1999. FOURMENT, FRANÇOIS: *Procédure pénale*. Larcier, Paris, 2013. pp. 157–159.; VOLFF, JEAN: *Un coup pour rien! L'injonction pénale el le Conseil constitutionnel*. 26e, Recueil, Cahier-Chronique, Dalloz Sirey, 1995. pp. 201–204.; STEFANI, GASTON – LEVASSEUR, GEORGES – BOULOC, BERNARD: *Procédure pénale*. Dalloz, Paris, 2012. pp. 586–588.

[10] PRADEL, JEAN: *Une consécration du 'plea bargaining' à la française. La composition pénale instituée par la loi n° 99-515 du 23 juin 1999*, Chronique 1999. 379–382. p.; BUREAU, AURORE: *États des lieux d'un dispositif procédural tipique: la composition pénale*. Archives de Politique Criminelle (APC), 2005/1, p. 127.

[11] FOURMENT 2013, pp. 162–163.

[12] LAZERGES, CHRISTINE: *Le Conseil constitutionnel acteur de la politique criminelle, á propos de la décision 2004-492 DC, du 2 mars 2004*. Revue Sciences Criminelles (RSC), 2004/7–9, p. 728.; FOURMENT 2013, p. 164.

[13] PÁPAI – TARR 2013, p. 245.

decisions).[14] If approved, the amicable settlement becomes executable (no appeal shall lie) involving the same legal effect as the final judicial decision (i.e. the amicable settlement becomes a case decided).[15]

An interesting feature of this legal institution is that it takes into consideration the interests of the *victim*, too. The law prescribes that if the victim is a known party and amicable criminal law settlement is applied, then the prosecutor shall oblige the defendant to provide for compensation for the damage caused by the criminal offence.[16]

2.2. Plaider coupable

Besides composition pénale, another legal institution appeared in 2004 that is also based on amicable settlement: it is called *plaider coupable* and also known as *comparution sur reconnaisance préalable de culpabilité* in the French criminal proceeding act, meaning appearance based on prior confession of guilt (refer to Sections 495-7 and 495-16 of the CPP).[17] Even though it is commonly cited as "real plea bargaining" in French bibliography, this legal institution is not identical to that applied in the U.S.A.[18]

This legal institution shares the essential elements with the composition pénale and 'only' differs in that the plaider coupable allows the prosecutor to apply effective sanction (as this term is construed from a substantive criminal law perspective) including the proposal of imprisonment up to and including one year.[19] Subsequently, this type of amicable settlement proceeding is considered a case of obligatory defence.

Besides confession by the defendant, another prerequisite of this legal institution is that *the defendant take presence, in person, before the prosecutor*. Another difference is that the decision shall be adopted in a *public trial* (refer to Section 495-9 of the CPP). In this trial, the judge shall verify whether the criminal offence has been appropriately qualified, whether the confession made by the defendant is volunteer and credible (authentic), and whether the sanction is in line with the severity of the criminal offence and the personal conditions of the defendant (these tasks of the judge are jointly called *homologation* or judicial assent).

It means that in this type of amicable settlement, *the judge has an active role* rather than just formally signing a document.[20] Appeal against the judge's decision may lie.

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[14] DANET, JEAN – GRUNVALD, SYLVIE: *Brèves remarques tirées une première évaluation de la composition pénale*. Actualité Juridique Pénal (AJ Pénal) 2004/5. p. 198.

[15] SAAS, CLAIRE: *De la composition pénale au plaider coupable: le pouvoir de sanction de procureur*. Revue Sciences Criminelles (RSC) 2004/9–12, pp. 833–834.

[16] FOURMENT 2013, p. 163.

[17] Loi n° 2004-204 du 9 mars 2004. FOURMENT 2013, p. 168., and PÁPAI-TARR ÁGNES: *Marchandage judiciaire á la française*. Collega, 2007/2-3, pp. 99–103.

[18] PÁPAI-TARR 2012, p. 225.

[19] MOLINS, FRANÇOIS: *Comparution sur reconnaissance préalable de culpabilité*. Rép. Pén. Dalloz. 2004/5, p. 2.; STEFANI – LEVASSEUR – BOULOC 2012, p. 588.

[20] LAMY, DE BERTRAND: *La loi no. 2004-204 du 9 mars 2004 portant adatation de la justice aux évolutions de la criminalité*. Recueil Dalloz, 2004/28, p. 5.

