Hungarian Helsinki Committee

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Trial Waiver in Hungary

Research report

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1.

Introduction

1.1. Overview of the project "Trial Waiver Systems in Europe"

Despite the apparently increasing popularity of trial waiver systems, many international and domestic bodies have expressed concern about the potential impact of the increased use of trial waivers on the fair operation of criminal justice systems. The Parliamentary Assembly of the Council of Europe's (PACE) Committee on Legal Affairs and Human Rights in September 2018 published a report entitled "Deal-making in criminal proceedings: the need for minimum standards for trial waiver systems"[1] which identifies the need for a comprehensive study on the use of trial waiver systems with an eye to developing a set of recommendations designed to ensure that the threat to human rights, in particular the right to a fair trial, is minimised.

The international project "Trial Waiver Systems in Europe", supported by the European Union and coordinated by Fair Trials,[2] in the framework of which the present country report has been prepared, aims to gather comprehensive and comparative information on the use of trial waiver systems in the countries covered by the project: Albania, Cyprus, Hungary, Italy and Slovenia. Based on the research, the project aims to develop country-specific guidance on use of trial waiver systems without compromising defence rights. This information will also serve as a basis for wider discussion on reform on the EU level.

In the EU context the objective of the project was to provide comparable data and analysis on the implementation of safeguards in terms of the rights of defendants, provided for in the EU's Roadmap Directives. This data would allow us to identify potential common threats trial waiver systems pose to the right to a fair trial across the Member States and candidate countries and make recommendations to address them. This information will also be used to engage EU policy makers in the need for reform.

At the national level, the project seeked to identify risks and best practices specific to each jurisdiction. Each country covered in this project has a unique set of legal, social, economic and other circumstances in which trial waiver systems operate. The objective of the project was to develop practical, country-specific understanding of the impact of trial waiver systems on the right to a fair trial. Research results were summarized in a country report in each country, prepared on the basis of a uniform template developed by the project coordinator Fair Trials, and they were analysed in a comparative report as well. The project also aimed to develop guidance on best practices adapted to each country on the basis of the research results. This will be used as an essential tool for empowering domestic actors to bring about sustainable change.

1 Resolution 2245 (2018), Recommendation 2142 (2018), https://pace.coe.int/en/files/25041

2 www.fairtrials.org

1.2. Scope of research

For the purposes of the project, a trial waiver was defined as "a process not prohibited by law under which criminal defendants agree to accept guilt and/or cooperate with the investigative authority in exchange for some benefit from the state, most commonly in the form of reduced charges and/or lower sentences".

Therefore, the present country report on Hungary focuses on two forms of cooperation by the defendant understood narrowly[3] from among the various procedures introduced by Act XC of 2017 on the Code of Criminal Procedure (hereafter: CCP) as of 1 July 2018 with a view to facilitate cooperation by the defendant and the timeliness of criminal procedures, namely on (i) the settlement to plead guilty, which is a settlement concluded by the prosecution and the defendant before the charges are pressed (before the indictment),[4] and (ii) the procedure to be followed if the defendant confesses and waives their right to a trial at the preparatory session of the court.[5]

Accordingly, the present country report does not cover in detail the forms of cooperation by the defendant understood more broadly, namely that the prosecution can offer to take certain measures or issue certain decisions in the course of the procedure.[6] According to the CCP, the prosecution may at any point during the investigation inform the defendant and the defence counsel what kind of prosecutorial measure or decision would be possible to be taken or issued, should the defendant confess to committing the crime.[7] In the framework of this, the prosecution may foresee

a) the suspension of the criminal procedure in order to launch a mediation process, and, with a view to the outcome of the latter, the termination of the criminal procedure;

b) applying a so-called conditional prosecutorial suspension of the criminal procedure, and, with a view to the outcome of that, the termination of the criminal procedure;

c) the termination of the criminal procedure or the rejection of the criminal report with a view to the defendant's cooperation; and

d) in case of an indictment, taking the measures necessary for an arraignment or for a procedure aimed at issuing a penal order,

provided that the further preconditions for these steps as prescribed by the CCP prevail.[8] Similarly, the defendant and the defence counsel may inform the prosecution or the investigating authority at any point during the investigation that the defendant (at that point, the "suspect") will

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3 For the categorization into forms of cooperation by the defendant understood narrowly or more broadly, see: Anett Erzsébet Gácsi*: A terhelti együttműködés rendszere az új büntetőeljárási törvényben (The system of cooperation by the defendant in the new Code of Criminal Procedure).* In: Krisztina Karsai – Zsanett Fantoly – Zsuzsanna Juhász – Zsolt Szomora – Andor Gál (eds): Ünnepi kötet Dr. Nagy Ferenc egyetemi tanár 70. születésnapjára. Acta Universitatis Segediensis, Szeged, 2018, http://acta.bibl.u-szeged.hu/53845/1/juridpol_081.pdf, p. 278.

4 CCP, Chapter LXV

5 CCP, Articles 504–505

6 CCP, Chapter LXIV

7 CCP, Article 404(1)

8 CCP, Article 404(2)

confess to committing the criminal offence in exchange for the prosecution applying one of the above measures and issuing one of the above decisions.[9] The prosecution may make the above conditional upon the defendant's cooperation in solving or proving the underlying case or another criminal case when it comes to the possibilities listed above under a)–b) and d); upon paying the damages claimed by the victim when it comes to the possibilities listed above under c) and d); and upon complying with any other obligation that may be imposed in the framework of a conditional prosecutorial suspension when it comes to the possibilities listed above under a), c) and d).[10]

The country report does not cover either the other procedures included in the CCP that are aimed at accelerating criminal procedures, namely the possibility to issue a penal order (formerly known as "omission of the trial") and the arraignment, which were included already in the Code of Criminal Procedure in effect before 1 July 2018, and which are applied in a significant proportion of criminal cases. The essence of issuing a penal order[11] is that the court, upon the prosecution's motion or ex officio, decides the case and issues a penal order without a trial hearing, only on the basis of the case files, if the offence is punishable by a maximum of three years of imprisonment, the case is simple, the defendant is not detained in the underlying case (or is detained only in another case), and the aim of the sanction may be achieved also without holding a trial. The court may issue a penal order also if the offence is punishable by a maximum of five years of imprisonment, all of the previous conditions prevail, and the defendant confessed to committing the offence.[12] Under the rules of the arraignment procedure, the prosecution may bring the defendant before the court within two months from committing the criminal offence if the underlying criminal offence is punishable by a maximum of 10 years of imprisonment, the case is simple, the evidence is available, and the defendant was caught in the act, or confessed to committing the criminal offence.[13] Thus, in these procedures the confession of the defendant has limited significance, and defendants do not waive their right to a trial either.

1.3. Methodology

In order to prepare the present country report, in addition to reviewing the literature available, the Hungarian Helsinki Committee (HHC) submitted freedom of information requests to the Ministry of Justice, the Chief Public Prosecutor's Office and the National Office for the Judiciary. In order to map the practice, we conducted semi-structured interviews with eight attorneys, three judges, one prosecutor[14] and one police officer; and reviewed the files of 41 criminal cases. Since the

9 CCP, Article 406(4)

10 CCP, Article 404(3)

11 CCP, Chapter C

12 CCP, Article 740(1) and (3)

13 CCP, Article 723

14 In the course of the research, in December 2020, the HHC requested permission from the Chief Public Prosecutor's Office to conduct an interview with a further prosecutor or prosecutors, or, alternatively, that they reply to our questions pertaining to the practice in writing, but under the circumstances prevailing in December 2020, the Chief Public Prosecutor's Office did not consider this feasible due to capacity constraints.

research had to be conducted during the coronavirus pandemic, we were not able to analyse case files at courts, because for most of the project's research period, access to court buildings was restricted due to the pandemic. Therefore, the HHC accessed case files via attorneys (while of course observing attorney-client privilege and applicable data protection rules). This also resulted that unfortunately we were not in the position to put together a national, representative sample, and so our statements included in the country report should be read in the light of that. In the end, we were able to access the files of 13 cases in which a settlement to plead guilty was initiated or concluded by the prosecution and the defendant,[15] and the case files of 28 cases in which the defendant confessed to committing the criminal offence and waived their right to a trial at the preparatory session of the court.[16] In addition, we reviewed first instance decisions made available online and in an anonymised manner by courts[17] between July 2018 and April 2021 in which the defendant confessed to committing the criminal offence and waived their right to a trial at the preparatory session of the court, and the available second instance, extraordinary review, etc. decisions related to them – this way, we were able to have a look at 44 further cases.[18] The draft of the present research report was presented to and discussed with effected stakeholders in the framework of a workshop held in the autumn of 2021.[19]

15 Division of first instance courts in the cases reviewed: 10 district court cases and 3 tribunal (county-level court) cases (Hódmezővásárhely District Court – 1 case, Kecskemét District Court – 2 cases, Nyíregyháza District Court – 1 case, Pest Central District Court – 3 cases, Tatabánya District Court – 2 cases, Szeged District Court – 1 case, Metropolitan Tribunal – 3 cases).

16 Division of first instance courts in the cases reviewed: 24 district court cases and 4 tribunal cases (Balassagyarmat District Court – 1 case, Budapest 2nd and 3rd District Court – 2 cases, Budapest 18th and 19th District Court – 1 case, Budaörs District Court – 1 case, Cegléd District Court – 1 case, Hódmezővásárhely District Court – 1 case, Pest Central District Court – 16 cases, Szeged District Court – 1 case; Budapest Area Tribunal – 2 cases, Pécs Tribunal – 1 case, Székesfehérvár Tribunal – 1 case).

17 Available here: https://eakta.birosag.hu/anonimizalt-hatarozatok.

18 Division of first instance courts in the cases reviewed: 7 district court cases and 37 tribunal cases (Balassagyarmat District Court – 1 case, Budapest 2nd and 3rd District Court – 1 case, Fonyód District Court – 1 case, Keszthely District Court – 1 case, Mosonmagyaróvár District Court – 2 cases, Pest Central District Court – 1 case; Debrecen Tribunal – 5 cases, Eger Tribunal – 1 case, Metropolitan Tribunal – 16 cases, Győr Tribunal – 2 cases, Kecskemét Tribunal – 4 cases, Miskolc Tribunal – 1 case, Nyíregyháza Tribunal – 2 cases, Pécs Tribunal – 2 cases, Szeged Tribunal – 2 cases, Tatabánya Tribunal – 2 cases).

19 The Chief Public Prosecutor's Office, the National Judicial Office and the National Police Headquarters did not take the opportunity to attend the workshop or to comment on the draft research report in writing.

2.

Relevant characteristics of the Hungarian criminal justice system

The Hungarian criminal procedure is a mixed type of procedure, but "the changes introduced [by the new CCP] at the same time strengthen the inquisitorial elements of the procedure, diverting from the intentions of the [previous CCP of 1998] which strived to strengthen the procedure's accusatorial elements and its adversarial character".[20] Thus, the same dilemma emerges in the case of the Hungarian criminal procedure as in the case of other continental legal systems: to what extent can "plea bargain" and similar institutions and convictions based solely on a confession be reconciled with the need to establish material truth and criminal responsibility based on that.

According to the general official reasoning attached to it by the legislator, it was a "priority" for the new CCP which came into effect on 1 July 2018 "to enhance the timeliness of criminal procedures, for example by making certain special procedures – such as the arraignment, settlements and penal orders – more effective".[21] The background for this was the realisation that "[earlier] attempts to conduct the procedures in an effective and speedy manner have failed".[22] In the years before adopting the new CCP, **the average length of criminal procedures as a whole has increased**, and in particular, the average length of investigations has increased, from 162.9 days to 244 days between 2007 and 2016.[23] This occurred in a period when the number of registered offences committed decreased by around 25%, and the staff and budget of the police and the prosecution service increased in almost the same proportions.[24] Meanwhile, certain types of procedures aimed at simplifying and accelerating the criminal procedures were relatively widely used by the authorities: for example in 2017, the year preceding the coming into effect of the new CCP, 23.1%-a of the indictments was filed in the framework of an arraignment procedure, and in 32.3% the prosecution proposed the omission of the trial.[25]

Statistical data showed that "from among the various parts of the procedure, the period between the filing of the indictment and the final court decisions is the longest", and so when drafting the new CCP, "the legislator adopted a procedural regime that allows for concluding as many cases as possible without a trial".[26] From among the procedures aimed at accelerating and simplifying the procedure, and/or based on the defendant's confession, those which "worked and functioned well – such as the arraignment – have been included in the new CCP as well, but at the same time, the procedure 'renouncing of the trial', which was used only in an insignificant proportion of cases

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20 Péter Hack: A büntetőeljárás újításának esélyei (The chances of renewing the criminal procedure). *Belügyi Szemle (Internal Affairs Review)*, 2018/3., http://real-j.mtak.hu/14951/3/2018_03_Bor%C3%ADt%C3%B3val_DOI-val.pdf, p. 72.

21 Draft Bill T/13972 on the Code of Criminal Procedure, General official reasoning, https://www.parlament.hu/irom40/13972/13972.pdf, p. 317.

22 Hack, p. 72.

23 *Bűnözés és igazságszolgáltatás (Criminality and criminal justice)*. Chief Public Prosecutor's Office, 2017, http://ugyeszseg.hu/repository/mkudok264.pdf

24 Hack, p. 73.

25 *Ügyészségi Statisztikai Tájékoztató (Büntetőjogi szakági terület). A 2017. évi tevékenység (The statistical information leaflet of the prosecution – criminal field. Activities in the year 2017)*. Chief Public Prosecutor's Office, 2018, http://ugyeszseg.hu/pdf/statisztika/buntetojogi_szakterulet_2017.pdf, p. 33, Table 35

26 Hack, p. 73.

and was based on concluding an agreement with the defendant, was abolished, and the legislator developed a new system on its basis. The improved procedure is based on the legal framework introduced successfully in Slovenia years ago, in which the confession and the defendant's willingness to cooperate may lead to two types of agreements."[27] In the Hungarian CCP, these two types are the settlement to plead guilty and the confession made at the preparatory session of the court – both of these will be discussed in detail below.

In the Hungarian system, the prosecution service, which enforces the state's punitive demands in an exclusive manner, as public prosecutor, has a significant role with regard to the various forms of trial waiver as well, but it has no total discretion when establishing the **sanctions**. In the case of a confession at the preparatory session of the court, the prosecutor may make a motion as to the amount and length of the punishment or the (punitive) measure acceptable for the prosecution, would the defendant plead guilty and waive their right to a trial (hereinafter referred to as "sentencing motion") according to the general principles of imposing a punishment as included in Act C of 2012 on the Criminal Code. Thus, the prosecutor shall make a motion within the boundaries set by the Criminal Code, with a view to the punishment's intended objective, so that it is consistent with the severity of the criminal offence, the degree of culpability, the danger the perpetrator represents to society, and the other aggravating and mitigating circumstances.[28] The prosecution shall also comply with the provision of the Criminal Code that sets out that when a fixed-term imprisonment is imposed, its length shall be guided by the so-called "median", which is half of the sum of the lowest and highest punishment applicable for the given criminal offence.[29] In addition, the prosecution may apply the general rule that if even the minimum punishment applicable under the Criminal Code for a given criminal offence is deemed too harsh with a view to the principles of sentencing, a punishment less severe than the punishment applicable under the general rules may be imposed. This means that if the minimum punishment to be imposed for a criminal offence is

a) 10 years of imprisonment, it may be reduced to a minimum of five years of imprisonment;

b) if it is five years of imprisonment, it may be reduced to a minimum of two years of imprisonment;

c) if it is two years of imprisonment, it may reduced to a minimum of one year of imprisonment; and

d) if it is one year of imprisonment, it may reduced to a lesser term of imprisonment, confinement, community service work or a fine, or these punishments cumulatively.[30]

The Criminal Code establishes more lenient rules as compared to these general rules for when a settlement is concluded and approved by the court. Accordingly, in the procedures involving settlements to plead guilty, the lower limits of the less severe punishments provided for in the above list shall be taken into account when sentencing. In addition, the Criminal Code sets out that if the

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27 *Az ügyész változó szerepe az új büntetőeljárásban (The prosecutor's changing role in the new criminal procedure).* Chief Public Prosecutor's Office, 2 July 2018, http://ugyeszseg.hu/az-ugyesz-valtozo-szerepe-az-uj-buntetoeljarasban/

28 Criminal Code, Article 80(1)

29 Criminal Code, Article 80(2)

30 Criminal Code, Article 82(1)–(2)

settlement is concluded with a defendant who cooperated with the prosecutor's office and/or the investigating authority (in most cases, the police) to a significant extent, contributing to proving the underlying criminal offence or any other criminal offence, the sentence may be imposed on the basis of the next category in the list above (this is the so-called "double decrease"). Furthermore, "the Criminal Code's provisions on reducing the punishment or to suspend its application can also be taken into account".[31]

It is relevant for the practice of trial waiver systems in Hungary as well that the Hungarian **prosecution service** is a hierarchical organisation; it carries out its tasks established in the Fundamental Law and the Acts of Parliament in an organisational structure based on subordination, ensuring that the staff member responsible for a given decision can be identified.[32] It also adds to the context that indictments by the prosecution have been resulting in convictions in a rather high percentage of the cases for years in Hungary: in the last 10 years, the prosecution's success rate has constantly been over 95%, it has been increasing since 2012, and by 2019, it reached 98.3%, while the proportion of defendants convicted reached 96.95%.[33] The prosecution service has an important role in the investigations as well; in the so-called examination phase of the investigation which commences after the defendant's first interrogation, it is the prosecutor's office which directs the examination, and the investigating authority shall carry out the examination in line with the instructions of the prosecutor's office,[34] and in the case of certain criminal offences, the prosecutor's office itself investigates.[35]

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31 Ádám Békés in: Péter Polt (ed.): *Kommentár a büntetőeljárásról szóló 2017. évi XC. törvényhez (Commentary of Act XC of 2017 on the Code of Criminal Procedure)*

32 Act CLXIII of 2011 on the Prosecution Service, Article 3(2)

33 *A büntetőbíróság előtti ügyészi tevékenység főbb adatai I. A 2014. évi tevékenység (The main statistical data regarding prosecutorial activities before criminal courts I. Activities in the year 2014).* Chief Public Prosecutor's Office, 2015, http://ugyeszseg.hu/wp-content/uploads/2022/01/buntetobirosag-elotti-i.-2014.-ev.pdf, p. 76.; *A büntetőbíróság előtti ügyészi tevékenység főbb adatai I. A 2019. évi tevékenység (The main statistical data regarding prosecutorial activities before criminal courts I. Activities in the year 2019).* Chief Public Prosecutor's Office, 2020, http://ugyeszseg.hu/wp-content/uploads/merzag/2020/12/buntetobirosag_ugyeszi_tev_i_2019.pdf, p. 67.