2.3. Lessons to be drawn

As it can be seen above, these two types of amicable settlement legal institution similar to plea bargaining re-assign the classic tasks amongst the parties involved in justice proceedings. In the French model, the prosecutor shall apply (in fact, make motion for) the sanction and the judge shall approve it.[21] Besides, the defence counsel acts more like a consultant in this model. On the other hand, the defendant becomes an active party, sort of 'driving' the proceeding.[22]

All of this expediate the proceeding (primarily, the judicial phase becomes shorter) and the prejudice to the 0fundamental rights of the defendant is counter-balanced (compensated for) by the guarantee rules associated with these legal institutions.

3. The failure of the separate proceeding titled '*waiver of right to trial*'

Waiver of right to trial is a separate proceeding that is based on the confession of the defendant and was incorporated into the Hungarian Criminal Proceeding Act on 1 March 2000 with the aim to expedite criminal proceedings and make them more efficient. However, it has not brought the expected effects and still does not function as an efficient legal institution despite of being amended several times. There are no constitutional concerns to justify why this proceeding is applied so rarely as the Hungarian Constitutional Court laid the constitutional foundation for this legal institution as early as its implementation, stating that "providing incentive to confessing defendants in the form of allowances defined in the Hungarian Criminal Code is in the best interests of the Hungarian Constitution and cannot, in any way, be considered as a state coercion aimed at making defendants waive their constitutional rights".[23]

In my opinion, this separate proceeding has been suffering from obvious mistakes associated with the imposition of penalties (amongst other mistakes) since it was established.[24] Based on the original rules for this separate proceeding and considering that Hungarian practices for the imposition of penalties tended towards the lower limit of the penalties, the application of reduced penalties did not bring real benefits to perpetrators. Also, in the initial times, it was not even possible to suspend the execution of imprisonment.[25] The enactment of the new Hungarian Criminal Code (Hungarian Act C of 2012; hereinafter referred to as the 'Criminal Code') has brought along changes in the rules for imposition of penalties in relation to the waiver of right to trial. The essence of these changes does not go beyond the implementation of a possible minimum threshold, with the reduced maximum threshold for the penalties not having been

[21] CHAVRET, DOMINIQUE: *Réflexion autour du plaider coupable*. Recueil Dalloz, 2004/35, p. 2518.
[22] PÁPAI-TARR 2012, p. 237.
[23] Decision 422/B/1999 of the Hungarian Constitutional Court – ABH 2004, 1316, 1323.
[24] PÁPAI-TARR ÁGNES: *Büntetéskiszabási anomáliák a tárgyalásról lemondás körül*. In: Elek Balázs – Háger Tamás – Tóth Andrea Noémi (szerk.): Igazság, ideál és valóság. Tanulmányok Kardos Sándor 65. születésnapja tiszteletére. Debreceni Egyetem, Állam- és Jogtudományi Kar, Debrecen, 2014. pp. 290–301.
[25] PÁPAI-TARR ÁGNES: *A büntetőperek elhúzódása*. In: Jakab András – Gajduschek György (szerk.): A magyar jogrendszer állapota, Budapest, 2016. p. 791.

specified. As a direct result of that, in case of imposition of cumulative penalties, it does not make a difference to the defendant whether or not they waive the right to trial.[26] However, it is to be noted that this legislation does not make sense in that it gives privilege to a perpetrator committing organised crime in a criminal organisation if the perpetrator cooperates with the authorities. The reason why it does not make sense is that these perpetrators are subject to the old reduced penalties that guarantee a maximum threshold. Consequently, among all perpetrators, cooperative defendants remain the only beneficiaries to whom it would be worth to waive the right to trial. But the number of such perpetrators is very low in Hungary.[27]

Therefore, I have come to the conclusion that *the reason why this separate proceeding is applied rarely* mainly lies in *the substantive criminal law consequences* of the legal institution waiver of right to trial. All of this have resulted in the participants in the proceeding becoming *unmotivated*. First, the investigating authority has become unmotivated as promoting the waiver of right to trial would cause the separate proceeding to expedite the judicial phase but not the investigatory phase. From the side of the authorities, the prosecutor may also become unmotivated as it shall bear significant amount of responsibility for being the party who shall enforce the state's request for the imposition of penalty and decide (after verifying that the conditions are met) whether or not the separate proceeding may be applied. Amongst other factors, it is the reason why the rate of application of the legal institution waiver of right to trial shows a great deal of variation across Hungary.[28] The defence side also becomes unmotivated as the Hungarian substantive criminal law legislation does not seem to provide real benefits to the defendant who agrees to the restriction of their constitutional rights.[29] Finally, it is also to be highlighted that legal practice studies have indicated that the reason why the legal institution waiver of right to trial is applied rarely (in addition to the reasons mentioned above) is that *it competes with other separate proceedings* with regards to the conditions of its application, amongst other aspects. Such competing separate proceedings include the 'fast track court procedure' and 'expedited hearing'.[30]

III. The forms and system of defendant cooperation in the New Criminal Proceeding Act

"*[…] Justice must not only be done: it must also be seen to be done […]*", said the European Court of Human Rights with regards to the study of the principle of equality of arms.[31] In my opinion, this view also goes for the new Hungarian legislation about the cooperation by the defendant.

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[26] PÁPAI-TARR 2016, p. 792.
[27] PÁPAI-TARR 2016, p. 792.
[28] FANTOLY ZSANETT: *A büntető tárgyalási rendszerek sajátosságai és a büntetőeljárás hatékonysága*. HVG ORAC, Budapest, 2012. pp. 286–287.
[29] OROSZ JUDIT: *A vádalku, avagy a tárgyalásról lemondás a magyar büntetőeljárásban*. 2013. pp. 14–15. http://www.jogiforum.hu/publikaciok/496
[30] FANTOLY 2012, p. 285.
[31] Delcourt v. Belgium (Application no. 2689/65) Judgment of 17 January 1970, ECtHR Ser. A. No. 11.

In the New Criminal Proceeding Act, the confession of guilt and the intention of the defendant to cooperate may lead to two types of amicable settlement. Below are the detailed descriptions of these types of cooperation by the defendant.

1. Cooperation type 1 (amicable settlement about confession of guilt in the investigatory phase)

Defendant cooperation type 1 has been established as a direct and express response to the failure of the legal institution waiver of right to trial. It is mainly aimed at such proceedings conducted before courts of first instance where a case-deciding final decision is adopted already at first instance after a relatively long evidence procedure.[32]

In this form of cooperation, the amicable settlement starts as early as in the *investigatory phase* (the new Criminal Proceeding Act cites this legal institution as '*amicable settlement about confession of guilt*' amongst the rules for investigation). The reason being is that, in cases of obligatory defence, the prosecutor, the defendant and the defence counsel may enter into a formal amicable settlement about the confession of the guilt of the defendant with such settlement being independent of the court. Even though it may not be read out unambiguously from the legislation, this process may be broken down to the following 3 phases in my opinion. The first phase is the *initiation of amicable settlement* (not bound by formal conditions), available not only to the defendant and the defence counsel as it used to be, but now also available to the prosecutor. It is followed by the *course of negotiations* (also not bound by formalities) where bargaining may take place about the confession of guilt and the substantive elements of the amicable settlement. In this phase, the defence counsel shall be entitled to negotiate with the prosecutor separately. The only formality that applies to this negotiation is that the prosecutor shall state its position at the beginning of this negotiation. The third phase comprises *entering into the amicable settlement*. It must be made in written form since it has to be recorded in the minutes for the suspect's questioning and signed by the prosecutor, the defendant and the defence counsel at the same time (refer to Sections 407 to 409 of the New Criminal Proceeding Act). The amicable settlement may apply to a single criminal offence, multiple criminal offences or all criminal offences [refer to Section 410 (1) of the New Criminal Proceeding Act]. The latter raises the question whether entering into the amicable settlement will result in segregation of the criminal offences.