34 CCP, Articles 25(2) and 392(1)

35 CCP, Article 30

3.

Forms of trial waiver in Hungary in theory and practice

3.1. Settlement to plead guilty

3.1.1. Legislative context: the reasons for introducing the settlement to plead guilty

When codifying the new CCP, in addition to **the improvement of the timeliness of criminal proceedings**, the legislator also aimed at "increasing the defendant's willingness to cooperate, since a consensual procedure meeting the requirements of a fair trial will save time and resources for the state, provide more lenient sanctioning for the defendants, guarantee restitution for the victims, and provide society with a guarantee that the perpetrator will be called to account".[36] The settlement to plead guilty is one manifestation of these aspirations, the objective of which was, according to the official reasoning attached to the new CCP, to "**simultaneously decrease the uncertainty of the participants** of this special procedure **regarding the conclusion of the settlement and its approval by the court, and their administrative burdens**. The 'target group' of this special procedure [was constituted] by those first instance proceedings, where after a protracted evidentiary procedure a final and binding judgment is handed down already at the first instance. In such cases, it does not seem reasonable to conduct the full evidentiary procedure at the court hearing […]."[37] The Commentary of the CCP adds that the settlement to plead guilty "has serious significance in the context of criminalistics, since the discovery of facts that is completed faster and, due to the confession, in a more detailed manner can assist the investigation of other cases, and discovering new criminal methods and tactics".[38]

As it was mentioned above, the settlement to plead guilty is not without predecessors. Its direct predecessor was the "**renouncing of the trial**" that was regulated in Chapter XXVI of the previous CCP, which however "was not functional despite the repeated amendments of the regulation" and "did not fulfil the hopes attached to it".[39] The relevant statistical data aptly illustrate this: e.g. in 2013–2017, before the new CCP was introduced, within the total population of defendants against whom charges were pressed, the ratio of defendants renouncing the trial before the indictment was between 0.09 and 0.20%, while after the indictment, this ratio was between 0.06 and 0.12%.[40]

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36 Draft Bill T/13972 on the Code of Criminal Procedure, Detailed official reasoning, https://www.parlament.hu/irom40/13972/13972.pdf, pp. 453–454.

37 Draft Bill T/13972 on the Code of Criminal Procedure, Detailed official reasoning, https://www.parlament.hu/irom40/13972/13972.pdf, p. 554.

38 Ádám Békés in: Péter Polt (ed.): *Kommentár a büntetőeljárásról szóló 2017. évi XC. törvényhez (Commentary of Act XC of 2017 on the Code of Criminal Procedure)*

39 Draft Bill T/13972 on the Code of Criminal Procedure, Detailed official reasoning, https://www.parlament.hu/irom40/13972/13972.pdf, pp. 453 and 554.

40 *A büntetőbíróság előtti ügyészi tevékenység főbb adatai I. A 2017. évi tevékenység (The main statistical data regarding prosecutorial activities before criminal courts I. Activities in the year 2017).* Chief Public Prosecutor's Office, 2018, http://ugyeszseg.hu/pdf/statisztika/buntetobirosag_ugyeszi_tev_I_2017.pdf, p. 15.

The dysfunctionality of this legal institution was due to a number of reasons related to the legislative concept. On the side of the defence, it was a severe problem that "according to the original rules, the application of the reduced sentences did not offer a real benefit for the perpetrators, because the Hungarian sentencing practice tends to converge towards the lower threshold of the punishment interval, and in addition, in the beginning, the possibility of suspending the imprisonment was excluded" – defendants cooperating with the authorities were the only exception to these rules, but their numbers were relatively low.[41] Furthermore, "the unwillingness to use this solution was [also] stemming from the uncertainty, since the court was not bound by the agreement of the defendant and the prosecution".[42] In addition, the investigating authority and the prosecution had no vested interest in this special procedure either: it only accelerated the court phase, while the prosecutor's responsibilities remained substantial in such cases; the complex procedural rules put "unnecessary administrative burdens on the authorities, with special regard to the prosecution, which thus became counter-interested in applying the procedure doe to the additional workload".[43] According to the literature, the lack of success of the renouncing of the trial also stemmed from the failure to resolve the contradiction that, as opposed to the common law systems, the continental jurisdictions, including the Hungarian legal system, aim to establish the (material) truth instead of the procedural truth,[44] which serves as the basis of "plea bargains". Furthermore, its "competing" with other special procedures – such as the omission of the trial and the arraignment – also contributed to the lack of success of the renouncing of the trial.[45] One must also remember that there had been a practice of "informal" bargaining between the prosecutor and the defence counsel – one interviewed judge for example said that at the court where they used to work, there had been a decade-long tradition of "plea bargaining in the waiting room".

The official reasoning attached to the CCP refers to the fact and an analysis of the provisions supports this reference that the legislator tried to take into account the lessons learnt from the failure of the renouncing of the trial when drafting the rules of the settlement to plead guilty. For example, it is an important change that the settlement to plead guilty can be initiated by the prosecutor and that the court is bound by the agreement as far as the sanction is concerned, in case it approves of the settlement. However, as it will be outlined below, not all the problems have been successfully resolved: for instance, settlements continue to place an extra burden on the prosecution.

41 Gácsi, p. 278.

42 Ádám Békés in: Péter Polt (ed.): *Kommentár a büntetőeljárásról szóló 2017. évi XC. törvényhez (Commentary of Act XC of 2017 on the Code of Criminal Procedure)*

43 Péter Vass in: Péter Polt (ed.): *Kommentár a büntetőeljárásról szóló 2017. évi XC. törvényhez (Commentary of Act XC of 2017 on the Code of Criminal Procedure)*

44 Hack, p. 77.

45 Gácsi, p. 279.

3.1.2. The main characteristics of the settlement: definition, conditions, the procedure and its participants

The essence of the settlement to plead guilty is that before the indictment (i.e. when the prosecutor submits a bill of indictment to the court) the prosecution and the defendant may conclude an agreement in relation to the criminal offence perpetrated by the defendant on the admittance of guilt and the consequences thereof.[46] A settlement to plead guilty may be concluded irrespective of the type of offence, or the characteristics of the defendant; such a settlement can be concluded with juvenile defendants too. Since 1 January 2021, the CCP prescribes that it shall not prevent the parties from concluding a settlement to plead guilty if the defendant has confessed to the offence at an earlier stage of the procedure.[47] The defendant can confess to all or only some of the offences into which the proceeding is conducted.[48]

The conclusion of the settlement **can be initiated by the defendant, the defence counsel and the prosecution**, but it is required for the launching of the settlement process that the other party shall not exclude the possibility of concluding a settlement.[49] (The defence counsel is not allowed to initiate a settlement without the consent of their client.) The process is primarily conducted between the prosecution and the defence, but the CCP "provides the prosecution with the possibility to communicate its stance [to the defence] through the investigating authority".[50] Government Decree 100/2018. (VI. 8.) on the Detailed Rules of the Investigation and the Preparatory Procedure (hereafter: Government Decree 100/2018) prescribes further rules for the investigating authority (which is the police in most cases).[51] For instance, the decree sets forth that the investigating authority shall inform the prosecution if it considers the conclusion of a settlement justified or expedient on the basis of the facts collected in the case. In such instances,

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46 CCP, Article 407(1)

47 CCP, Article 407(1). With the amendment the legislator has remedied the "unjust situation that a suspect who, upon his/her own consideration or the advice of his/her defence counsel, decides to strategically withhold the confession is in a better position than the suspect who shows repentance and makes a confession at the beginning of the procedure. The former can conclude a settlement, the latter is not allowed to do so." (Dr. habil Gergely Bárándy – Dr. Ferenc Dávid: Mint a mesebeli okos lány: gondolatok a bűnösség beismeréséről szóló egyezségről (Like the clever girl of the fairy tale: reflections on the settlement to plead guilty). *Büntetőjogi Szemle (Criminal Law Review)*, 2019/2., https://ujbtk.hu/wp-content/uploads/lapszam/BJSz_201902_10-15o_BarandyG_DavidF.pdf, p. 11.) It must be noted that in the legislator's view, this was not really an issue, since based on the strict the grammatical interpretation of the CCP, it could be concluded already before the amendment that confessing and admitting the perpetration of the offence during the investigation cannot in itself exclude the possibility of concluding a settlement, however, according to the official reasons attached to the amendment, it was justified to state this expressly in order to guarantee "the internal consistence of the CCP and the unity of the jurisprudence". (See Draft Bill T/9918 on the Amendment of the Code of Criminal Procedure and Other Related Acts of Parliament, Detailed official reasoning, https://www.parlament.hu/irom41/09918/09918.pdf, p. 195.)

48 CCP, Article 410(1)

49 CCP, Article 407(2) and (4)

50 Draft Bill T/13972 on the Code of Criminal Procedure, Detailed official reasoning, https://www.parlament.hu/irom40/13972/13972.pdf, p. 454; CCP, Article 407(6)

51 Government Decree 100/2018, Articles 156–158

the investigating authority shall also present its reasons for the recommendation. The investigating authority may already do so before (not only during or after) the first interrogation of the suspect, but the suspect, the person with regard to whom a well-grounded suspicion of a criminal offence exists and the defence counsel shall not be informed about this fact.[52] If the suspect or the defence counsel initiates the settlement, the police are under the obligation to immediately inform the prosecutor.[53] The investigating authority "may make a decision on accepting the initiative within the scope determined by the prosecutor's instruction".[54] This shows that the police can have a substantial role in the conclusion of the settlement, their task is not restricted to act as an intermediary between the prosecution and the defence.

After the settlement has been initiated, the prosecution, the defendant and the defence counsel can conduct **negotiations** about the confession of guilt and the substantive elements of the settlement.[55] The CCP does not contain any specific provisions about what the initiation shall contain, so "it is not expected from the defendant or the counsel that they should disclose in advance what the defendant would be willing to confess to, nor is the prosecution expected to determine the parameters of the punishment in advance, as these issues are subject to the negotiation that follows the act of initiating the settlement".[56] The facts of the case and the offence's legal classification under the Criminal Code are not subject to negotiation,[57] these are established by the prosecution.[58] Therefore, in relation to the facts of the case and the classification of the offence, "there is no room for the type of bargaining that is characteristic of the common law system",[59] in this sense, the settlement may not be regarded as a form of "plea bargaining". (At the same time, "it might happen that in the course of the negotiation, the prosecution becomes aware of information that requires the modification of the facts of the case as established by the prosecution, but in such cases, a new suspicion must be established. If this happens, the negotiation shall be suspended until the modified suspicion is communicated to the suspect by the prosecution or the investigating authority."[60]) There is no statutory deadline for completing the negotiation process.

The **mandatory elements** of the settlement are the following: (i) the description of the facts of the offence and its legal classification under the Criminal Code; (ii) the defendant's statement in relation to the offence that he/she admits his/her guilt, and therefore he/she makes a confession,

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52 Government Decree 100/2018, Articles 156(2) and 157(5)–(6)

53 Government Decree 100/2018, Article 157

54 Ádám Békés in: Péter Polt (ed.): *Kommentár a büntetőeljárásról szóló 2017. évi XC. törvényhez (Commentary of Act XC of 2017 on the Code of Criminal Procedure)*

55 CCP, Article 408(1)

56 Ádám Békés in: Péter Polt (ed.): *Kommentár a büntetőeljárásról szóló 2017. évi XC. törvényhez (Commentary of Act XC of 2017 on the Code of Criminal Procedure)*

57 CCP, Article 408(1)

58 CCP, Article 410(3)

59 *Az ügyészség változó szerepe az új büntetőeljárásban (The changing role of the prosecution in the new criminal procedure)*. Chief Public Prosecutor's Office, 2 July 2018, http://ugyeszseg.hu/az-ugyesz-valtozo-szerepe-az-uj-buntetoeljarasban/

60 Ádám Békés in: Péter Polt (ed.): *Kommentár a büntetőeljárásról szóló 2017. évi XC. törvényhez (Commentary of Act XC of 2017 on the Code of Criminal Procedure)*

and (iii) the punishment or the independently applicable measure to be applied.[61] Therefore, it is mandatory for the parties to agree with regard to the punishment. As far as the provisions to be taken into account by the prosecution in determining the applicable sanction are concerned, the Criminal Code sets out rules for imposing sanctions that are more lenient than the generally applicable norms.[62] (See more on this in Chapter 2.) The description of the criminal offence "must […] not only be confined to the classification, but shall be as detailed as if it was included in the bill of indictment".[63]

In addition to the mandatory elements, the CCP also lists several **optional elements**.[64] For instance, the prosecution may undertake that it would terminate the criminal procedure with regard to certain criminal offences that have no significance in terms of calling the defendant to account as compared to the other, more severe criminal offence committed (i.e. regarding which the defendant pleads guilty); or that it would terminate the criminal procedure[65] or refuses to launch an investigation[66] with regard to certain criminal offences with a view to the defendant's cooperation with the authorities and the defendant's contribution to solving or proving the underlying case or another criminal case. (In these latter cases, "although the CCP does not expressly stipulates so, it is logical to conclude that the settlement is not subject to judicial approval, since the result of the settlement is exactly the termination of certain ongoing proceedings".[67]) The settlement may stipulate that the defendant is exempted from having to pay all or part of the costs of the procedure, and so the agreed proportion of the costs are born by the state. In the settlement, the defendant may undertake that

- contributing to solving the actual or another criminal case, he/she cooperates with the prosecution or the investigating authority in a substantial manner;

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61 CCP, Article 410(2)

62 Criminal Code, Article 83. This "is applicable for offences perpetrated after the coming into effect of the new CCP. Article 2 of the Criminal Code provides guidance for offences perpetrated before 1 July 2018. Therefore, it is to be decided which Criminal Code is more favourable for the defendant: the one in force at the time of the perpetration or the one that was in force after 1 July 2018." See: Anna Kiss: *Vádalku magyar módra? (Plea bargaining in Hungarian style?).* In: Kriminológiai Tanulmányok 56., National Institute of Criminology, 2019, https://www.okri.hu/images/stories/KT/KT56_2019/kt56_sec.pdf, p. 97.

63 Ádám Békés in: Péter Polt (ed.): *Kommentár a büntetőeljárásról szóló 2017. évi XC. törvényhez (Commentary of Act XC of 2017 on the Code of Criminal Procedure)*

64 See in detail at: CCP, Article 411.

65 This is possible if the conditions set out in Article 399(1) of the CCP are met, i.e. if the suspect or the person with regard to whom the well-grounded suspicion of a criminal offence exists cooperates with the prosecutor's office and/or the investigating authority in uncovering the particular offence that is being investigated or another criminal offence to such an extent that the national security or investigative interest vested in cooperating with him/her is greater than the interest lying in making him/her accountable for the particular offence.

66 This is possible if the conditions set out in Article 382(1) of the CCP are met, i.e. if the person with regard to whom the well-grounded suspicion of a criminal offence exists cooperates with the prosecutor's office and/or the investigating authority in uncovering the particular offence that is being investigated or another criminal offence to such an extent that the national security or investigative interest vested in cooperating with him/her is greater than the interest lying in making him/her accountable for the particular offence.

67 Ádám Békés in: Péter Polt (ed.): *Kommentár a büntetőeljárásról szóló 2017. évi XC. törvényhez* (*Commentary of Act XC of 2017 on the Code of Criminal Procedure)*

- he/she pays the damages claimed by the victim or another financially aggrieved party before the court session on approving the settlement;
- he/she participates in a mediation process with the victim;
- he/she would perform, within the deadline determined by the prosecution, further obligations that can be prescribed by the prosecution within the framework of a conditional prosecutorial suspension.[68]

If the settlement is agreed on by both the prosecution and the defendant, the prosecution enters it into the record of the defendant's interrogation.[69] Since 1 January 2021, the CCP allows the prosecution to suspend the proceedings for a maximum of six months if it is necessary for the fulfilment of the obligation undertaken by the defendant in the settlement,[70] since there might be obligations among those undertaken by the defendant "that justify the setting of a [reasonable] deadline".[71]

If the prosecution and the defendant conclude a settlement, the prosecution **submits a bill of indictment** that contains the facts of the case and the classification of the offence **identically with the settlement as entered into the records of the interrogation**, which must be submitted to the court along with the bill of indictment.[72]

According to the interpretation of the Chief Public Prosecutor's Office, due to the absence of express authorisation in the CCP, it is not allowed to amend the settlement.[73] The CCP does not contain an express provision on whether the settlement can be cancelled, and what is to be done if a new circumstance arises after the conclusion of the settlement. Memorandum LFNIGA//142/2019. of the Chief Public Prosecutor's Office on Certain Issues Related to the Application of the CCP (hereafter: Memorandum; binding for prosecutors) provides guidance in this regard: "[b]ased on circumstances arising after the conclusion of the settlement or a violation of the law in relation to the settlement it is possible that the contents of the settlement may not be regarded as well-grounded or lawful any more. In such cases, if no bill of indictment has been submitted, the prosecution shall press charges on the basis of […] the general rules, and if charges […] have already been pressed, they shall be modified at the preparatory session of the court. In this case, the court will obviously refuse to approve the settlement […]."[74] According to the Memorandum, "the defendant can withdraw from the settlement until the court makes a decision about the

68 In terms of Article 419(2) of the CCP, in the framework of the conditional prosecutorial suspension of the proceeding, the prosecution may prescribe as an obligation or behavioural requirement that the suspect should a) compensate the damage, financial loss, loss of tax or customs revenues caused by the offence; b) provide remedy to the victim in any other way, c) make a donation for a certain cause or perform work of public interest; d) undergo psychiatric or alcohol addiction treatment (in this latter case the prior consent of the defendant is required).

69 CCP, Article 409(2)

70 CCP, Article 395(1)(b)

71 Draft Bill T/9918 on the Amendment of the Code of Criminal Procedure and Other Related Acts of Parliament, Detailed official reasoning, https://www.parlament.hu/irom41/09918/09918.pdf, p. 192.

72 CCP, Articles 424(1) and (3)

73 The section regarding Article 407 of the CCP in Memorandum LFNIGA//142/2019. of the Chief Public Prosecutor's Office on Certain Issues Related to the Application of the CCP, Point 3)

74 The section regarding Article 407 of the CCP in the Memorandum, Point 3)

settlement at the preparatory session",[75] although the CCP does not contain any provision that would expressly allow for such a withdrawal. Thus, the CCP does not unambiguously settle the issue whether the concluded settlement can be cancelled with or without a new settlement being forged. According to the commentaries, the former option is in accordance with the legislative intent, while the latter is not, but the practice is "moving into a direction of accepting" both forms.[76] We are of the view that this issue should be regulated in the law.