The act contains an itemised list of the *substantive elements of the amicable settlement* with such elements divided into mandatory and optional elements. Mandatory elements include the description of the criminal offence in the same form and with the same level of details as specified in the indictment as well as the qualification of the criminal offence as established by the prosecutor; the statement made by the defendant about confessing the guilt and making a confessing testimony in relation thereto; and the penalty or individually applicable measure (with indication of the type, extent and duration). Optional elements include secondary penalty; measure (with indication of type, extent and duration) applicable in parallel with a penalty or

[32] GÁCSI 2018, p. 280.

measure; for certain criminal offences, termination of the proceeding or rejection of the denunciation; obligation of or exemption from paying criminal costs; scope of other obligations undertaken by the defendant such as undertaking to satisfy a civil law claim made by a private party (refer to Sections 410 and 411 of the New Criminal Proceeding Act). The New Criminal Proceeding Act contains expressis verbis that none of the following shall be subject to the amicable settlement: coercive medical treatment; seizure; seizure of assets; or permanently rendering electronic data inaccessible [refer to Section 411 (6) of the New Criminal Proceeding Act]. (The legislator has established a so-called *favor defensionis* regulation for the case when no amicable settlement is entered into by and between the prosecutor and the defendant. It means that the initiation of the amicable settlement or the documents created in association therewith may not be used as evidence or means of evidence. In this case, the proceeding shall continue, under the rules applicable to standard proceedings, with the filing of a traditional formal accusation.)

If a written amicable settlement is entered into, the case will proceed to the judicial phase with *the filing of a special formal accusation* (under the title '*filing of formal accusation in case of amicable settlement*'). In this case, the prosecutor shall be obliged to file the formal accusation with the same facts and criminal offence qualification as specified in the amicable settlement recorded in a minutes. The prosecutor shall also be obliged to submit to the court not only the indictment but also the minutes that contains the amicable settlement. The prosecutor shall make 3 motions in the indictment: for the court to approve the amicable settlement; for the type of penalty to be imposed or measure to be applied in line with the substance of the amicable settlement; and for the type of other measure or measures to be taken by the court in line with the substance of the amicable settlement [refer to Sections 424 (1) to 424 (3) of the New Criminal Proceeding Act].

In case of cooperation type 1, the *court proceeding* shall be conducted within the framework of a *separate proceeding* ("*proceeding in case of amicable settlement*") where the court shall hold a preparatory session at which the court shall not modify the substance of the amicable settlement but shall verify the legitimacy of the amicable settlement. The preparatory session shall start with the prosecutor stating the essence of the charge and the motions. After that, the court shall inform the accused party of the consequences of approval of the amicable settlement. One of these consequences that, in my opinion, may have outstanding significance is that no appeal shall lie against the approval decision. Then the court shall ask the accused party to state whether or not the accused party confesses guilt and waives their right to trial, both in accordance with the amicable settlement. In my opinion, this rule (i.e. the defendant shall re-state their position before the court) facilitates the enforcement of the principle of directness. Moreover, the legislator has added a guarantee rule according to which the defendant shall be entitled to consult with their defence counsel before giving answer to the question (refer to Sections 731 and 732 of the New Criminal Proceeding Act). If the accused party confesses guilt and waives their right to trial, the court shall verify if the conditions for approving the amicable settlement are satisfied (i.e. running a test consisting of 5 conjunctive elements specified in Section 733 of the New Criminal Proceeding Act). If court chooses to approve the amicable settlement with a court

decision, the proceeding shall continue as if the defendant had confessed guilt at the preparatory session in case of cooperation type 2. In this scenario, the case-deciding decision shall be made either at the preparatory session or, in exceptional cases, at a trial (refer to Sections 735 and 736 of the New Criminal Proceeding Act). If the court chooses to decline the amicable settlement (also with a court decision, against which no appeal shall lie), the proceeding shall continue under the rules applicable to standard proceedings, i.e. as if the defendant had not confessed guilt at the preparatory session in case of cooperation type 2 (refer to Section 734 of the New Criminal Proceeding Act). At this point, it can be noticed in my opinion that the legislator did not intend to establish two separate forms of cooperation by the defendant in the new legislation but rather intended to establish a system that combines them and correlates them to each other.

2. Cooperation type 2 (form relating to the preparatory session)

The legislator has established another type of cooperation by the defendant (in my opinion, with a subsidiary nature) the distinctive feature of which is that the investigation shall take place under the general rules (i.e. without an amicable settlement being entered into), but the *preparation of the trial*, more specifically the preparatory session (to be commended after the filing of the formal accusation) shall involve the establishment of a cooperation that does not require a formal amicable settlement but rather, virtually, the approval and reconciliation of the defendant.

The legislator did not try to conceal its intention to establish the so-called *preparation of the trial on the merits* process in criminal proceedings. This process shall give place not only to the administrative tasks but also to the preparation of the trial on the merits.[33] The reason being is that, if the reaction of the prosecution and the defence sides becomes obvious as early as at the beginning of the judicial phase, it may serve as a guide to establish which direction the evidence process should go to and may also help expedite the proceedings and make them more efficient.