The court also holds a **preparatory session**[77] in the case if a settlement has been reached. If at the preparatory session the defendant admits his/her guilt in accordance with the settlement and waives the right to a hearing (trial), the court examines **whether the conditions for approving the settlement are in place** in light of the defendant's statement in this regard, the case file, the interrogation of the defendant and – if necessary – questioning the defence counsel.[78] Thus, the court examines the settlement from the point of view of lawfulness before it decides on its approval. The court approves the settlement if

- the process of concluding the settlement was in line with Articles 407–409 of the CCP;
- the content of the settlement is in line with Articles 410–411 of the CCP;
- the defendant understood the nature of the settlement to plead guilty and the consequences of its approval by the court;
- there is no reasonable doubt as to the sanity of the defendant and the voluntariness of the confession; and
- the defendant's guilty plea is unequivocal and it is supported by the case files.[79]

If the court approves the settlement, it hands down an order about that, and the proceeding continues in accordance with the provisions applicable to the confession at the preparatory session, which substantiates the stance that the legislator "intended to establish a connected system of cooperation in the narrow sense, and not two separate forms thereof".[80]

If the settlement is approved, the court still hands down a judgment on the defendant's guilt and the sanction to be imposed, but **the judgment cannot divert from the established facts of the case and their legal classification as set out in the bill of indictment**, nor can it divert from the prosecutor's motion as far as the punishment, the applicable measure or any other issue arranged in the settlement is concerned.[81] Therefore, the court shall not overrule the contents of the settlement, and shall not impose a punishment that is either stricter or more lenient than

75 The section regarding Article 407 of the CCP in the Memorandum, Point 3)

76 Bárándy–Dávid, p. 11.

77 The preparatory session is an open hearing held after the submission of the indictment with a view to preparing the trial, at which the defendant and the defence counsel may present their views on the indictment and may participate in shaping the direction and schedule of the procedure. See: CCP, Article 499(1).

78 CCP, Article 732(5)

79 CCP, Article 733

80 Gácsi, p. 282.

81 CCP, Article 736(3)

what is agreed in the settlement. By default, **the judgment is handed down at the preparatory session**.

In certain cases it may be necessary **to conduct a trial** even after the approval of the settlement: if "the settlement approved by the court does not cover every necessary aspect that the judgment must settle and it is not possible for any reason to clarify these issues at the preparatory session, the court will conduct a trial and carry out the required evidentiary actions within the framework of the issues that have not been settled".[82] (The official reasoning attached to the CCP quotes as an example that the law itself excludes the possibility of concluding a settlement with regard to the confiscation of assets,[83] "but it is also possible that the defendant and the prosecution cannot agree on certain issues, e.g. due to a difference of opinions on the justification or extent of procedural costs".[84]) In such cases, the evidentiary procedure is limited at the trial. If "based on this, the unsettled issues can be clarified, the court hands down a judgment", but if "it is of the view that the settlement should not have been approved due to the changes [necessitated by the new evidence] in the established facts of the case or the legal classification of the criminal offence, the decision approving the settlement may be repealed by the court. In this scenario the trial procedure shall be continued according to the general rules. It is an important procedural safeguard that if the settlement is repealed, neither the defendant nor the prosecution is bound by the settlement […]."[85]

Furthermore, a trial must be conducted according to the CCP "if there are more defendants and not all them have concluded settlements, or the court has not approved all the settlements concluded by the defendants, and it still decided to try all the cases jointly […]."[86] In relation to cases with more defendants, the CCP stipulates since 1 January 2021 that the court may, with a view to delivering a judgment, separate cases that are in progress before it only if the process has more defendants (and the conditions for separating the cases prevail otherwise).[87] That is, "as of 1 January 2021, the legislator has put an end to the possibility that a court might adjudicate cases against the same defendant in different proceedings".[88]

If the settlement is approved, **the right to appeal** is limited: there is no room for appeal into (i) the conclusion of guilt, (ii) the facts of the case and the classification, (iii) the type, amount or length of the punishment or measure, and (iv) any other stipulation of the judgment if the above

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82 Péter Vass in: Péter Polt (ed.): *Kommentár a büntetőeljárásról szóló 2017. évi XC.* törvényhez (*Commentary of Act XC of 2017 on the Code of Criminal Procedure)*; cf.: CCP, Article 737(1)

83 CCP, Article 411(6)

84 Draft Bill T/13972 on the Code of Criminal Procedure, Detailed official reasoning, https://www.parlament.hu/irom40/13972/13972.pdf, p. 555.

85 Péter Vass in: Péter Polt (ed.): *Kommentár a büntetőeljárásról szóló 2017. évi XC. törvényhez (Commentary of Act XC of 2017 on the Code of Criminal Procedure);* cf.: CCP, Article 737(2)–(3)

86 Péter Vass in: Péter Polt (ed.): *Kommentár a büntetőeljárásról szóló 2017. évi XC. törvényhez (Commentary of Act XC of 2017 on the Code of Criminal Procedure);* cf.: CCP, Article 736(6)

87 CCP, Article 737(1)

88 Draft Bill T/9918 on the Amendment of the Code of Criminal Procedure and Other Related Acts of Parliament, Detailed official reasoning, https://www.parlament.hu/irom41/09918/09918.pdf, p. 228.

are in accordance with the bill of indictment (and thus with the settlement itself).[89] In the appeal it is only possible to refer to new facts and evidence, and the court can also conduct an evidentiary proceeding only within these limitations.[90] The court of second instance may only amend the first instance judgment's conclusion regarding the defendant's guilt if it can be concluded without holding a trial that the defendant should have been acquitted or the procedure should have been terminated.[91] In certain taxatively listed cases – e.g. if the court of first instance approved the settlement despite an expressly stated exclusionary rule – the court of second instance shall quash the first instance decision and order that the first instance court shall repeat the proceeding.[92] (In the repeated proceeding, no settlement to plead guilty may be approved.[93]) If the court of second instance concludes that the prosecution made a motion for the settlement procedure without the legal preconditions for it being fulfilled, it shall quash the first instance judgment and send the case file to the prosecution.[94]

The court also has the **right to refuse to approve the settlement** at the preparatory session. This happens if

- the indictment and the motions in the bill of indictment submitted by the prosecution differ from what is included in the settlement;
- the defendant does not plead guilty in line with the settlement,[95] or does not waive their right to a trial at the court's preparatory session;
- the conditions of approving the settlement are not complied with;
- the defendant does not fulfil the obligations undertaken in the settlement; or
- the court is of the view that the criminal offence could be classified differently from what is included in the indictment.[96]

If the court does not approve the settlement, the procedure is continued in accordance with the general rules.[97] The refusal to approve the settlement is not subject to appeal.[98] It is important to point out that the defendant "is not prevented from confessing to the offence as presented in the

89 CCP, Article 738(1)

90 CCP, Article 738(2)–(3)

91 CCP, Article 738(1)

92 CCP, Article 738(5)

93 CCP, Article 738(8). (Also see: the Memorandum's section related to Article 738 of the CCP.)

94 CCP, Article 738(6)

95 According to the CCP's Commentary, "in addition to expressly denying guilt, those cases shall be regarded as the failure to admit guilt, where the defendant exercises his/her right to silence, or changes his/her confession extending to the admittance of guilt in a manner that the confession does not meet the requirement of unambiguity any more, or is not in line with what is included in the case file". [Péter Vass in: Péter Polt (ed.): *Kommentár a büntetőeljárásról szóló 2017. évi XC. törvényhez (Commentary of Act XC of 2017 on the Code of Criminal Procedure)*]

96 CCP, Article 734(1)

97 CCP, Article 734(3)

98 CCP, Article 734(2)

bill of indictment or as amended by the prosecutor in the course of the procedure"[99] even if the court has denied to approve the settlement, but this will only be possible in the trial phase. This is because the CCP stipulates that if the court refuses to approve the settlement, the procedure shall be conducted according to the provisions (Articles 506–508 of the CCP) that pertain to the case when the defendant does not admit his/her guilt at the preparatory session.[100] (This rule is supplemented by Instruction 8/2018. (VI. 27.) of the Chief Public Prosecutor on Prosecutorial Activities Before the Criminal Courts, which stipulates that in such cases the prosecutor shall not put forth a sentencing proposal.[101])

3.1.3. The settlement as applied in practice

Although the "success" of a legal institution cannot, of course, be judged solely on the basis of the frequency with which it is used, it is still worth starting the overview of the practice with the figures on the settlement to plead guilty. The statistical data presented in the table below show that **very few settlements are concluded** in comparison to other special procedures aimed at accelerating the criminal proceedings, the proportion of which is rather high.

Table 1 – The distribution of cases based on the type of indictment in the percentage of cases in which indictment has been made[102]

	Submission of the bill of indictment in accordance with the general rules	Submission of the bill of indictment based on a settlement	Arraignment	Motion for a penal order[103]	Total number of cases in which charges were pressed[104]
2018	18,273 (36.6%)	37 (0.1%)	9,567 (19.2%)	22,005 (44.1%)	49,882
2019	8,305 (19.3%)	91 (0.2%)	6,920 (16.1%)	27,633 (64.3%)	42,949

The number of those defendants who were sentenced at the first instance after the conclusion of a settlement was 86 and 102 in 2018 and 2019 respectively (in 2018, it was only possible to conclude a settlement after 1 July). As the Chief Public Prosecutor mentioned in his 2019 report to the Parliament, this could not be regarded as a substantial increase, which was against

99 Draft Bill T/13972 on the Code of Criminal Procedure, Detailed official reasoning, https://www.parlament.hu/irom40/13972/13972.pdf, p. 555.

100 CCP, Article 734(3)

101 Instruction 8/2018. (VI. 27.) of the Chief Public Prosecutor on Prosecutorial Activities Before the Criminal Courts, Article 41(2)

102 Source: *A legfőbb ügyész országgyűlési beszámolója az ügyészség 2019. évi tevékenységéről* (*The Chief Public Prosecutor's report to the Parliament on his activities in the year 2019)*, http://ugyeszseg.hu/wp-content/uploads/admin/2020/10/ogy_beszamolo_2019.pdf, p. 25; *A legfőbb ügyész országgyűlési beszámolója az ügyészség 2018. évi tevékenységéről (The Chief Public Prosecutor's report to the Parliament on his activities in the year 2018),* http://ugyeszseg.hu/wp-content/uploads/v1xpafghz/2020/08/ogy_beszamolo_2018.pdf, p. 29.

103 Under the previous CCP, in force before 1 July 2018, this was called motion for the omission of the trial.

104 This does not coincide with the number of persons regarding to whom a bill of indictment was submitted.

their expectations. The Chief Public Prosecutor added as an explanation that "exactly due to this legal institution's novel nature, it takes time to forge an adequate prosecutorial practice, which takes into account the effective enforcement of the state's punitive demands".[105] This may sound convincing at the first glance, however, the simultaneously increasing prevalence of confessing at the preparatory session that we will discuss in more details in the chapters below, gives ground to the conclusion that the novelty of this legal institution is not the sole reason for its limited application. The response that the Chief Public Prosecutor's Office gave to the Hungarian Helsinki Committee's FOI request[106] has also revealed that there are several regional differences: there are a number of counties where not even one settlement was reached in 2018.[107]

In 2018 (between 1 July and the end of the year), the defence initiated a settlement in 677 cases, while the prosecution offered a settlement in only 62 instances (out of which, 51 were initiated in Budapest). In 2019, the defence initiated a settlement in 1,293 cases, as opposed to the prosecution, which availed itself of this possibility in only 124 instances (85 in Budapest). In both years there were counties where the prosecution initiated no settlement at all: in 2018, there were 12, in 2019, there were six such counties, so there is some improvement in this regard.

The prosecution disagreed with the initiative of the defence in 79.7% and 76.4% of the cases in 2018 and 2019, respectively. The regional differences are significant in this respect as well, but some improvement can be sensed in this regard too: e.g. in 2018, there were eight counties where the prosecution never agreed with the defence's offer to conclude a settlement, whereas in 2019, there was only one such region: Vas county. In 2018, the lowest ratio of the prosecutorial disagreement was 60%, in 2019, this decreased to 43.9% (both numbers are from Baranya county). It must be added that the prosecutorial initiatives also rarely prove to be successful. In 2018, the number of prosecutorial initiatives leading to the conclusion of a settlement and initiatives failing was approximately even, whereas in 2019, the number of unsuccessful initiatives was about 50% higher than that of successful ones. So based on the numbers, it seems that the defence is often not open to settling either, therefore, the low number of concluded settlements is not attributable to the prosecution only. It rather seems that the perception of the defence and the prosecution greatly differs as to what types of cases are those where the conclusion of a settlement is expedient. Another possible reason for the low success rate of prosecutorial initiatives is that the prosecution and the defence have very differing views on what may be regarded as adequate punishment for the offence.

105 *A legfőbb ügyész országgyűlési beszámolója az ügyészség 2019. évi tevékenységéről (The Chief Public Prosecutor's report to the Parliament on his activities in the year 2019)*, http://ugyeszseg.hu/wp-content/uploads/admin/2020/10/ogy_beszamolo_2019.pdf, p. 34.

106 ABOIGA/1-120/2020., 27 March 2020

107 No data concerning regional distribution are available for 2019.

Table 2 – Pre-indictment settlement to plead guilty[108]

	Initiatives concerning pre-indictment settlement to plead guilty	out of that:			Successful initiatives by the prosecution	Unsuccessful initiatives by the prosecution
		initiated by the defence with the prosecution's		initiated by the prosecution		
		agreement	disagreement			
2018 2nd half	739	88 (11.9%)	589 (79.7%)	62 (8.4%)	26	22
2019	1,417	211 (14.9%)	1,082 (76.4%)	124 (8.8%)	41	63

The significant discrepancy between the number of initiatives by the defence and the prosecution leads us to one of the key problems regarding settlements, namely **that the prosecution is reluctant to use this novel legal institution**. According to the research, there may be two main reasons behind this phenomenon: the prosecution's demand that the investigating authority ought to conduct a full-fledged investigation even if there is a settlement, and the fact that a settlement may be more cumbersome for the prosecution than pressing charges in accordance with the general provisions.

The reasoning attached by the codifier to the new CCP makes it clear that the legislator's expectation was that even if a settlement is reached, **the pressing of charges shall not be based solely on the defendant's confession**: according to the reasoning, "the confession may only concern the offence committed by the defendant, therefore, relying on the data and evidence acquired in the course of the investigation before the conclusion of the settlement, the prosecution shall examine whether the defendant's confession is in accordance with the requirement of establishing the facts of the case in a manner that reflects the truth".[109] (This stance is based on the CCP's general rule according to which "unless this law stipulates otherwise, all the evidence shall be acquired even when the defendant makes a confession".[110]) Instruction 9/2018. (VI. 29.) LÜ of the Chief Public Prosecutor on the Preparatory Procedure, the Supervision and Direction of Investigations and Concluding Measures (hereafter: Instruction 9/2018 of the Chief Public Prosecutor's Office) goes farther than this, when it stipulates not only that the prosecution shall not conclude a settlement if doubts arise as to the voluntariness or credibility of the defendant's confession, but also that no settlement shall be concluded by the prosecution if "in the absence of the confession, the available evidence would not be sufficient for the pressing of charges".[111] In addition to this, the Memorandum calls attention to "the need to make sure that the collection

108 *Ügyészségi Statisztikai Tájékoztató – 2018. II. félév – Büntetőjogi szakterület (The statistical information leaflet of the prosecution – 2nd half of 2018 – criminal field).* Chief Public Prosecutor's Office, 2019, http://ugyeszseg.hu/pdf/statisztika/Orszagos_2018_02.pdf, p. 56., Table 73; *Ügyészségi Statisztikai Tájékoztató (Büntetőjogi szakág). A 2019. évi tevékenység (The statistical information leaflet of the prosecution – criminal field. Activities in 2019).* Chief Public Prosecutor's Office, 2020, http://ugyeszseg.hu/wp-content/uploads/merzag/2020/12/ugyeszsegi-statisztikai-tajekoztato-buntetojogi-szakag-2019.-ev.pdf, p. 71., Table 73

109 Draft Bill T/13972 on the Code of Criminal Procedure, Detailed official reasoning, https://www.parlament.hu/irom40/13972/13972.pdf, p. 455.

110 CCP, Article 183(4)

111 Article 50(2) of Instruction 9/2018 of the Chief Public Prosecutor's Office

of evidence that cannot be acquired later or can only be acquired later with significant difficulties should be carried out even in the course of consensual procedures based on the confessing defendant's cooperation – including [...] the settlement to plead guilty as regulated by Chapter LXV".[112] Furthermore, Prosecutorial Circular no. KSB. 3561/2018/1-I. issued on 6 July 2018 stipulates that "special attention must be paid to the fact that *a settlement may only be concluded with regard to a fully investigated criminal offence, if – taking into account Article 734 of the CCP – there is a realistic chance of proving the criminal offence*"; and that "[i]t does not serve the objectives of the settlement" if "it is concluded with regard to a case the facts of which may be expected to change depending on the evidentiary procedure conducted by the court".

According to the research results, all these provisions and guidelines push the practice into a direction whereby **the prosecution requires full investigation even in cases where a settlement could be reached**. The interviewed defence counsels are of the view that since the settlement to plead guilty is a type of indictment, the evidence and the contents of the settlement must coincide. Certain prosecutor's offices interpret this requirement in a way that the negotiation about the settlement can only be commenced if all the necessary evidence is at disposal. This is why they refuse the defence's initiatives as premature. According to some defence counsels, this is a misunderstanding of the law, since it is exactly the not fully investigated cases with regard to which the prosecution has a strong interest in settling in the early stages of the investigation. This uncertainty in the interpretation of the law may contribute to the low number of settlements. It is also interesting that out of the seven examined cases in which a settlement was concluded, in five more than a year passed between the suspect's first interrogation and the conclusion of the settlement – in line with the research interviews, this shows that the prosecution is only open to settle if the facts of the case are well-explored and there has been significant progress in the gathering of evidence.