The stage of defendant cooperation type 2 is the *preparatory session* which the legislator has tried to make more concentrate. The baseline was to define this form of court proceeding: "a public session held after filing of the formal accusation with the aim to facilitate preparation of the trial on the merits, at which the accused party and the defence counsel may state their positions about the charge and contribute to how the criminal proceeding evolves, both prior to the trial" [refer to Section 499 (1) of the New Criminal Proceeding Act]. This session shall start with the prosecutor stating the essence of the charge and indicating the means of evidence that corroborate the charge. Even though the prosecutor may not know at this point whether or not the defendant confesses guilt, the prosecutor may make motion for the type, extent and duration of the sanction in order to facilitate orientation of the court's decision later in the proceeding. Then, the accused party shall be questioned where the accused party shall be given the so-called defendant warning (Miranda warning) and informed that the defendant may confess guilt. After that, the accused party shall be asked to make statement whether or

[33] GÁCSI 2018, p. 282.

not they confess guilt in the criminal offence constituting the subject matter of the charge and thus waive their right to trial (refer to Section 502 of the New Criminal Proceeding). If the accused party confesses guilt (without a written amicable settlement), the court shall run a test consisting of three conjunctive conditions specified in Section 504 (2) of the New Criminal Proceeding Act with the aim to verify whether or not the confessing testimony had been given voluntarily. If the court accepts it, the court shall make the case-deciding decision either at the preparatory session or at a trial. In case of the latter, evidence process may be conducted but it shall not question the foundedness of the facts specified in the indictment or the matter of guilt (refer to Sections 504 and 505 of the New Criminal Proceeding). If the court does not accept the confessing testimony of the accused party or if the defendant denies to confess guilt in the first place, then the court proceeding shall continue under the rules applicable to standard proceedings with condition that the defendant shall be entitled to confess guilt at any time during the proceeding (refer to Sections 506 to 508 of the New Criminal Proceeding Act).

3. Common rules and making conclusions

Both types of cooperation by the defendant share the rule according to which the legal sanction and associated matters may constitute the *subject matter of the bargain*. On the other hand, facts or legal crime qualifications may not be subject matter of the amicable settlement as these are stated by the prosecutor during the proceeding. Another common feature of the two types of cooperation is the *voluntary confessing testimony of the defendant* that has been obtained without any kind of coercion of force. In each case, the court shall review such testimony and adopt a decision in connection therewith.

The legal institution of cooperation by the defendant may be applied to any type of criminal offence. In my opinion, the legislation and its *complex system* imply that the legislator considers cooperation type 1 as the general rule in the system of cooperation. That is, the best way to expedite proceedings would be for the defendant to give confessing testimony and for the prosecution and defence sides to start cooperation, both as early as in the investigatory phase. Nonetheless, for pragmatic consideration, the legislator did not wish to lose the possibility for cooperation by the defendant even if the defendant does not give confessing testimony in the investigatory phase or if either or both sides lack full commitment towards the cooperation. So, there is a second option for cooperation by the defendant in which the defendant may, without a written amicable settlement, give a confessing testimony and waive their right to trial during the preparation of the trial, more specifically at the preparatory session that the legislator has made more concentrate. If the defendant does not wish to cooperate (and also does not waive their right to trial) either in the investigatory phase or during the preparation of the trial, the defendant may still, at any time during the proceeding of first instance, give (confessing) testimony and thus contribute to how the evidence procedure evolves. However, it would also mean that the defendant would deprive themselves of the possibility for their case to be completed more quickly and a (final) case-deciding decision to be made earlier.

Below is a diagram to facilitate understanding of the system of cooperation by the defendant.

Diagram 1.

The system of cooperation by the defendant (as interpreted by the author)

<table>
<tr><th colspan="2">Cooperation type 1</th><th colspan="2">Cooperation type 2</th></tr>
<tr><td colspan="2">In the investigatory phase: the prosecutor – the defendant – the defence counsel may enter into a formal amicable settlement about the confession of guilt ("amicable settlement about confession of guilt" – refer to Chapter LXV of the New Criminal Proceeding Act)</td><td colspan="2">Investigatory phase: in accordance with general rules (i.e. no amicable settlement)</td></tr>
<tr><td colspan="2">Filing of formal accusation: in accordance with special rules ("filing of formal accusation in case of amicable settlement" – refer to Section 424 of the New Criminal Proceeding Act)</td><td colspan="2">Filing of formal accusation: in accordance with general rules (refer to Sections 421 to 423 of the New Criminal Proceeding Act)</td></tr>
<tr><td colspan="2">Judicial phase: separate proceeding – "proceeding in case of amicable settlement" (refer to Chapter XCIX of the New Criminal Proceeding Act)
- the court shall decide whether or not the amicable settlement is legitimate
- the court shall not modify the substance of the amicable settlement</td><td colspan="2">After filing of the formal accusation starts the negotiation process during the preparation of the trial, more specifically at the preparatory session. This process does not result in a formal amicable settlement but rather gives the defendant the opportunity to approve the situation and reconcile themselves.</td></tr>
<tr><td>approves the amicable settlement (with a decision against which appeal shall not lie)</td><td>declines the amicable settlement (with a decision against which appeal shall not lie)</td><td>the accused party confesses guilt</td><td>the accused party does not confess guilt</td></tr>
<tr><td>passing a judgement: either at the preparatory session or at the trial</td><td>case-deciding decision: in accordance with the rules applicable to standard proceedings</td><td>if the court accepts it: the court shall pass a judgement either at the preparatory session or at a trial</td><td>in this case, or if the court declines the confessing testimony: the court shall make a case-deciding decision within the framework of a standard proceeding (with condition that the defendant shall have the right to confess guilt at any time)</td></tr>
<tr><td colspan="4">What are the items that may not be subject matter of an amicable settlement? Facts, and legal qualification (these are stated by the prosecutor)
What are the items that may be subject matter of bargaining? Legal sanction and associated matters</td></tr>
</table>

Overall, it can be stated that the rules for cooperation by the defendant as set forth in the new legislation as well as the associated guarantee provisions (for example, cases of obligatory defence; verification of the legitimacy of any confessing testimonies made before the court and of any amicable settlement; extended scope of warnings to be given to the defendant during the proceeding) comply with the requirements for fair trials. Moreover, this legislation does not derogate the more broadly construed principle of equality of arms, either – if the defendant chooses to waive their fundamental right to trial, they will receive, in exchange, quicker proceeding and certain substantive criminal law allowance.[34] (However, as detailed in Section II.3 of this study above, such allowance in its current form does not give the perpetrators true benefits in my opinion. This aspect of substantive criminal law rules would be worth reconsideration.) Therefore, I find proceeding law rules appropriate. However, the legislation unfortunately seems to have some mistakes typical to 'works of multiple authors'. These mistakes render some of the provisions concerning cooperation uncertain or rather ambiguous than not. Some examples are already mentioned in this study such as the matter of cooperation type 1 where the phases of the negotiation for amicable settlement cannot be read out unambiguously from the legislation.

Both types of cooperation may give rise to the question why the victim has been left out from the process of cooperation. The reason being is that there is a separate legal institution aimed at helping the victim and the defendant reach a sort of 'agreement'. This legal institution is called mediation proceeding and taxonomically separated from the system of cooperation by the defendant. However, the French model (where, if the victim is a known party, the prosecutor shall oblige the defendant to compensate the victim for the damage caused by the defendant) could serve as a good example to reinforce the rights of the victim (private party) in this system by, for example, making the 'undertaking to satisfy a civil law claim made by a private party' a mandatory element (rather than being an optional element as the case is now).

IV. Closing thoughts

"*Justice may fade away as time passes by*", said the French criminalist *Edmond Locard*.[35] This thesis is evergreen as the matter of how criminal proceedings could be expedited and made more efficient is constantly present in both legal theory and legal practice.

The possible solutions to look at by the Hungarian legislator during the codification works in the quest of expediting proceedings and making them more efficient, included for example the legal institution of plea bargaining working excellently in the American continent and the amicable settlement type proceedings conducted in Europe. As a

[34] GÁCSI 2018, p. 285.