These research conclusions are confirmed by other sources as well. In a presentation held at a conference organised by the University of Public Service on 20 November 2020, it was identified as one of the reasons for the lack of prevalence of settlements that the prosecution only presses charges if the case is fully proven.[113] If however the facts of the case are, as expected on the basis of the above outlined requirements, "fully explored by the investigating authority – and the defendant cannot be expected to provide evidence for a different criminal offence – the prosecution will refuse to conclude a settlement",[114] since in such cases it will be simpler for the prosecution to make a sentencing motion than to start negotiations with the defendant regarding a prospective settlement. Defence counsels writing about the settlement also mention that according to the Metropolitan Chief Public Prosecutor's Office, a settlement can be concluded "if, after having

112 The section regarding Article 163 of the CCP in the Memorandum

113 Zsanett Fantoly's presentation titled "Egyezség a nyomozásban" (Settlement during the investigation) at the event "A jövőformáló rendészettudomány" (Law-enforcement studies shaping the future) held at the Faculty of Law Enforcement of the University of Public Service on 20 November 2020

114 Viktor Bérces – Dániel Gyulay: Egy új remény, avagy az egyezség megjelenése a hazai büntetőeljárásban (New hope: the appearance of settlements in the Hungarian criminal procedure). *Ügyészségi Szemle (Prosecutorial Review),* 2019/4., http://www.ugyeszsegiszemle.hu/hu/201904/ujsag#20, p. 31.

performed all the necessary investigative actions, the investigating authority has concluded the classification of the offence that is subject to the settlement" and "based on the prosecutorial practice, it is obvious that until this has been done, […] the conclusion of a settlement is generally regarded as premature".[115] The interviewed prosecutor also mentioned that if the interpretation of the Chief Public Prosecutor is followed very strictly, no settlement can be concluded before the final stages of the investigation.

At the same time, the Memorandum conveys a somewhat different interpretation when it states that "the confession of the defendant may only be regarded as an advantage for the prosecution if it makes the enforcement of the state's punitive demands simpler and more successful by making the evidentiary difficulties stemming from the lack of a confession – and causing delays in either the pre-trial or the trial phase – avoidable".[116] This is confirmed by Prosecutorial Circular no. KSB. 3561/2018/1-I, according to which the settlement "may be a tool for increasing the speed and efficiency of the procedure in cases that are not simple". Legal literature published before the coming into force of the new CCP also anticipated that the settlement "can be expected to have a use with regard more complex offences", because it will be in the prosecution's interest to conclude a settlement only if it "will become aware of new suspects or new evidence as a result of the agreement" with the defendant.[117] Furthermore, the "chance that the authorities will prefer to conclude a settlement may increase" when the case "may go either way" in the court phase.[118] The same idea appears in the Commentary of the CCP, which claims that the settlement "is more in the interest of the state and society: it is a quicker route for an unchallenged decision; a simpler way to investigate and prove more complex cases".[119] The practice has to some extent evolved in this direction. At the 20 November 2020 presentation held at the University of Public Service it was mentioned that settlements had not gained prevalence in less severe cases, they are more likely to be used in complex cases involving organised crime where the defendant undertakes to cooperate with the authorities.[120] The police officer interviewed in the research also believes that a settlement is usually concluded where the authorities "have a hard time" proving the case, because only indirect evidence is at their disposal. The interviewed prosecutor also mentioned (in addition to very simple cases) as the most often settled ones those complex cases with several defendants in which certain defendants can provide substantive information that advances the investigation.

In summary it might be said that while it is the interest (and to some extent the communicated intention) of the prosecution that the settlement should "bridge" certain gaps in the evidence, and the settlements that are concluded do meet this expectation, **the very strict interpretation**

115 Bárándy–Dávid, p. 12.

116 The section regarding Article 407 of the CCP in the Memorandum

117 Bérces–Gyulay, p. 31.

118 Mária Bakonyi: A beismerő vallomás az új Be. középpontjában (Confession at the centre of the new CCP). *Ügyészségi Szemle (Prosecutorial Review),* 2019/3., http://www.ugyeszsegiszemle.hu/hu/201903/ujsag, p. 66.

119 Ádám Békés in: Péter Polt (ed.): *Kommentár a büntetőeljárásról szóló 2017. évi XC. törvényhez (Commentary of Act XC of 2017 on the Code of Criminal Procedure)*

120 Zsanett Fantoly's presentation titled "Egyezség a nyomozásban" (Settlement during the investigation) at the event "A jövőformáló rendészettudomány" (Law-enforcement studies shaping the future) held at the Faculty of Law Enforcement of the University of Public Service on 20 November 2020

adopted by the Chief Public Prosecutor's Office pushes the practice into the direction of more reliance on the sentencing motion, and **greatly contributes to the prosecutors frequently dismissing the defence's initiatives as premature or not expedient**. This result is in contrast with the legislative intent, since "the legal policy objective of reasonable procedural length, and saving time and costs is hardly met if in the investigative phase the authorities keep waiting until the end of the investigation instead of using a confession – required, for instance, by the prosecution to reveal the facts of the case as a precondition for concluding the settlement – to accelerate and enhance the investigation of the case".[121] A settlement should be possible to be initiated "at the very beginning of the procedure",[122] and it should be remembered that "the sooner the settlement is concluded, the more favourable it is for the prosecution and the investigating authority, since if the suspect confesses and is ready to settle, there is no need to superfluously appoint an expert or experts, hear witnesses, conduct evidentiary acts, and perform a series of tasks the results of which are eventually not used in the procedure".[123]

From the above, it must also be inferred that it makes a difference when the defence initiates the settlement, since the initiative conveys the "message" to the prosecution that the defendant has "sufficient information and evidence to be motivated to confess, so the fact that the defence initiates a settlement provides the prosecution with confirmation",[124] while the defendant does not benefit from the initiative in itself.

As far as the criminal offences in relation to which settlements are concluded are concerned, the picture is rather mixed, but the majority of the criminal offences are those which typically feature several co-defendants and are more complex. According to the response of the Chief Public Prosecutor's Office to the Hungarian Helsinki Committee's FOI request, for example in 2018 altogether 28 types of criminal offences where "characteristic" to the criminal procedures in which a settlement was concluded. Only three criminal offences were included in the list that occurred 10 or more times: budgetary fraud[125] (24 cases), drug trafficking[126] (16 cases), and tax and social security fraud under the previous Criminal Code[127] (10 cases). Newer statistics are not at our disposal when writing the present country report, but research results show a similar picture. The majority of the cases reviewed had more co-defendants, and the stakeholders interviewed mentioned similar cases as well: for example, the police officer interviewed mentioned budgetary fraud and offences committed as part of a criminal organisation as characteristic cases. According to a presentation by the Deputy Chief Public Prosecutor held in the autumn of 2021, "[e]xperience so far has

121 Bárándy–Dávid, p. 13.

122 Bárándy–Dávid, p. 13.

123 Hack, p. 82.

124 Ádám Békés: *Az egyezség (valóban) új lehetőségei a magyar büntetőeljárásban (The (truly) new possibilities of the settlement in the Hungarian criminal procedure)*. In: Bonus iudex. Ünnepi kötet Varga Zoltán 70. születésnapja alkalmából. Pázmány Press, Budapest, 2018, http://real.mtak.hu/95753/1/VargaZoltan_kotet_2018_vegl0528.pdf, p. 36.

125 Criminal Code, Article 396

126 Criminal Code, Article 176

127 Act IV of 1978 on the Criminal Code, Article 310

shown that in cases of less gravity settlements have not played a role, and the legal institution has been used mainly in relation to offences committed as part of a criminal organisation".[128] The experiences of the defence counsels interviewed confirm as well that it is more common to start a negotiation about a prospective settlement in more complex cases, some of them involving criminal organisations. According to their statements, the prosecution is not open to a settlement in relation to criminal offences against life and violent offences, and they are ready to forego the need to uncover material truth rather in the instance of economic or intellectual criminal offences.

Another reason for the severe underuse of the settlement to plead guilty is the **workload** concluding a settlement means **for the prosecution service**. In order for a legal institution to achieve its purpose, all affected stakeholders need to be made interested and motivated to apply it, and this is particularly relevant for the prosecution service in the case of a settlement. Prosecutor László Láng, head of department at the Chief Public Prosecutor's Office, summed up the relevant aspects in the following manner back in 2013: "Any concept aimed at speeding up and simplifying procedures is only worth as much as it can be put into practice from it. Laws are applied by people, whose capacities are not infinite. When a legal practitioner feels that they are coming to the end of their capacities, they will choose the legal option open to them which means the least amount of work for them. [...] [A]s long as the procedure under the general rules – in a given case, the indictment – is easier to follow for those who pursue it than the procedure that is declared simple (e.g. postponement of the indictment, motion for the renouncing of the trial, etc.), it can hardly be expected that the simplified procedure will be the general rule and the general rule the exception. The legislator, when enacting solutions to speed up and simplify the criminal procedure, should also reflect on the fact that a real simplification of the proceedings can realistically be expected if the work of all of those conducting the proceedings is simplified at least to a small extent."[129]

The legislator was also aware of this: for example, the official reasoning of the CCP explicitly states that the approved settlement has "considerable advantages" for the participants to the proceedings also because it "saves time, work and costs for the court, the prosecution and the investigating authority".[130] In practice, however, this does not seem to be the case for the prosecution and the police. On the one hand, since, as stated above, "the prosecution remains obliged [...] to investigate the facts of the case, the cost-effectiveness and burden reduction primarily concerns the judicial and prosecutorial apparatus in relation to the trial phase".[131] Therefore, the preliminary expectations, expressed for example by a judge author, that in the event of a settlement "not only will the judicial procedure be shortened, but also, to a greater or lesser extent, the examination phase of the investigation and the prosecutorial phase as well, which will make

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128 The video recording of the presentation by Mr. Ervin Belovics, titled "Mértékes indítvány, egyezség" (Sentencing motion, settlement to plead guilty), is available here: https://www.youtube.com/watch?v=Xou33xQJRf8.

129 *Görögország helyett Budapest (Budapest instead of Greece)*, 23 May 2013, https://jogaszvilag.hu/eletmod/gorogorszag-helyett-budapest/

130 Draft Bill T/13972 on the Code of Criminal Procedure, Detailed official reasoning, https://www.parlament.hu/irom40/13972/13972.pdf, p. 555.

131 Bérces–Gyulay, p. 31.

the prosecutor interested as well in more thoroughly considering the settlement" and that "the same interest will be even more pronounced when it comes to the investigating authority",[132] have not been fulfilled.

The information obtained in the course of the research also shows that, although the original aim was to speed up the work and reduce the workload, concluding a settlement and conducting a negotiation means an increased workload for the prosecution service also because of the **internal processes**. According to the Prosecutorial Circular no. KSB. 3561/2018/1-I, the "information request" of the defence regarding a potential settlement shall be received by the head of the prosecutor's office with competence and jurisdiction in the case, and he/she shall inform the defence about the stance of the prosecution regarding the settlement as well. According to the circular, the personal negotiation may then take place, which can also be conducted either by the head of the respective prosecutor's office or by the prosecutor designated by him/her. Accordingly, concluding a settlement requires high-level involvement on the part of the prosecution.

The research interviews show the same picture. According to the police officer interviewed, it is considerably easier for the prosecution to submit a sentencing motion than to conclude a settlement process, but he also believes that individual attitudes and approaches at a given prosecutor's office play a very important role in this regard. The prosecutor interviewed was also of the view that it is more work for the prosecution to negotiate and conclude a settlement than to press charges under the general rules, and that the internal processes of the prosecution service are inefficient in this respect. For example, according to his knowledge, the leading prosecutor is involved in the negotiations alongside the prosecutor who is the rapporteur, and the settlement reached must also be submitted to the superior prosecutor's office for approval. He also sees it as a problem to be addressed that the different prosecutorial roles are played by separate prosecutors, whereby for example in the capital the prosecutor who attends the preparatory session of the court will not be the same prosecutor as the one concluding the settlement and filing the bill of indictment, and so the latter will have no interest in simplifying the work of the prosecutor attending the court session. In his view, for example penal orders and arraignments are much more "effective" ways out of the criminal procedures than settlements. (This is also indicated by his experience that these latter two procedures were used instead of the settlement to deal with the backlog of cases accumulated as a result of the coronavirus epidemic.) One of the judges interviewed was also of the view that the penal order and the arraignment are "simpler" legal institutions and serve well the purpose of speeding up criminal proceedings, and therefore he considers the settlement as an institution to be downright superfluous; while another of the judges interviewed believes that the settlement should not be discarded yet, but should be allowed to "run its course" in practice.

It was also confirmed by the defence counsels interviewed that the lead prosecutor is also present at the negotiations. According to what was said in the interviews, the fact that prosecutors in

[132] Gergő Czédli: A bírósági eljárást gyorsító és fékező rendelkezések az új büntetőeljárási törvényben (Provisions accelerating and protracting the court procedure in the new Code of Criminal Procedure). *Büntetőjogi Szemle (Criminal Law Review)*, 2019/1., https://ujbtk.hu/wp-content/uploads/lapszam/BJSZ_201901_15-34_CzedliGergo.pdf, p. 32.

charge have to report cases found suitable for a settlement to their superiors may work against openness towards the settlement, since by initiating a settlement the prosecutor generates extra work for the lead prosecutor – this is a less workable construct in the hierarchical Hungarian prosecution service. According to the defence counsels, the settlement in its current form is less suitable for wide usage.

In addition to the above, there is also the consideration that, unlike in the common law system, in a continental system "the career path, promotion, bonuses and generally the existence of the prosecutor is not affected by what happens to the case after the indictment".[133]

According to the police officer interviewed, it is also true for **the police** that they have no real "benefit" from the settlements, they **are not interested in opting for it**, for example because concluding a settlement is very time-consuming, it does not "fit into" the police officer's time, and it is not a performance indicator in the evaluation of their work (unlike, for example, arraignments). Another factor working against the use of settlements is that, as explained above, since the police have to investigate the case fully anyway, they do not "save energy" by concluding a settlement.

As for the role of the police, the police officer interviewed stated that because of their caseload, prosecutors will not be able to identify the cases where a settlement could be initiated if these are not brought to their attention by the investigating authority. However, investigators typically do not bring cases suitable for settlement to the attention of the prosecution, because police officers do not understand or see through the cases to this degree. In his view, some of the initiatives by the defence counsel or the defendant may also "get stuck" at the police. (It shall be noted that this is contrary to Government Decree 100/2018, because according to its provisions, the investigating authority is obliged to inform the prosecution about the initiative for a settlement.[134]) It is a problem that there is no internal police regulation or professional guidance on the criteria to be taken into account when assessing whether a settlement is expedient, and it is not clear at what point in the procedure it is generally appropriate to enter into a settlement process. It does not help either that the smaller the municipality, the more understaffed the local police force is and the less specialisation there is within the organisation. One of the judges interviewed also believed that the prosecutor is not so involved in the investigation to identify cases suitable for a settlement, so investigators have a big role to play in identifying such cases. He added that it is also at the discretion of the police to use investigative techniques such as making a given piece of evidence available to the defendant at the initial stage of an investigation to influence their willingness to confess and thus facilitate a settlement.

In addition, defence counsel interviews and the case file review showed that the defence typically initiates a settlement directly with the prosecution after the first (or several, follow-up) interrogations of the defendant. According to the defence counsel, the main reason for this is that they are less confident that information entrusted to the investigating authority will not be misused by the authorities during the investigation.

133 Hack, p. 78.

134 Cf.: Government Decree 100/2018, Article 157

From the viewpoint of the defendant, it can be raised as a problem that, according to the literature, the rules of the CCP do not allow the prosecutor to "make an offer to the defendant that is worth for the defendant to accept",[135] i.e. **the substantive criminal law "benefit" allowed in the case of a settlement does not provide a real benefit** to the defendant. In order to increase the incentive for defendants to enter into a settlement, it would therefore be necessary to amend the substantive rules on sentencing in a way that is favourable for the defendants.[136]

The limited scope of the negotiations could also influence the attitude of the defence towards the settlement. As already mentioned multiple times above, according to the CCP, the facts of the case and the legal classification of the offence subject to the settlement are determined by the prosecution,[137] and **the prosecution and the defence may not consult on the facts of the case and the legal classification of the offence** subject to the settlement when negotiating the content of the settlement.[138] In other words, as put by the official reasoning attached to the CCP, the law "clearly prohibits that the facts of the case and the legal classification of the offence which is the subject of the settlement are subject to discussion or debate, and only the public prosecutor's office, which enforces the punitive demands of the state, may decide on these matters".[139] This interpretation is also confirmed by Point 7 of the Prosecutorial Circular no. KSB. 3561/2018/1-I, according to which "it must be borne in mind already during the oral negotiation that *the facts of the case and the classification of the offence* which the prosecutor considers to be ascertainable *cannot be the subject of a settlement*". However, experts have indicated already around the time of the adoption of the CCP that "everyday practice will not be so sterile", since there will be, for example, "delimitation issues [...] where different doctrinal positions on the classification of the same facts may lead to different legal classifications",[140] and because of these different doctrinal positions "the defence counsel may orientate the prosecutor by providing reasoned arguments for the classification he/she considers appropriate".[141] According to these views, the above provision of the CCP on the limits of the negotiation "cannot be interpreted as meaning that the facts or the classification established by the prosecutor cannot be influenced by the defence counsel".[142] As the CCP's Commentary puts it, the above prohibition "does not mean that a professional – if you like, dogmatic – difference of opinion between the prosecution and the defence counsel could not be resolved", and "it is possible that the prosecution changes the classification of the offence on the basis of the defence counsel's argument – for example, by finding an assault causing danger to life instead of attempted murder. There is room for professional arguments on delimitations, stages, cumulative issues, etc., and without such arguments it is difficult to imagine a settlement in a more complex case."[143]

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135 Hack, p. 79.

136 Gácsi, pp. 285–286.

137 CCP, Article 410(3)

138 CCP, Article 408

139 Draft Bill T/13972 on the Code of Criminal Procedure, Detailed official reasoning, https://www.parlament.hu/irom40/13972/13972.pdf, p. 454.

140 Békés, p. 34.

141 Bérces–Gyulay, p. 30.

142 Bérces–Gyulay, p. 30.

143 Ádám Békés in: Péter Polt (ed.): *Kommentár a büntetőeljárásról szóló 2017. évi XC. törvényhez (Commentary of Act XC of 2017 on the Code of Criminal Procedure)*

A prosecutor author also suggests in this regard that if defendants "can only make a confession that can only and exclusively fit into the facts established by the prosecution and cannot concern the classification of the offence, [...] i.e. they have no possibility to make a 'confession' that is 'their own', there is a high probability that many false confessions will be made, in order to be able to accept a favourable offer".[144] It is also important to underline that the fact that the facts of the case and the classification cannot be formally challenged can frustrate a settlement in a number of cases where the suspect is open to confessing, but does not fully agree with the facts or classification put forward by the prosecution. Several defence counsels were of the view that the bill of indictment is not aimed at establishing the objective facts, and that it is therefore not an adequate procedure to adopt a non-modifiable statement of facts in the investigative stage.

In addition, the statement of facts may also be affected if the suspect brings new facts to the attention of the prosecution on the basis of the negotiations, because the prosecution makes it part of the settlement that the defendant cooperates with the prosecution in proving the underlying case or another criminal case. However, in this respect, for example the deputy head of the Metropolitan Chief Public Prosecutor's Office has taken the position that "new evidence provided by the defendant at the time of the conclusion of the settlement cannot lead to a change in the facts and the classification of the case against the defendant as established by the prosecution".[145] However, this restrictive interpretation, which is doubted by a prosecutor author as well in the literature,[146] is contrary to the wording of the CCP, which only prohibits the negotiation about these, not their modification,[147] and is contrary to the purposes of the CCP, since it makes it much more difficult to process and legally assess the information provided in the framework of the defendant's cooperation with the prosecution. In a presentation held in the autumn of 2021, the Deputy Chief Public Prosecutor stated as well that "if the confession [given as part of the settlement] is not consistent with the statement of facts established so far, and the confession is not contradicted by other available evidence (or, in contrast, is even strengthened by them), the evidence supporting the facts of the case as originally established may appear in a quite different context in the light of the confession, and so the prosecution may correct the facts of the case and, if necessary, even the legal classification".[148]

As far as the results of the case file review is concerned, in none of the seven cases reviewed where a settlement was reached did the classification of the offence change between the initiation and conclusion of the settlement. However, according to the research interviews, in practice, there is in fact a negotiation about both the facts and the classification, influencing the facts and the classification that are recorded in the settlement. This was confirmed by the prosecutor interviewed as well. According to the defence counsels interviewed, the legal institution of the settlement to plead guilty inherently implies the possibility that new information brought to light

144 Bakonyi, p. 71.

145 Letters no. NF.5518/2018/24. (8 April 2019) and NF.5518/2018/26. (3 May 2019) by the deputy head of the Metropolitan Chief Public Prosecutor's Office. Quoted by: Bárándy–Dávid, p. 13.

146 See: Bakonyi, p. 67.

147 Cf.: Bárándy–Dávid, p. 13.

148 The video recording of the presentation by Mr. Ervin Belovics is available here: https://www.youtube.com/watch?v=Xou33xQJRf8.

by the confession may lead to changes in the content of the suspicion as far as the facts or the classification are concerned. Although the first proposal in the settlement process is made by the prosecution, there will always be an element in a resulting settlement that is shaped by the defence. It is also in the prosecutor's interest to have regard to the defence counsel's motion when determining the classification in order to reach a settlement. Many prosecutors are not open to this – this is another obstacle to conclude a settlement.

The above considerations show that it would be necessary to review the express prohibition in the CCP on negotiating the facts of the case and the classification of the offence. This would not in itself take away the right of the prosecution to conclude only the agreements which include the facts and classification the prosecution accepts as realistic, i.e. it would not contradict the requirement of the CCP that the authorities shall base their decisions on realistic facts,[149] but it could make the procedure more flexible, thus increasing its efficiency and even the frequency of its application. Such an amendment would also have the advantage of resolving the differences in interpretation and creating a procedural framework for an already existing informal practice. Such an amendment would be justified according to the prosecutor interviewed as well, at least in a form that would allow the defence counsel to formally make a proposal or motion to these.

In addition, the attitude of defendants and defence counsels towards the new legal institution may of course also be influenced, and thus the spreading of settlements will also depend on "for which offences, and what kind of sentence waiver or reduction will be deemed acceptable by the prosecution in the upcoming years".[150] A related factor is the extent to which the defence and the prosecution make use of the **optional elements** that can be included in the settlement. The balance is not favourable on the basis of the case files reviewed in the research: out of the seven cases in which a settlement was reached, in only two was an optional element included in the settlement. (In one of the cases, the defendant undertook to pay the damages claimed by the victim earlier until the court's preparatory session on approving the settlement, and in another case, it was agreed that the defendant would pay the damages claimed by the private party until the preparatory session deciding on the approval of the settlement, but "in exchange" he gets exempted from having to borne all or part of the costs of procedure.) The interviews with defence counsels also show that in this respect, the potential of the settlement is not capitalized on by the actors of the criminal procedure. This not only harms the interests of the defendants, but in some cases may harm the interests of the victims as well: although the official reasoning of the CCP refers to the fact that the settlement provides the victim with "certain reparation",[151] this does not seem to be the case in practice. The instructions in the Memorandum that in the framework of the settlement, the prosecution shall "require the defendant to pay damages for the total financial loss caused, and this shall be the starting point for negotiating a settlement",[152] affect defendants in

149 CCP, Article 163(2)

150 Bérces–Gyulay, p. 31.

151 Draft Bill T/13972 on the Code of Criminal Procedure, Detailed official reasoning, https://www.parlament.hu/irom40/13972/13972.pdf, p. 555.

152 The section regarding Article 411 of the CCP in the Memorandum

a poor financial situation detrimentally. (Among the cases reviewed in the research, there was a case in which no settlement was ultimately reached because the defendant could not undertake to pay the damages fully, which would have been the precondition of the prosecution for a settlement.) This unjustifiably narrows the options available under the CCP, and is also contrary to the CCP's wording.

Another question from the point of view of the defendant is whether openness to a settlement can lead to "informal" benefits, such as the termination of the coercive measure applied against them or the application of a less coercive measure. Research results do not lead to such a conclusion: there was only one case out of the seven and 13 cases that could be assessed in this respect where the defendant was subject to a less coercive measure when concluding the settlement or when filing the bill of indictment, respectively, than when the settlement was initiated. (In that sole case, criminal supervision was ordered with a view to the negotiation process instead of pre-trial detention.) A defence counsel reported a case in which it was agreed on that the coercive measure against the defendant will be replaced by a less coercive measure, but this was not included in the record containing the settlement. In the experience of defence counsels, the fact that the defendant is under a coercive measure could be a motivating factor for the settlement. (In nearly half of the cases reviewed in the research, namely in six cases the defendant was under a coercive measure affecting personal liberty as authorised by a judge at the time the settlement was initiated. They were in pre-trial detention in all of the cases.)

As far as the **form of the procedure** is concerned, the legislator's objective was to make the process leading to a settlement relatively simple: the official reasoning states that the new CCP "removes any unnecessary formalism" from the process. As part of this, since it "did not hold any value as a guarantee", the legislator removed the previously applicable obligation (which applied in the case of the "renouncing of the trial" procedure) to issue a decision on accepting the initiative. Thus, according to the CCP, "the initiative and its acceptance or rejection are free of any formality", and are not included in any record or decision.[153] Meanwhile, the CCP prescribes that if the prosecution does not agree with the initiative of the defendant or the defence counsel, they shall inform the defendant and the defence counsel about that,[154] but it does not set out the time limit within which the participants of the proceedings shall decide on accepting or rejecting the initiative.

While the intention of creating a procedure free of unnecessary formalities is certainly to be welcomed, and it is a positive development for example, that the initiative for a settlement can be submitted via any means (in a written format – i.e. on paper –, orally, on the telephone, via fax or other technical means, i.e. email),[155] research experience also shows that in some cases the lack of formalities can undermine the rights of the defendants. Several defence counsels interviewed reported for example that the prosecution simply had not responded to their initiative for a

153 Draft Bill T/13972 on the Code of Criminal Procedure, Detailed official reasoning, https://www.parlament.hu/irom40/13972/13972.pdf, p. 454.

154 CCP, Article 407(3)

155 Prosecutorial Circular no. KSB. 3561/2018/1-I., Point 1; Bérces–Gyulay, p. 29.

settlement. When the prosecution does not agree with their initiative, the most common practice is to send a short, unjustified negative reply in which the prosecution states that it does not see any possibility for a settlement or does not consider it timely. The legislation does not set out any obligation to justify a negative reply, and the Memorandum only states as well that it "seems expedient" to briefly inform the defence about why the settlement is not applicable (e.g. because the initiative is premature or it is not expedient to settle the case). While it is explicitly stated in Prosecutorial Circular no. KSB. 3561/2018/1-I. that if the initiative is premature, the prosecution shall inform the initiator about that, it would be necessary to provide in law that in case of a rejection, the prosecution shall communicate its reasons in a detailed manner that instructs the defence as to whether it is worthwhile to try to initiate a settlement again at a later stage of the investigation.

The intention to simplify the procedure is reflected also in the **negotiation process** being "informal as well, and [the CCP] does not require it to be recorded in the minutes; on the contrary, in order to make the negotiation process more efficient, the [CCP] expressly omits rules on the formalities of the negotiations".[156] However, as the CCP's Commentary points out, "this does not mean that the prosecutor's office and the bar association cannot issue instructions or rules of procedure for the various professions with the aim of providing guidance", and that "although recording in writing is not required, it is not prohibited either, and therefore there is the possibility of taking notes or even minutes, particularly if the negotiation requires several occasions".[157] In this spirit, Article 50 of Instruction 9/2018 of the Chief Public Prosecutor's Office sets out that the prosecution may order the continuous image and sound recording of the phases of the negotiation process which precede the phase when the settlement concluded is entered in the record (minutes).[158]

The cases reviewed in the research shows that the practice of recording the negotiation process varies greatly: in four cases the negotiation was audio and video recorded, in one case it was partially recorded, and in eight cases it was not recorded audiovisually. In at least four of the latter cases, the negotiation process was not recorded in any way that was perceptible to the defence counsel. The cases reviewed also show that the negotiation process was typically audio and video recorded in the cases where a settlement was subsequently reached. In the cases where the settlement process failed, the negotiation process was not recorded in any form.

Based on the interviews with defence counsels, it is common that the negotiation process, irrespective of whether it was initiated by the defence counsel or the prosecution, starts with an

156 Draft Bill T/13972 on the Code of Criminal Procedure, Detailed official reasoning, https://www.parlament.hu/irom40/13972/13972.pdf, p. 454.

157 Ádám Békés in: Péter Polt (ed.): *Kommentár a büntetőeljárásról szóló 2017. évi XC. törvényhez (Commentary of Act XC of 2017 on the Code of Criminal Procedure)*

158 This rule is in force since 1 January 2021. Before that, this same section set out that the negotiation process shall be recorded in a minutes "in such detail as necessary", along with the information and warnings provided and the defendant's response, "in an interview room provided by the investigating authority where making a continuous audiovisual recording is possible", and if there is an obstacle to audiovisual recording, the defendant and the defence counsel shall be asked to put down their initiative for a settlement in writing.

undocumented, informal negotiation phase, usually in the absence of the defendant, with the participation of the defence counsel and the prosecutor. In most cases, there is no record of this first meeting. Afterwards, the prosecutor either asks the defence counsel to formally initiate a settlement or indicates that he/she sees no possibility for further settlement negotiations. In the view of defence counsels, it raises concerns if the negotiation process is not recorded either by video and audio recording or in written minutes. One of the judges interviewed was of the view that the video and audio recording could partly eliminate possible abuses and the pressuring of the defendant.

Finally, we have to cover an aspect on which the effective functioning of the legal institution depends in some respect, namely that the settlement "obviously **requires a change of attitude** on the part of the professional stakeholders".[159] The settlement is "a special situation in an investigative phase", "because the prosecution and the defence are rather on the same footing, compared with the subordinate-superior relationship otherwise prevailing in the investigative phase", and the different professional stakeholders must therefore cooperate with each other and understand each other's "different interests and the motivations for their decisions".[160] This includes the fact that "in many cases, the client's instructions are behind the defence counsel's actions, which are not based on professional considerations".[161] Thus, prosecutors and defence counsels should engage in "open communication" with each other, "seeking to understand the motivations of the other party, which can serve as a basis for an informed decision to accept or reject [an initiative]".[162] In this context, it is important that prosecutors and defence counsels "do not see each other as enemies, but as professional partners willing to settle, with an interest in bringing the criminal proceedings to a conclusion as soon as possible and in a way which is favourable to all parties".[163] The relationship between the prosecution, the defence and the court must therefore be redefined,[164] and, as it was also raised at the workshop organised to discuss the draft research report, it would be necessary to establish a forum where the various professions can exchange their views.

159 Ádám Békés in: Péter Polt (ed.): *Kommentár a büntetőeljárásról szóló 2017. évi XC. törvényhez (Commentary of Act XC of 2017 on the Code of Criminal Procedure)*

160 Ádám Békés in: Péter Polt (ed.): *Kommentár a büntetőeljárásról szóló 2017. évi XC. törvényhez (Commentary of Act XC of 2017 on the Code of Criminal Procedure)*

161 Ádám Békés in: Péter Polt (ed.): *Kommentár a büntetőeljárásról szóló 2017. évi XC. törvényhez (Commentary of Act XC of 2017 on the Code of Criminal Procedure)*

162 Ádám Békés in: Péter Polt (ed.): *Kommentár a büntetőeljárásról szóló 2017. évi XC. törvényhez (Commentary of Act XC of 2017 on the Code of Criminal Procedure)*

163 Bakonyi, p. 69.

164 Békés, p. 32.

3.1.4. Defence rights in relation to the settlement to plead guilty

3.1.4.1. Access to a lawyer

As far as the right of access to a lawyer is concerned,[165] the current Hungarian legal framework meets the requirements of Article 3(2) of Directive 2013/48/EU[166] as to the time from which the right of access to a lawyer is in place, since the right to defence and the right of access to a lawyer is granted to the future defendants even before the suspicion is communicated to them: if a person against whom a well-founded suspicion of having committed a criminal offence exists is captured, summoned, taken into police custody, wanted or if an arrest warrant is issued against them, they have the right before the communication of the suspicion to retain a defence counsel or motion for the appointment of a defence counsel, and consult with their defence counsel without supervision.[167] Thus, if the defendant has a defence counsel in the procedure – either an ex officio appointed or a retained one –, they have the possibility to consult with their defence counsel about the possibility of the settlement from an early stage of the procedure. (It shall be recalled at this point that the rules of the Hungarian criminal procedure provide for "mandatory defence" in a wide scope of instances, thus, the CCP sets out for certain scenarios that it is obligatory for a defence counsel to participate in the proceedings.[168] In relation to that it shall be noted that from the 13 cases reviewed, defence was mandatory in 12 cases irrespective of the

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165 For more details on the right of access to a lawyer and compliance with the respective EU directive, see: András Kristóf Kádár – Nóra Novoszádek – Dóra Szegő: *Inside Police Custody 2. Country Report for Hungary.* Hungarian Helsinki Committee, December 2018, https://www.helsinki.hu/wp-content/uploads/IPC_Country_Report_Hungary_Eng_fin.pdf, Chapter 4.

166 Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty

167 CCP, Article 386(1)

168 CCP, Article 44

The participation of a defence counsel in the criminal procedure is mandatory if

a) the underlying criminal offence is punishable by a sentence of imprisonment of five years or more;

b) the defendant or the person against whom a well-founded suspicion of having committed a criminal offence exists is subject to a coercive measure concerning personal liberty, is subject to pre-trial detention or mandatory pre-trial psychiatric treatment in another case, or serves an imprisonment, a confinement or an education term in a juvenile correctional facility;

c) the defendant or the person against whom a well-founded suspicion of having committed a criminal offence exists is hard of hearing, deaf and blind, blind, unable to speak, is unable to or severely limited in communicating for any other reason, or has a mental disability, regardless of their mental capacity;

d) the defendant or the person against whom a well-founded suspicion of having committed a criminal offence exists is unfamiliar with the Hungarian language;

e) the defendant or the person against whom a well-founded suspicion of having committed a criminal offence exists is unable to defend themselves in person for any other reason;

f) the court, the prosecution or the investigating authority appointed a defence counsel upon the motion of the defendant or the person against whom a well-founded suspicion of having committed a criminal offence exists, or because they deemed it necessary for any other reason; and

g) if the CCP provides for mandatory participation of a defence counsel separately.

settlement process, already before the settlement was initiated. In the sole case where defence was not mandatory, the defendant was represented by a defence counsel from the beginning of the proceedings, and so all defendants had a defence counsel when they initiated the settlement.)

In addition to the above, the CCP sets out that if the prosecution (reacting to the initiative of the defendant) or the defendant (reacting to the initiative of the prosecution) does not exclude the possibility of a settlement, the participation of a defence counsel (i.e. **having a defence counsel) is mandatory in the procedure aimed at concluding the settlement**, but only from the point when the parties declare that they do not exclude the possibility of a settlement initiated by the other party, i.e. only after the parties agreed to enter into a negotiation process. Accordingly, defendants participate in the negotiation process in every case in a way that they have a defence counsel, but they may initiate a settlement without one as well. If the defendant does not wish to retain a lawyer, the prosecution shall appoint an ex officio defence counsel for them without delay, and ensure that the defence counsel may familiarize themselves with the case materials of the investigation. If no settlement is concluded, the appointment of the ex officio defence counsel shall be terminated when the negotiation process is over.[169] In the court phase, the mandatory participation of the defence counsel shall mean mandatory *presence* by the defence counsel.[170]

Research experience suggests that the potential benefits of a settlement are more likely to be enjoyed by defendants who otherwise have a lawyer in the investigative phase of the procedure. Defence counsels see it as primary their responsibility to inform their clients in a meaningful way about the possibility of a settlement and its consequences, and they believe that other actors in the criminal procedure also see this as their responsibility. It is likely that, in the absence of a defence counsel, information on the possibility of a settlement is reduced to the formal, minimal transmission of information, or even that providing oral information about this is omitted, making it less realistic for defendants to initiate a settlement themselves.

As far as the rights of the defence counsels are concerned, they may, according to the general rules, participate actively at procedural acts, may pose questions to the suspect, the expert and the witness, may make comments and may put forth motions.[171] As a special rule, the CCP puts forth that **if the defendant agrees, the defence counsel may negotiate about the guilty plea and the contents of the settlement with the prosecution separately**, without the defendant as well.[172]

Consultation between the defence counsel and the defendant is possible at any point of the procedure: under the general rules, the prosecution and the investigating authority ensure that the suspect may consult with their defence counsel before the procedural act, or in the course of the procedural act, without disturbing that.[173] In relation to the latter, it has been an important change

169 CCP, Article 407(4)–(5)

170 CCP, Article 434

171 CCP, Article 383(5)

172 CCP, Article 408(1)

173 CCP, Article 393(6)

that, since 1 July 2018, in order to ensure compliance with Article 2(2) of Directive 2010/64/EU,[174] Government Decree 100/2018 expressly allows for defence counsels to communicate with their clients during their consultation by using the interpreter appointed by the authorities.[175] At the same time, the possibility of using an interpreter hired by the defence for the purposes of the consultation is not guaranteed, even if somebody could afford to pay for the services of an interpreter, which is problematic because of the quality concerns around the work of interpreters. Namely, the CCP's provision according to which if it is not possible to find an interpreter or translator who meets the statutory criteria, any other person having "sufficient knowledge of a certain language" could be appointed as an ad hoc interpreter or translator,[176] may cause problems in practice with regard to the quality of interpretation and translation, as there are no measurable guarantees for what is sufficient, and, in the lack of further conditions to fulfil, persons not having a sufficient command of a given language may be easily appointed as well. Furthermore, there is no formalised quality assurance system.[177] It has been a step forward though that since 1 January 2021, persons present at a procedural act conducted with the assistance of an interpreter can request the appointment of another interpreter because of the poor quality of the interpretation.[178]

To sum it up, the right of access to a lawyer is guaranteed adequately with regard to settlements, but certain deficiencies in relation to the right to translation may potentially endanger the right to effective defence also in the case of settlements or settlement negotiations.