[35] PRADEL, JEAN: *La célérité et les temps du procès pénal, Comparaison entre quelques législations européennes.* In: Delmas-Marty, Mireille (ed.): Champ pénal – Mélanges en l'honneur du professeur Reynald Ottenhof, Paris, 2006. p. 251.

result, the new legislation has established the rules for cooperation by the defendant and the framework within which they should be applied. When establishing the system of cooperation based on the defendant's confessing testimony, the legislator took into consideration the failure of the separate proceeding titled 'waiver of right to trial'. The establishment of the defendant cooperation forms and their complex system (which, in some points, resembles the solution applied in the French model) was, in part, a response to that failure.

It is also to be noted that such cooperation may involve *risks* to almost all 'parties'. One of them is the risk of "*point of no return*" commonly mentioned in international bibliography. This risk means that if the defendant is too early to give a confessing testimony during the proceeding, it may deteriorate the defending strategy and proportionately reduce the possibility for the defendant to be acquitted.[36] In my opinion, the rules for the new system of cooperation by the defendant along with the associated guarantees comply with the requirements for fair trial and do not derogate the more broadly construed principle of equality of arms, either. However, for this legislation to achieve its objective (expedition and increasing efficiency), the parties have to perceive that they have interest in the application of this legislation. However, it seems that achieving the parties' perception of being interested would require, amongst others, amending the rules of substantive law in a direction that is more favourable to the defendant.

Besides, the legal institution of cooperation by the defendant gives rise to numerous *questions* (mainly dogmatical ones relating to proceeding law). Some of such questions about cooperation type proceedings, for example, are how impartial judges can remain in such proceedings, and whether or not this legal institution derogates the function of finding justice. In my opinion, by establishing the various types of cooperation by the defendant in Hungarian criminal proceedings, the legislator has given the judge (and the judicial phase) the very role of securing the legitimacy of the amicable settlement and the voluntariness of the confessing testimony and safeguarding the amicable settlement process. All of this help ensure that the principle of judicial impartiality cannot be derogated. [However, it may cause an interesting situation if the court declines the amicable settlement (in case of cooperation type 1) or does not accept the accused party's confession of guilt (in case of cooperation type 2) as either of these scenarios would oblige the court to conduct the proceeding under the rules applicable to standard proceedings as if no amicable settlement had been entered into (in case of cooperation type 1) or if the accused party had not confessed guilt (in case of cooperation type 2).] Also, justice shall be treated as a justice of golden mean, without the addition of any qualifier word, and in the quest of justice, the expedition of proceedings (with the application of proper guarantees) shall be and remain an objective to accomplish.

[36] DAHS, HANS: *Absprachen im Strafprozess – Chanchen und Risiken*. NStZ 1988. p. 156.

GÁCSI ANETT ERZSÉBET

A MAGYAR „VÁDALKU" INTÉZMÉNYE, AVAGY A TERHELTI EGYÜTTMŰKÖDÉS RENDSZERE A MAGYAR BÜNTETŐELJÁRÁSBAN

(Összefoglaló)

Az 1998-ban elfogadott, majd 2003 nyarán hatályba lépett magyar büntetőeljárási törvényt (1998. évi XIX. törvény, a továbbiakban: Be.) mára közel 90 törvény, több alkotmánybírósági határozat hozzávetőlegesen 2000 helyen módosította, amely koherencia zavart okoz. Erre reagált a magyar jogalkotó, amikor megalkotta az új magyar büntetőeljárási törvényt (2017. évi XC. törvény; a továbbiakban: új Be.), amely 2018. július 1-jén fog hatályba lépni.

Általánosságban elmondható, hogy jelentős társadalmi igény mutatkozik a *büntetőeljárások gyors és egyben hatékony befejezése* iránt. Ezek lényege, hogy a bűncselekmények elkövetőit kivétel nélkül, minél kevesebb pénzbeli és időbeli ráfordítás mellett, tisztességes eljárásban vonják felelősségre. Az új büntetőeljárási törvény ezeknek a céloknak próbál eleget tenni.

Jelen tanulmányban egy elméleti bevezetőt követően (mi volt az újra szabályozás indoka, milyen minták álltak a jogalkotó előtt, különös tekintettel a francia modellre) a terhelti együttműködés (a magyar „vádalku") rendszerét mutatom be. A vizsgálatot a tisztességes eljáráshoz való jog szemüvegén keresztül végzem el, amelynek során figyelemmel leszek arra, hogy vajon az új szabályozásban a tisztességes eljáráshoz való jog lényegi elemeként elismert fegyverek egyenlőségének elve miként érvényesül.