3.1.4.2. Access to the case files and information on the suspicion

As far as the right of access to the materials of the case is concerned,[179] the new CCP has brought a fundamental – and, in terms of complying with Article 7 of Directive 2012/13/EU,[180] positive – change: under the new CCP, the **defendants and their defence counsels are**, as a main rule, **entitled to get access to all the case materials** already during the investigation, **after the**

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174 Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings

175 Government Decree 100/2018, Article 141

The investigating authority ensures through the appointment of an interpreter that during their communication with their defence counsel the following persons may exercise their right to use their mother tongue:

a) detained suspects or detained persons against whom a well-founded suspicion of having committed a criminal offence exists, at the premises of the detention, and

b) non-detained suspects and persons against whom a well-founded suspicion of having committed a criminal offence exists before or after the procedural act [that they are subjected to].

176 CCP, Article 201(2)

177 For more details on the right to interpretation and translation and compliance with the respective EU directive, see: Kádár–Novoszádek–Szegő, Chapter 2.

178 CCP, Article 201(4)

179 For more details on the right of access to the materials of the case and compliance with the respective EU directive, see: Kádár–Novoszádek–Szegő, Chapter 3.3.

180 Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings

defendant's interrogation,[181] and the law provides for exceptions to this main rule.[182] (Originally, the new CCP only made it possible for the court, the prosecution and the investigating authority to restrict access to certain case materials or any manner of providing access listed by the CCP with regard to case materials identified by them, until the end of the investigation, in the interests of the procedure. This possibility has been widened by the legislator as of 1 January 2021.[183]) In addition, the new CCP focuses on "access", and regards the handing out of copies only as one of the means of providing access, putting an end to the hegemony of providing "copies". It is also an important improvement that a formal decision shall be delivered about the restriction of the access or the manner of access,[184] and a remedy may be sought against this decision.[185] These general rules are applicable in the case of settlements as well; the CCP does not include any special provisions in this regard for settlements.

For the defendants who do not understand the Hungarian language, it may cause a difficulty that **the CCP only requires the translation of those documents that are to be served.**[186] This solution is in essence compliant with Articles 3(1) and 3(2) of Directive 2010/64/EU, but in the meantime, the CCP does not provide the right to the defendants or their defence counsels to request the translation of those documents that they regard to be essential, which is against Article 3(3) of Directive 2010/64/EU. On a practical level, this means that while at the beginning of the investigation, the communicated suspicion is translated orally by an interpreter, the records, etc. of the various procedural acts (e.g. of witness interrogations) are not available for the suspect in their mother tongue free of charge, and so if the defendant wants to read them in his/her mother tongue, he/she has to pay for the translation. This results in a situation whereby those indigent defendants who cannot afford to pay for the translation of those documents that the state authorities are not obliged to have translated, are in a significantly disadvantageous situation compared to wealthy defendants who can pay for this service. All of this can have an impact on how well-informed the defendant who does not understand Hungarian is when deciding to initiate a settlement or not to exclude the possibility of a settlement at the initiative of the prosecution.

As far as **providing information about the suspected offence** is concerned, the provisions of the new CCP comply with the requirements set forth in Article 6 of Directive 2012/13/EU. However, according to the results of a research conducted by the Hungarian Helsinki Committee earlier, in 2018, in practice, the requirement set forth in Article 6(1) of Directive 2012/13/EU, according to which information about the criminal act the suspect is suspected of having committed shall be provided "in such detail as is necessary to safeguard the fairness of the proceedings and the effective exercise of the rights of the defence", is not fully complied with. In our previous research, 80% of the defence counsels asked have said that usually no full information is provided about

181 CCP, Article 100(1)(a)

182 CCP, Article 100(6)–(6d)

183 See: Act XLIII of 2020 on Amending the Code of Criminal Procedure and Other Related Acts of Parliament, Article 156.

184 CCP, Article 100(6)–(6d)

185 CCP, Article 369

186 CCP, Article 78(7)

the basis of the suspicion, and it occurs for example that instead of the facts of the case, it is only the text of the Criminal Code that is provided, which may not be regarded as substantive information, and it means only formal compliance with the obligations concerning the provision of information. Some of them have mentioned that certain details and facts that could be relied on in designing a defence strategy are missing from the information that is provided.[187] This may have significance with regard to the settlement because the above deficiencies may result that the defendant initiates a settlement or agrees to enter into negotiations while not being sufficiently aware of the details of the suspicion.

3.1.4.3. Information on rights

The CCP sets forth that the court, the prosecution or the investigating authority shall inform the defendant about his/her rights under Article 3(1) of Directive 2012/13/EU[188] when his/her participation in the criminal proceeding commences,[189] in a language he/she understands,[190] and requires that the information is provided by using simple and accessible language.[191] As far as the practical implementation of the right is concerned, in the investigation phase defendants are informed of their rights **at the beginning of the interrogation** in such a way that the investigating officers read out aloud to them the cautions generated by the RobotZsaru NEO system (the integrated administrative, case processing and electronic document management system of the police), or provide information on the basis of that. The current version of this generated template (which was revised due to the coming into effect of the new CCP) contains information about all the rights listed in Article 3(1) of Directive 2012/13/EU. The information provided is included in the record of the defendant's interrogation, which the defendant gets a copy of upon request.[192]

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187 For more details on the right to be informed about the criminal act defendants are suspected of having committed and compliance with the respective EU directive, see: Kádár–Novoszádek–Szegő, Chapter 3.2.

188 CCP, Article 39(1)

189 CCP, Article 39(4)

190 The CCP complies with Article 2(1) of Directive 2010/64/EU, and guarantees the defendants' right to use their mother tongue, minority language or other language spoken or understood by them in the course of the criminal procedure. See: CCP, Article 8(1) and (3), Article 78(1)–(2).

191 CCP, Article 74

(2) In the course of communicating with persons participating in the criminal proceeding, the court, the prosecution and the investigating authority shall strive to ensure that the persons participating in the criminal proceeding would understand what has been communicated to them and would be able to make themselves understood.

(3) In order to achieve the purpose set out in Paragraph (2), the court, the prosecutor, and the investigating authority shall when communicating with the participants of the criminal proceeding

a) use simple and accessible language,

b) have regard to the condition and personal characteristics of the person participating in the criminal proceeding,

c) make sure that the affected person has understood the contents of the oral communication addressed to them, and if not, shall explain the information provided.

192 For more details on the right to information about rights and compliance with the respective EU directive, see: Kádár–Novoszádek–Szegő, Chapter 3.1.

The information on the possibility of concluding a settlement forms part of these cautions: reading together Articles 39(1)(k) and 39(4) of the CCP, the authorities shall inform the defendant when their participation in the criminal proceeding commences (practically at the beginning of their interrogation as a defendant) that they have the right to initiate a settlement. The laconic caution generated by the RobotZsaru NEO in this regard goes as follows:

> *I inform you that under Article 407(1) of the CCP – with a view to its Paragraph (2) – both you or your defence counsel and the prosecution may initiate the conclusion of a settlement on the admittance of guilt and the consequences thereof.*
>
> *According to Paragraph (4), if the prosecution (reacting to your initiative) or you (reacting to the initiative of the prosecution) do not exclude the possibility of a settlement, the participation of a defence counsel is mandatory in the procedure aimed at concluding the settlement. If you do not wish to retain a lawyer, the prosecution shall appoint an ex officio defence counsel for you without delay, and ensures that the defence counsel may familiarize themselves with the case materials of the investigation.*

Furthermore, Government Decree 100/2018 provides as an additional possibility that if a person against whom a well-founded suspicion of having committed a criminal offence exists or their defence counsel indicates their intention **before the defendant's first interrogation** to initiate the process to conclude a settlement, the investigating authority may inform them about the legal preconditions of the settlement, and shall inform them that they may put forth their initiative for a settlement after the communication of the suspicion, but that it is "expedient" to put the initiative forth *after* the interrogation.[193] In the cases reviewed, the defendant's side put forth such an indication in two cases, and the investigating authority informed them both times about the legal preconditions of the settlement (once orally, and once in writing).

According to the experiences of legal professionals interviewed in a previous, 2018 research conducted by the Hungarian Helsinki Committee, in the investigation phase it is a problem that when authorities provide information about the rights orally, **the information given is not whole and it is not accessible**: for example, 80% of the respondents said that the provision of information is usually limited to the reading out of the text of the CCP, while the remaining 20% are of the view that in more than half of the cases, the investigating officer only reads out the text of the law.[194] This can also be problematic because at this point in the proceedings, a defendant without a defence counsel may decide to initiate a settlement or not to exclude the possibility of a settlement while not being fully aware of the consequences of his or her decision. The risk of this is increased by the laconic nature of the warning generated by RobotZsaru NEO, which is not suitable for the defendant making a well-founded and deliberated decision on its basis alone.

The CCP does contain **additional guarantees** in relation to the right to information, but only for the period after the defendant has already made the decision to at least enter into a negotiation process. Thus, the CCP provides that the prosecution shall inform the defendant or the defence counsel about the possible content elements and the consequences of the settlement at the

193 Government Decree 100/2018, Article 156(1)(a)–(b)

194 For more details on the related practical problems, see: Kádár–Novoszádek–Szegő, Chapter 3.1.2.

beginning of the negotiations,[195] and if the prosecution and the defendant agree on the content of the settlement, the prosecution shall warn the defendant about the consequences of the planned settlement in the course of the defendant's interrogation.[196] (No practical problems were reported in the research in this respect.) The prosecution shall include the settlement as agreed in the course of the negotiations in the record of the defendant's interrogation, which also includes the above warning and the defendant's response to that. The record shall be certified jointly by the prosecutor, the defendant and the defence counsel.[197] A further guarantee is that at the preparatory session of the court, after the charges and the prosecutor's motions have been presented, the court shall inform the defendant about the consequences of the court approving the settlement, and in particular about the fact that there is no remedy against the court decision approving the settlement, and about the other limitations applicable in terms of the content of an appeal and the evidentiary procedure that can be conducted during the second instance procedure.[198]

3.1.4.4. The use of evidence and evidentiary means

It serves as a guarantee that the CCP sets out: the settlement included in the record of the interrogation is not capable of having any legal effect beyond the aim of the procedure conducted on the basis of it. **If no agreement is reached on the settlement between the prosecution and the defendant, the initiative for the settlement and the case materials that were produced in relation to the failed attempt to conclude a settlement cannot be used as evidence or evidentiary means in the criminal procedure**; they do not constitute the part of the case files of the proceedings. In this case, the prosecution must not inform the court about the fact either that a settlement was initiated.[199] (It shall be noted that before 1 January 2021, the CCP contained the provision that the prosecution "shall not submit the case materials" related to the settlement to the court either instead of the provision that these do not constitute the part of the case files. Thus, the amendment removed the affected case materials from the notion of case files, "in order to ensure that they cannot influence neither the court, nor other stakeholders",[200] strengthening the guarantee included in the original provision.) There was, however, a case among those reviewed in the framework of the research where the prosecution discontinued the settlement negotiations after one session, but used in the investigation what the defence counsel had said in the course of the negotiation. In addition, it was raised at the workshop that the wording of the above rule does not make it clear whether using the relevant case materials as evidentiary means is excluded only in the procedure in question or in any other criminal procedure as well.[201]

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195 CCP, Article 408(2)

196 CCP, Article 409(1)

197 CCP, Article 409(2)

198 CCP, Article 732(2)

199 CCP, Article 409(4)

200 See: Draft Bill T/9918 on the Amendment of the Code of Criminal Procedure and Other Related Acts of Parliament, Detailed official reasoning, https://www.parlament.hu/irom41/09918/09918.pdf, p. 195.

201 By way of comparison, the participant raising the issue referred to Article 314(2) of the CCP, which explicitly states in relation to the seizure of documents that if the prosecution or the court does not order the seizure of a document after reading it, "the document cannot be used as evidentiary means in the ongoing case *or in any other* criminal procedure".

If the prosecution and the defence conclude a settlement, but the court does not approve it, the above constraint on using the evidence related to the settlement does not apply.[202] This important exception is pointed out in leading court decision BH2021. 5., according to which the interrogation of the defendants at the preparatory session after giving them the statutory warnings is a source of evidence duly obtained, and the law does not foresee that using the evidence obtained from such a testimony by the defendants in the criminal procedure is excluded if the court refuses to approve the settlement. Thus, according to leading court decision BH2021. 5., the content of the testimony qualifies as lawful evidence that can be used in the proceedings, even if the court ultimately refuses to approve the settlement. In the same way, "the defendant's statement made in connection with the approval of the settlement and the defendant's testimony made before the approval of the settlement [...] may also be used in the event that [the order approving] the settlement is quashed".[203]

The literature also draws attention to the fact that, likewise, the CCP does not contain any exclusionary provision either for the instance when, despite the settlement concluded – and against the express provision of the CCP[204] – the prosecution nevertheless presses charges under the general rules.[205] The literature also raises as a problem that "there is no procedural law constraint on using evidence obtained on the basis of the confession made in the course of reaching a settlement".[206]

3.1.4.5. Effective judicial control and remedy

As already mentioned above when describing the legal framework, **the court shall examine at the preparatory session whether the conditions for approving the settlement are met from the point of view of lawfulness**.[207] In this context, the question of how the court, in addition to examining the case file, determines whether these conditions are met, and in particular whether the defendant understands the nature of the settlement and the consequences of its approval, whether there is no reasonable doubt as to the defendant's sanity and the voluntariness of the confession, and whether the defendant's guilty plea is unequivocal or not, appears to be a point of difficulty in practice.

It was a positive legislative change in this respect that, since 1 January 2021, the wording of Article 732(5) of the CCP makes it clear that the questioning (interrogation) of the defendant is not optional for the court, and that "the court shall in any event ask for a statement from the

202 The section regarding Article 734 of the CCP in the Memorandum

203 Ádám Békés in: Péter Polt (ed.): *Kommentár a büntetőeljárásról szóló 2017. évi XC. törvényhez (Commentary of Act XC of 2017 on the Code of Criminal Procedure)*

204 CCP, Article 424(1) If the prosecution and the defendant conclude a settlement, the prosecution submits a bill of indictment that contains the facts of the case and the classification of the offence identically with the settlement as entered into the records of the interrogation.

205 Kiss, p. 100.

206 Kiss, p. 101. See also: Bakonyi, p. 68.; and the section regarding Article 734 of the CCP in the Memorandum.

207 CCP, Articles 732(5) and 733

accused in connection to the settlement pursuant to Article 732(3) of the CCP[208]",[209] so the phrase "if necessary" only applies to the questions posed to the defence counsel. Before the defendant makes a statement as to whether he/she pleads guilty in accordance with the settlement and waives his/her right to trial, the court allows the accused to consult with the defence counsel; and the defence counsel and the prosecutor may also make a speech before the decision is handed down.[210] However, these provisions do not give any guidance as to the nature and depth of the questioning of the defendant in this situation. While the official reasoning attached to the legislative amendment referred to above states that during the interrogation of the accused, "the court shall ask the accused as many and such questions as necessary in order to be able to make a well-founded decision on whether to approve or refuse the settlement",[211] the research experience shows that this does not always happen in practice. For example, in four out of the five cases reviewed in the research where the respective information was available, the court only asked the accused a yes-no question about whether they confess their guilt. The interviews conducted with the defence counsels showed as well that the judicial practice varies in terms of what is covered by the judges' questions directed at the accused persons in relation to confessing to the charges at the preparatory session. Some judges question the accused in great detail and ask them a number of questions aimed at finding out whether the accused actually confesses to what is included in the bill of indictment. Other judges simply ask the accused a yes-no question at the preparatory session. One of the judges interviewed noted in this regard that judges tend to treat the confession made in the framework of concluding a settlement as "holy writ", which is problematic, but most of his colleagues agree that the only way to ascertain whether a guilty plea is voluntary and free of undue influence is to ask the defendant substantive questions. Against this background, we are of the view that there is a need for more detailed legal rules on the scope and content of interrogations in these instances.

It was raised in multiple research interviews that it is not clear what the process to follow is if the judge disagrees with the legal classification of the offence as included in the bill of indictment (i.e. the settlement) – of course it also matters in this respect whether the judge believes that the offence qualifies as a more or less serious offence, especially when taking into account the sanctions that can be imposed. According to the prosecutor interviewed, such a situation could lead to refusing the approval of the settlement, which is why it is very important that the judge asks the right questions from the defendant during the preparatory session. The two judges interviewed who commented on this issue were also of the view that reviewing the classification of the offence shall be part of the judge's examination of the settlement's lawfulness, but one of them also indicated that there are differences in the judicial practice in this respect, and that the

208 CCP, Article 732(3) The court shall [after the presentation of the charges and the prosecution's motions] call upon the defendant to state whether they plead guilty in accordance with the settlement and whether they waive their right to a trial or not.

209 Draft Bill T/9918 on the Amendment of the Code of Criminal Procedure and Other Related Acts of Parliament, Detailed official reasoning, https://www.parlament.hu/irom41/09918/09918.pdf, p. 252.

210 CCP, Article 732(4) and (6)

211 Draft Bill T/9918 on the Amendment of the Code of Criminal Procedure and Other Related Acts of Parliament, Detailed official reasoning, https://www.parlament.hu/irom41/09918/09918.pdf, p. 252.

practice of the courts outside Budapest is that the examination of the classification is not part of the examination of lawfulness.

3.1.4.6. Impact of the settlement on the rights of co-defendants not settling

It is a recurring criticism from legal practitioners that the rules of the settlement to plead guilty have been designed by the legislator in such a way that they are essentially "optimal" for cases with a single defendant, and that their application causes various practical difficulties in cases with multiple defendants, while cases with a single defendant are not the "typical" criminal cases.

As already indicated above, in cases involving multiple defendants, the construction of the CCP allows that only some of the defendants enter into a settlement. From a practical point of view, the concern here is "what prevents [...] the prosecution authority from negotiating with several suspects and concluding an agreement with the defendant or defendants who accept the offer most favourable for the prosecution, while terminating negotiations with the others. Although in this case the evidence obtained in the course of the negotiation process from those with whom the prosecution has not concluded an agreement cannot be used because of the 'fruit of the poisonous tree' doctrine, confessions, witness statements and other evidence incriminating the other defendants can be obtained from those who have concluded a settlement. Given that this is not prohibited by law, making use of this possibility allows the prosecution to obtain sufficient evidence against the remaining defendants."[212] It is also relevant from the aspect of the work of defence counsels and the communication between defence counsels that in cases with multiple defendants conflicts of interest may emerge between the defendants, and it may easily happen that "they turn against each other because of the dynamics of their relationship and the opportunity for a settlement".[213] According to one of the judges interviewed, cases with multiple defendants also entail the danger that the authorities, abusing the legal institution, may make certain vulnerable co-defendants so interested in making incriminating statements against the other defendants that the credibility of their statements becomes questionable, as the vulnerable defendant will say anything the prosecution wants to hear.

It is also possible of course that the court does not approve all of the settlements concluded in a given case. In such instances, the court will either decide on the charges in a unified manner, on the basis of a trial, but within the limits set out for the respective special procedure with regard to the approved settlements (i.e. for example in their case the court cannot depart in the judgment from the facts and classification of the offence as included in the bill of indictment); or it will separate the cases with respect to the defendant covered by the approved settlement, provided that the general conditions for separating the cases are met.[214] It can make the defence of the defendants who did not conclude a settlement significantly more difficult in the course of the court proceedings that in the "still ongoing case the defendant covered by a settlement can be interrogated as a witness under the general rules. If the defendant who is subsequently heard

212 Bérces–Gyulay, p. 32.

213 Békés, p. 35.

214 CCP, Article 736(6)–(7)

as a witness refuses to testify, his/her earlier testimony made as a defendant may be used[215]. Furthermore, the defendant who undertook to cooperate with the authorities cannot refuse to testify[216]."[217] Taking all of this into account, it can be concluded that the wiggle room of the defendants who do not conclude a settlement is significantly reduced in these instances.

The defence counsels interviewed were also of the view that the position of the defendants "remaining" in the proceedings could be significantly affected by the confessions of those defendants who concluded a settlement, which confessions will carry more weight in the proceedings than subsequent testimonies and other evidence uncovered in the full evidentiary procedure. One of the defence counsels mentioned a case in which a defendant who concluded a settlement was later called to testify as a witness in the proceedings, but in his testimony, he denied what he had previously said as a defendant about his co-defendants. The judge confronted him regarding the contradiction, to which he replied that he was not obliged to tell the truth as a defendant, but that he was obliged to do so as a witness. In these situations, it is unclear what the lawful course of action for the court is. According to the prosecutor interviewed, it is not clarified properly either what the court should do if it turns out later on, during the trial, that the defendant covered by the approved settlement had a different, more significant role in the offence than what is included in the settlement.

3.2. Confession at the preparatory session of the court

3.2.1. Legislative context: the reasons for introducing the confession at the preparatory session of the court

As already presented in detail in relation to the settlement to plead guilty, the CCP's "fundamental concept is to create the possibility of **simplifying and speeding up procedures**, while ensuring fair trial guarantees".[218] To this end, the CCP "created a complex system of cooperation with the defendant, and one of the key areas of that was the reinterpretation of the function of the [court's] preparatory session, which previously played a marginal role, and making it compulsory",[219] along with allowing for a judgment to be delivered at the preparatory session. The legislator had high hopes for the introduction of the possibility of confessing at the preparatory session: according to the CCP's official reasoning, this form of cooperation with the defendant "could, if it works

215 CCP, Article 177(5)

216 CCP, Article 172(2)(d)

217 Ádám Békés in: Péter Polt (ed.): *Kommentár a büntetőeljárásról szóló 2017. évi XC. törvényhez (Commentary of Act XC of 2017 on the Code of Criminal Procedure)*

218 Draft Bill T/13972 on the Code of Criminal Procedure, Detailed official reasoning, https://www.parlament.hu/irom40/13972/13972.pdf, p. 476.

219 Draft Bill T/13972 on the Code of Criminal Procedure, General official reasoning, https://www.parlament.hu/irom40/13972/13972.pdf, p. 476.

optimally, make a significant contribution to the simplification and timely completion of criminal proceedings on a social scale".[220]

3.2.2. The main characteristics of confessing at the preparatory session: definition, conditions, the procedure and its participants

In the case of confessing and waiving the right to a trial at the preparatory session as a form of cooperation by the defendant, **there is no prior and formal agreement or settlement between the defendant and the authorities**, it is instead a form of cooperation "which practically requires the consent and acquiescence of the defendant".[221]

If charges are pressed, it is compulsory to include in the indictment the motion for the *imposition* of a punishment or for the *application* of a measure – this does not contain a specific motion as to the amount or length of the punishment or measure.[222] However, under the new CCP, the prosecution may submit a motion already in the bill of indictment as to the *amount* or *length* of the punishment or measure, would the defendant plead guilty at the preparatory session of the court.[223] This is the so-called **sentencing motion**, which can also be submitted by the prosecution later on, at the preparatory session.[224] Thus, the sentencing motion is "a unilateral motion by the prosecution, made in accordance with the general principles of sentencing".[225] Filing a sentencing motion is **not mandatory**, and its lack does not prevent the defendant from pleading guilty and waiving their right to a trial at the preparatory session. The "only consequence of the absence of such a prosecutorial motion is that, in the case of a guilty plea, the prosecution loses the possibility to lawfully influence the sentencing activities of the court before its decision is handed down",[226] while with a sentencing motion, it "can play an active role in guiding the court decision" regarding the sentence.[227] It should be stressed that it is no obstacle to submitting a sentencing motion that the defendant has already confessed to committing the criminal offence.[228]

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220 Draft Bill T/13972 on the Code of Criminal Procedure, General official reasoning, https://www.parlament.hu/irom40/13972/13972.pdf, p. 476.

221 Gácsi, p. 282.

222 CCP, Article 422(1)

223 CCP, Article 422(3)

224 CCP, Article 502

225 Kiss, p. 101.

226 Draft Bill T/13972 on the Code of Criminal Procedure, Detailed official reasoning, https://www.parlament.hu/irom40/13972/13972.pdf, pp. 477–478.

227 Draft Bill T/13972 on the Code of Criminal Procedure, Detailed official reasoning, https://www.parlament.hu/irom40/13972/13972.pdf, p. 476.

228 Mr. Ervin Belovics, the Deputy Chief Public Prosecutor, in a presentation held in the autumn of 2021 in which he highlighted that a sentencing motion can be submitted also in instances when the defendant has confessed, reported that despite this, according to an inspection carried out by the prosecutor's office, "many prosecutors' offices [...] followed the practice that if the defendant confessed to committing the criminal offence during the investigation phase, they did not submit a sentencing motion any more". (A video recording of the presentation is available here: https://www.youtube.com/watch?v=Xou33xQJRf8.)

As far as the preparatory session of the court is concerned, it is a public court session held after the filing of the indictment, in preparation for the trial, "open to the public and the media".[229] At the preparatory session, the defendant and the defence counsel may express their views on the charge and may contribute to shaping the further course of the criminal proceedings before a trial hearing takes place.[230] This also means that the preparatory session "cannot be used to confront pieces of evidence", because "that can only take place in the framework of the full evidentiary procedure conducted at the trial".[231] According to the legislative concept, the preparatory session "provides an opportunity to shape the further course of the criminal proceedings for both the defendant who confesses and the defendant who does not confess to committing the offence they are charged with".[232] The preparatory session must be held within three months from serving the defendant the bill of indictment.[233]

In the course of the preparatory session, after the prosecutor has presented the merits of the charge, indicated its evidentiary means in support of the charge, and, if necessary, submitted a sentencing motion,[234] the court shall question the defendant, and, after it has cautioned the defendant (see below in detail), shall ask the defendant whether they plead guilty to the offence they are charged with.[235]

If the defendant pleads guilty and waives their right to a trial with regard to the criminal offence they confessed to commit, **the court shall decide** on the basis of the confession, the case files, and hearing the defendant **whether to accept the defendant's confession**.[236] The confession may be accepted by the court if the following requirements are complied with:

a) the defendant understands the nature of their statement and the consequences of the court approving it;

b) there is no reasonable doubt as to the sanity of the defendant and as to the voluntariness of the confession; and

c) the defendant's confession is unequivocal and it is supported by the case files.

As of 1 January 2021, the CCP provides that the court shall question the accused at the preparatory session "with a view to the nature of the preparatory session",[237] and expressly states that the purpose of this questioning of the accused is to examine the fulfilment of the three conditions

229 Balázs Elek in: Péter Polt (ed.): *Kommentár a büntetőeljárásról szóló 2017. évi XC. törvényhez (Commentary of Act XC of 2017 on the Code of Criminal Procedure)*

230 CCP, Article 499(1)

231 Draft Bill T/9918 on the Amendment of the Code of Criminal Procedure and Other Related Acts of Parliament, Detailed official reasoning, https://www.parlament.hu/irom41/09918/09918.pdf, p. 200.

232 Draft Bill T/13972 on the Code of Criminal Procedure, Detailed official reasoning, https://www.parlament.hu/irom40/13972/13972.pdf, p. 476.

233 CCP, Article 499(2)

234 CCP, Article 502(1)

235 CCP, Article 502(3) and (5)

236 CCP, Article 504(1)

237 CCP, Article 502(3)

above.[238] According to the official reasoning attached, with this amendment, the legislator aimed to "clarify" what the questions posed to the accused may cover in order to "establish a uniform practice".[239] If the above conditions are met, the court will accept the guilty plea of the accused in a court order. There is no possibility to appeal against this order.[240]

If the court accepts the guilty plea, it will not examine whether the statement of facts as included in the bill of indictment is well-founded, nor the defendant's culpability.[241] If the court sees no obstacle to concluding the case at the preparatory session, inclusive that the conditions that "the guilty plea is complete" and "covers all the offences the defendant is charged with"[242] are complied with, the judge questions the accused on the circumstances orienting the sentencing, after which the prosecutor and then the defence counsel may make a speech.[243] The court **may deliver its judgment at the preparatory session**,[244] i.e. the cooperation by the defendant is also manifested in the fact that by confessing and waiving their right to a trial, the defendant "may create the possibility for the court accepting his/her confession to deliver its judgment already at the preparatory session".[245]

From the defendant's perspective, beyond the quick closure of the proceedings it is also a benefit that if **the court** accepts the confession at the preparatory session, it **may not impose a harsher sentence or may not apply a harsher measure in its judgment than the one indicated in the prosecutor's sentencing motion**[246] – and so, accordingly, it may impose a lighter sentence than the one included in the sentencing motion. Thus, with the sentencing motion the prosecution "may incentivise the defendant to plead guilty, in accordance with the principles of a fair trial",[247] since it "can reduce the uncertainty on behalf of the defendant and the defence counsel as to the outcome of the proceedings greatly if they know exactly what sanction will be accepted by the prosecution"[248] and if they are "aware of the most severe punishment or measure that the court can impose".[249] Thus, "[t]he guarantees of the viability of the legal institution are ultimately the

238 CCP, Article 504(1)

239 Draft Bill T/9918 on the Amendment of the Code of Criminal Procedure and Other Related Acts of Parliament, Detailed official reasoning, https://www.parlament.hu/irom41/09918/09918.pdf, p. 200.

240 CCP, Article 504(3)

241 Cf.: CCP, Article 500(2)(b).

242 Balázs Elek in: Péter Polt (ed.): *Kommentár a büntetőeljárásról szóló 2017. évi XC. törvényhez (Commentary of Act XC of 2017 on the Code of Criminal Procedure)*

243 CCP, Article 504(4)–(5)

244 CCP, Article 504(6)

245 Draft Bill T/13972 on the Code of Criminal Procedure, Detailed official reasoning, https://www.parlament.hu/irom40/13972/13972.pdf, p. 476.

246 CCP, Article 565(2). The only exception in this regard is when the court merges the underlying criminal proceedings with another case, and declares the accused guilty in the latter [CCP, Article 565(3)].

247 Draft Bill T/13972 on the Code of Criminal Procedure, Detailed official reasoning, https://www.parlament.hu/irom40/13972/13972.pdf, p. 476.

248 Balázs Elek in: Péter Polt (ed.): *Kommentár a büntetőeljárásról szóló 2017. évi XC. törvényhez (Commentary of Act XC of 2017 on the Code of Criminal Procedure)*

249 Imola Szigeti: A tárgyalás előkészítésének szerepe a Be.-ben, az előkészítő ülés (The role of the preparation for the trial: the preparatory session). *Büntetőjogi Szemle (Criminal Law Review)*, 2018/2., https://ujbtk.hu/wp-content/uploads/2019/01/BJSZ_201802_94-100_SzigetiImola.pdf, p. 97.

main features of a consensual system based on an admission: transparency, predictability and enforceability".[250] The content of the prosecutor's sentencing motion **limits even the second instance court**: according to the leading court decision BH2020. 353., "it is a violation of the prohibition to impose a harsher punishment if the court of second instance, in deciding on an appeal submitted to the detriment of the defendant against the first instance court's judgment handed down at a preparatory session that imposed a shorter term of imprisonment than the one included in the prosecutor's [sentencing] motion, imposes a longer term of imprisonment than the one set out in the prosecutor's original [sentencing] motion". (The defendant may, of course, make a confession also after the preparatory session in the course of the trial phase, and this may be taken into account as a mitigating circumstance, but it does not bring any other advantage for the accused.) The violation of the prohibition on imposing a harsher punishment may be challenged by the Chief Public Prosecutor[251] via an extraordinary remedy procedure called "remedy in the interest of lawfulness".[252]

Similar to the procedures involving a settlement, it may occur also in the case of a confession at the preparatory session that the case cannot be concluded at the preparatory session, and it is necessary to **hold a trial** in the case. In these instances, the defendant and the defence counsel may put forth motions to conduct an evidentiary procedure and other procedural acts, or a motion to exclude certain evidence (for example in relation to establishing the sentence[253]), but these may not concern the well-founded nature of the facts of the case as included in the indictment and the question of guilt. The prosecutor may make comments and submit motions as a reaction to that.[254] On the basis of these, the court may hold the trial hearing even immediately after the preparatory session.[255] (It is not allowed of course to conduct an evidentiary procedure at the trial hearing that would concern the well-founded nature of the statement of facts and the question of guilt.[256]) It serves as a guarantee that if the court holds a trial hearing but has already accepted the guilty plea at the preparatory session, the prosecutor cannot change its motion for the imposition of a punishment or the application of a measure to the detriment of the accused in his/her final pleading at the trial.[257]

A trial hearing will also take place if the accused has not pleaded guilty to all the offences he/she is charged with. In such cases, the court decides on the charges in a unified manner, on the basis of a trial, but again, no further evidentiary procedure may be conducted on the well-founded

250 Péter Vass: Az új Büntetőeljárási törvény első novellája: a bírósági eljárást érintő változások I. (The first extensive amendment of the new Code of Criminal Procedure: the changes affecting the court procedure I.). *Fontes Iuris*, 2021/1., https://ojs3.mtak.hu/index.php/fontesiuris/issue/view/677/PDF, p. 16.

251 See as examples for such cases: Kúria [Hungary's highest judicial forum], Bt.515/2020/5.; Kúria, Bt.822/2020/6.; Kúria, Bt.688/2019/5.

252 CCP, Chapter XCII

253 Draft Bill T/13972 on the Code of Criminal Procedure, Detailed official reasoning, https://www.parlament.hu/irom40/13972/13972.pdf, p. 479.

254 CCP, Article 505(1) and (3)

255 CCP, Article 505(4)

256 CCP, Article 521(1)

257 CCP, Article 542(3)

nature of the statement of facts as included in the bill of indictment and on the question of guilt in relation to the offence regarding which the court has accepted the guilty plea.[258]

It may occur that, in light of the result of the evidentiary procedure conducted within the above limits, the court comes to the conclusion that, due to the change in the statement of facts or the offence's classification under the Criminal Code, the guilty plea should not have been accepted at the preparatory session. In this case, the court may quash the order issued about accepting the guilty plea.[259]

The **right to appeal** is limited if the judgment was handed down on the basis of a confession at the preparatory session: if the court accepted the defendant's confession with a court order, none of the parties may appeal against the ensuing first instance court judgment over the issues of guilt, the facts of the case established in accordance with the indictment, and the legal classification.[260] Thus, "the second instance court does not examine whether the first instance judgment is well-founded or not, and is bound by the statement of facts as established by the first instance judgment".[261] The second instance court may change the first instance judgment as far as establishing guilt and the classification of the offence in accordance with the indictment only if at the same time it acquits the defendant, terminates the criminal procedure, or changes the legal classification of the criminal offence.[262] Furthermore, since 1 January 2021, it is an "absolute" instead of a "relative" ground for annulment (i.e. annulment on this basis is not conditional, but mandatory) if the court of first instance has accepted the guilty plea in the absence of the conditions set out in the CCP.[263] Accordingly, "in the framework of its review, the court of second instance [...] is obliged to examine ex officio whether the guilty plea was accepted unlawfully, in which case it shall decide to annul the judgment of the court of first instance and order the court of first instance to conduct a new trial".[264]

As regards cases involving **multiple defendants**, since 1 January 2021, under a new rule introduced into the CCP, the preparatory sessions may be held separately for the co-defendants even if the cases are not separated. Where the proceedings involve multiple defendants and other conditions for separating the cases are met as well, the CCP, like in the case of the settlement, allows the court to separate the cases pending before it with respect of the defendant who pleaded guilty in order to deliver the judgment.[265] As with the settlement, since 1 January 2021, the

258 CCP, Articles 503(1) and 521(1)

259 CCP, Article 521(3)

260 CCP, Article 580(2)

261 Metropolitan Regional Court, Bf.261/2018/6.; referring to Article 591(2) of the CCP.

262 CCP, Article 606(3). The part of the provision about the change in the legal classification was introduced in the text of the CCP as of 1 January 2021, remedying the situation that previously, "the fact that the classification is not in accordance with the law could be established in the second instance decision, but could not be corrected unless the defendant was acquitted or the procedure was terminated at the same time" (see: Metropolitan Regional Court, Bf.112/2019/16.).

263 CCP, Article 608(1)(h)

264 Vass, p. 21.

265 CCP, Article 503(2)

separation of cases has only been possible in cases with multiple defendants, and so since then the court is not allowed to sever a case in which it accepted the defendant's guilty plea concerning one of the offences covered in order to deliver a judgment if there is only one defendant in the case. According to the official reasoning, this amendment was introduced "in response to a suggestion from practitioners" and was considered by the legislator to be in line with the principle of a fair trial and the predictable application of the law.[266]

3.2.3. Confession at the preparatory session as applied in practice

In the literature, some are of the view that the procedure based on the confession at the preparatory session was introduced as a "subsidiary" solution, meaning that the legislator intended the application of the settlement to plead guilty to be the main rule, considering that the procedures could be accelerated the most by using this legal institution, and that it allowed confession at the preparatory session "for pragmatic reasons".[267] However, this cannot be derived from the official reasoning of the law, nor, in our view, from the concepts of the two legal institutions, and the practice has not progressed in this direction either. Statistics show that confessing at the preparatory session is much more popular than the settlement to plead guilty, **a significant proportion of defendants chooses to confess**, "prosecutors and defence counsels have also discovered the potentials in the preparatory session",[268] and a significant proportion of criminal cases are concluded in this way: "if we look at the defendants who have been convicted by a final court decision in the first instance, we see that 17% of them were convicted on the basis of a confession made at the preparatory session. (For juveniles, this proportion is 22%.)"[269] If we do not count the defendants of the proceedings where an arraignment took place or a penal order was issued, in 2019, 27.66% of the defendants charged confessed at the preparatory session, the confessions were accepted by the court in 92.06% of the cases, and in 96.23% of these cases the court even handed down a judgment at the preparatory session. The percentage of defendants who confessed at the preparatory session is even higher when we look at juvenile defendants separately.

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266 Draft Bill T/9918 on the Amendment of the Code of Criminal Procedure and Other Related Acts of Parliament, Detailed official reasoning, https://www.parlament.hu/irom41/09918/09918.pdf, p. 203. According to the official reasoning, the previous rule, which allowed for separating the case also when there was only a single defendant, was "unpredictable, essentially discretionary, and independent of the defendant's position, but could result in an overall less favourable situation for the defendant, as the criminal offences included in the indictment were subject to multiple judgments instead of a cumulative sentence, while the conditions for the merger of sentences [i.e. imposing a cumulative sentence after the judgments are handed down] are only met in the case of effective imprisonment sentences".

267 Gácsi, pp. 282–283.

268 Balázs Gellér – Bernadett Bárányos: Az új Be. kapcsán a joggyakorlatban jelentkező egyes problémák az előkészítő ülés, a szakértő és a zár alá vétel szabályozásán keresztül (Problems emerging in the practice in relation to the new CCP through the rules pertaining to the preparatory session, the expert and the seizure). *Miskolci Jogi Szemle (Miskolc Law Review)*, 2019, 2nd special edition, Volume 1, https://www.mjsz.uni-miskolc.hu/files/6561/31_gellerbaranyos_t%C3%B6rdelt.pdf, p. 306.

269 In addition, if "we look from a broader perspective at the defendants who have been convicted by a final court decision in the first instance, we can see that the proportion of defendants whose cases was closed at a preparatory session, via an arraignment or a penal order taken together is 76%". (Vass, p. 16.)

Table 3 – ***Confessions made at preparatory sessions***[270]

	Number of persons charged with a bill of indictment[271]	out of that:			
		a confession was made at the preparatory session	out of that:		
			the court accepted the confession	out of that:	
				a judgment was handed down	the court arranged for a trial
Total number of defendants					
2018[272]	41,944	2,023 (4.82%)	1,741 (86.06%)	1,714 (98.45%)	27 (1.55%)
2019	37,238	10,300 (27.66%)	9,482 (92.06%)	9,125 (96.23%)	357 (3.77%)
Juvenile defendants					
2018[273]	2,678	108 (4.03%)	90 (83.33%)	90 (100%)	0 (0%)
2019	2,118	739 (34.89%)	639 (86.47%)	609 (95.31%)	30 (4.69%)

It cannot be established on the basis of the statistical data published by the prosecution service how many defendants from those included in the table above have confessed after the prosecution had made a sentencing motion, but the detailed figures regarding the number of sentencing motions in 2019 are included in the official statistics of the prosecution service.[274]

Table 4 – ***Sentencing motions made by the prosecution***[275]

	Motions made in the bill of indictment	Motions made at the preparatory session	Total number of motions
2019	3,142	1,854	4,996

270 *A büntetőbíróság előtti ügyészi tevékenység főbb adatai I. A 2018. évi tevékenység (The main statistical data regarding prosecutorial activities before criminal courts I. Activities in the year 2018).* Chief Public Prosecutor's Office, 2019, http://ugyeszseg.hu/pdf/statisztika/buntetobirosag_ugyeszi_tev_I_2018.pdf, p. 20.; *A büntetőbíróság előtti ügyészi tevékenység főbb adatai I. A 2019. évi tevékenység (The main statistical data regarding prosecutorial activities before criminal courts I. Activities in the year 2019).* Chief Public Prosecutor's Office, 2020, http://ugyeszseg.hu/wp-content/uploads/merzag/2020/12/buntetobirosag_ugyeszi_tev_i_2019.pdf, p. 20.; *A büntetőbíróság előtti ügyészi tevékenység főbb adatai II. (fiatalkorú vádlottak). A 2018. évi tevékenység (The main statistical data regarding prosecutorial activities before criminal courts II. – juvenile accused persons. Activities in the year 2018).* Chief Public Prosecutor's Office, 2019, http://ugyeszseg.hu/pdf/statisztika/buntetobirosag_ugyeszi_tev_II_2018.pdf, p. 20.; *A büntetőbíróság előtti ügyészi tevékenység főbb adatai II. (fiatalkorú vádlottak). A 2019. évi tevékenység (The main statistical data regarding prosecutorial activities before criminal courts II. – juvenile accused persons. Activities in the year 2019).* Chief Public Prosecutor's Office, 2020, http://ugyeszseg.hu/wp-content/uploads/merzag/2020/12/buntetobirosag_ugyeszi_tev_ii_2019.pdf, p. 20.

271 This table does not contain those defendants whose cases were concluded via an arraignment or issuing a penal order (under the previous CCP, "omission of the trial").

272 In 2018, confessing at the preparatory session was possible only as of 1 July, the coming into force of the new CCP.

273 In 2018, confessing at the preparatory session was possible only as of 1 July, the coming into force of the new CCP.

274 This data is not available for 2018.

275 *Ügyészségi Statisztikai Tájékoztató (Büntetőjogi szakág). A 2019. évi tevékenység (The statistical information leaflet of the prosecution – criminal field. Activities in the year 2019).* Chief Public Prosecutor's Office, 2020, http://ugyeszseg.hu/wp-content/uploads/merzag/2020/12/ugyeszsegi-statisztikai-tajekoztato-buntetojogi-szakag-2019.-ev.pdf, p. 72., Table 92

Furthermore, the Chief Public Prosecutor's Office reported in the social media that in 2020, the number of the sentencing motions made in the bill of indictment increased by 27.8% as compared to the previous year, to 5,090 (however, the social media post differs from the above table in that it states that in 2019 the prosecution submitted 3,984 sentencing motions in the bill of indictment).[276]

The research experience shows that confessions at the preparatory session are **typically made in simple cases**, at the district court level, where there is strong evidence or when the defendant is caught in the act, so the type of the criminal offence does not matter in this respect. The experience of defence counsels suggests that confessions at the preparatory session occur in relation to almost all types of criminal offences.

Although it is a positive development from the aspect of accelerating proceedings that the legal institution of confessing at the preparatory session "works", its rapid and significant spread – especially compared to the failure of the settlement to plead guilty – **raises concerns from the viewpoint of all participants of the criminal proceedings**. On the one hand, in the case of the confession at the preparatory session, the "advantage" of the criminal justice system as a whole is only the shortening of the procedure, which is not a negligible result of course, but at the same time, other potential benefits of a settlement in terms of law enforcement and criminalistics, such as the cooperation of the defendant in solving another case as a condition for a settlement, do not arise in the case of a confession at the preparatory session. It is a disadvantage for the accused for example that the procedure against him for certain offences cannot be terminated at this point any more with a view to his/her cooperation. For the victim, it may be a disadvantage that whereas in the framework of a settlement the defendant can make several kinds of undertakings which mean some form of reparation for the victim, this is not possible in the case of a confession at the preparatory session. At this point, it is worth recalling the problem indicated in Chapter 3.1.3. of the present report that the strict interpretation of the obligation to investigate by the Chief Public Prosecutor's Office pushes the practice towards the sentencing motions instead of the settlement, and as a consequence, **a confession at the preparatory session takes place in those cases as well where a settlement could have been concluded**.

It shall also be mentioned that, according to the research interviews, the defence and the prosecution often engage in some kind of informal "negotiation" before the submission of a sentencing motion and a subsequent confession made at the preparatory session. In such cases, the question of why no settlement was concluded emerges even more strongly. At the same time, a negotiation between the defence counsel and the prosecutor may be pronouncedly justified if the bill of indictment does not contain a sentencing motion, since in such cases "it may be revealed only by the preliminary negotiation with the prosecution how valuable a potential confession would be for the prosecution", and "in the absence of any prior knowledge of the prosecution's position, the defendant undertakes a great risk"[277] by confessing.

276 See: https://bit.ly/3FflqQk.

277 Gellér–Bárányos, p. 307.

In the context of the confession at the preparatory session, it is a key question **when and in what kind of cases does the prosecution submit a sentencing motion and with what content**, since this "legal institution can [...] achieve its purpose if the prosecutor actually makes a motion for the instance of a confession that will be worth considering by the defendant, who will in this way not be interested in protracting the proceedings".[278]

The Memorandum issued by the Chief Public Prosecutor's Office does not contain any guidance on the types of cases in which it is justified or recommended to make a sentencing motion; it only refers back to Instruction 8/2018. (VI. 27.) of the Chief Public Prosecutor on Prosecutorial Activities Before the Criminal Courts, which states that if the bill of indictment does not contain a sentencing motion, the prosecutor is obliged to make a motion for the amount or length of the punishment or measure at the preparatory session in every case where he/she considers that the motion will facilitate the conclusion of the criminal proceedings at the preparatory session.[279] At the same time, the Memorandum provides examples and general guidance on when the prosecutor should not make a sentencing motion. This is the case, for example, when the conditions for accepting the confession "are not or not certain to be met on the basis of the information from the investigation", for example because "an expert has concluded that the defendant's mental capacities are limited, or information has come to light which makes this likely".[280] Another case is where "the facts of the case (such as the actual nature and seriousness of the injury) could not be clarified to the necessary extent before the charges were brought, in particular with a view to the time limits of the investigation, and therefore an evidentiary procedure must take place at the trial phase of the procedure". According to the Memorandum, in such cases "the interests of the prosecution service require that the court holds a trial hearing also on the merits of the case", and the prosecution can "emphasise this position by not making a sentencing motion". The conclusion to be drawn from the approach taken by the Memorandum is that according to the prosecution service, in practice, the submission of a sentencing motion shall be considered first in all cases as a main rule. The prosecutor interviewed in the research also confirmed that it is typical for the prosecutor to make a sentencing motion. Out of the 28 cases made available by defence counsels where the defendant confessed at the preparatory session, in 25 cases the prosecution made a sentencing motion[281] (in the vast majority of the cases already in the bill of indictment).

As regards the **amending of the sentencing motion**, the prosecutor can still amend the motion at the beginning of the preparatory session, but after that he/she is not able to do so formally under the CCP, even if the defendant brings such facts to the attention of the prosecution and the court in their confession at the preparatory session which affect the sentencing. It is to be welcomed that the Memorandum provides the guidance in this respect that "if, however, the defendant's confession reveals additional mitigating circumstances, the prosecutor representing the

278 Balázs Elek in: Péter Polt (ed.): *Kommentár a büntetőeljárásról szóló 2017. évi XC. törvényhez (Commentary of Act XC of 2017 on the Code of Criminal Procedure)*

279 Instruction 8/2018. (VI. 27.) of the Chief Public Prosecutor on Prosecutorial Activities Before the Criminal Courts, Article 7(1)

280 The section regarding Articles 499–503 of the CCP in the Memorandum, Point 4)

281 The respective information was not available in one of the cases.

charges may indicate in his/her oral statements that, in the light of the new circumstances, he/she considers it acceptable to impose a lighter sentence than the one proposed in the sentencing motion".[282] This serves to ensure that the court imposes a sanction that reflects to the defendant's confession made at the preparatory session and ensures at the same time that the prosecution will not appeal the judgment and that the proceedings are not unnecessarily protracted. The Commentary of the CCP adds that since after the questioning of the accused, "the members of the court may ask the prosecutor questions directly, and the defence counsel and the accused may motion questions to be put to the prosecutor", "the possibility of questions being asked by those entitled to do so about the prosecutor's position on the [amount and length of the] sentence is not excluded".[283]

As far as the **content of the sentencing motion** is concerned, the Memorandum states that it "may differ from the general [...] motion only in that the fact of the confession must necessarily be taken into account", and that "if the defendant has also confessed during the investigation, there can be no difference between the two motions – however, the concrete amount/length of the sanction cannot be included in the general motion, only in the sentencing motion". As put by Mr. Ervin Belovics, Deputy Chief Public Prosecutor, in a presentation in the autumn of 2021: "when the bill of indictment is filed, the accusation must be substantiated to a level that it will stand up in court. In other words, the defendant's confession can no longer have a determining role at this point, but rather can only express the remorse of the defendant, and therefore its weight should be less than when the accused makes an exploratory confession at the time of the communication of the suspicion, including an admission of guilt. For this reason, the [sanction included in the sentencing motion] can be only slightly more lenient than what would have been proposed in the absence of a confession by the defendant."[284]

Furthermore, the Memorandum explicitly states that "with the entry into force of the new CCP, the practice of the prosecution service regarding the motions for the imposition of a sanction shall not change (shall not become more lenient) as compared to the practice before. The fact that the defendant confessed can only be assessed as a mitigating circumstance with the same weight as before, the only difference being that in such instances the prosecution will also communicate the specific amount/length of the sanction it considers acceptable."[285]

Thus, the Memorandum shows that the Chief Public Prosecutor's Office is worried that the sentencing motions will lead to a more lenient sentencing practice, whereas on the basis of the research interviews the impression of the interviewees is that the sentencing motions are strict and thus confessing at the preparatory session do not necessarily result in a more lenient sanction than if the case were to go to trial. While this is in line with the prosecutorial objective under the Memorandum, it is at odds with the aim of the legal institution to reward and thus facilitate cooperation by the defendant. One of the judges interviewed even mentioned a specific review

282 The section regarding Articles 504–505 of the CCP in the Memorandum, Point 2)

283 Balázs Elek in: Péter Polt (ed.): *Kommentár a büntetőeljárásról szóló 2017. évi XC. törvényhez (Commentary of Act XC of 2017 on the Code of Criminal Procedure)*

284 A video recording of the presentation is available here: https://www.youtube.com/watch?v=Xou33xQJRf8.

285 The section regarding Articles 499–503 of the CCP in the Memorandum, Point 4)

of the functioning of the legal institution in the first few months after its introduction that was conducted at the tribunal he works at, which revealed that the prosecution's sentencing motions had "far exceeded" the judicial practice in terms of the amount/length of the sanctions.

It was also raised in the interviews that the strict sentencing motions could indirectly lead to a stricter judicial sentencing practice, not only for instances of confession at the preparatory session, but also in general. In the absence of comprehensive, national data and representative research, it is difficult to decide the question of **what the actual impact of sentencing motions on the judicial sentencing practice is**, and it was not possible to examine this issue in a methodologically adequate manner in the present research. However, the interviews strongly indicate that there is a need for a comprehensive and representative research into the possible changes in the sentencing practice. From the related statistics, it is worth highlighting that in 2019, the court imposed twice as many times the same sanction as proposed by the prosecution in the sentencing motion than sanctions deviating from the prosecution's motion in favour of the defendant.[286]

Table 5 – ***Content of court decisions as compared to the sentencing motions, in the percentage of all decisions***[287]

	The court imposed the same sanction	The court deviated in favour of the defendant	The court deviated to the detriment of the defendant	Total number of decisions
2019	1,378 (66.4%)	680 (32.8%)	17 (0.8%)	2,075 (100%)

From the 23 cases provided by defence counsels where the relevant data were available, in 15 cases the punishment or measure proposed for the event of a confession differed from the punishment or measure finally imposed by the court, and in all 15 cases the sanction imposed was lighter than what was included in the sentencing motion. Of the 20 cases published by the courts in which relevant information was available, in 18 cases the court imposed a lighter sanction than the one in the sentencing motion. There was also a judgment in which it was explicitly stated that the court had taken into account new information obtained during the interrogation of the defendant when imposing the sentence and had therefore reduced the daily amount of the fine.

The prosecutor interviewed added to this that if the court deviates from the sentencing motion in favour of the defendant, the prosecutor present at the preparatory session will typically appeal, the main reason being that they do not dare to accept a lighter sentence on their own, without the approval of their superior. The negative impact of this is illustrated by the fact that all three judges interviewed believed that judges are reluctant to deviate from the sentencing motion in favour of the defendant because they know that the prosecutor will then appeal, which runs counter to the intention of speeding up the proceedings. This adds to the issue of the potential tightening of the sentencing practice.

286 This data is not available for 2018.

287 *Ügyészségi Statisztikai Tájékoztató (Büntetőjogi szakág). A 2019. évi tevékenység (The statistical information leaflet of the prosecution – criminal field. Activities in the year 2019).* Chief Public Prosecutor's Office, 2020, http://ugyeszseg.hu/wp-content/uploads/merzag/2020/12/ugyeszsegi-statisztikai-tajekoztato-buntetojogi-szakag-2019.-ev.pdf, p. 72., Table 92

As to the **motivation of the defendants** to confess at the preparatory session, it is, on the one hand, the speedy conclusion of the proceedings (also considering how long the given proceedings have been going on and how long the trial phase can be expected to last) and, on the other hand, the certainty that no harsher punishment than the one included in the sentencing motion can be imposed in their case. In addition, the research interviews suggest that it can also be a motivation for the defendants that in this way they will not have to pay the defence counsel's retainer for the trial phase and that they may be released from pre-trial detention or from under other pre-trial measures involving the deprivation of liberty, and their personal circumstances such as their financial situation and family circumstances may also play a role in their decision. Some defence counsels argued that the concept of the confession at the preliminary session carries the risk that defendants make a confession even if the bill of indictment does not fully correspond to the truth, just to speed up the proceedings, or because in this way they still get a better deal in terms of the maximum sentence than if the case were to go to trial. However, it should also be borne in mind that in order to make the defendant motivated in testifying, "it is not enough to change the legal environment, it is also necessary that the authorities acting against the defendant are able to build trust" towards them, "which can only be achieved through clear and informative communication".[288]

Finally, it should also be mentioned that, just as the settlement to plead guilty, the possibility of making a confession and waiving the right to a trial at the preparatory session **significantly transforms the tasks of the defence counsel**: although the decision to confess shall be made by the defendant, "the defence counsels obviously have a great responsibility in what advise they give to the accused before the preparatory session in the light of the case file and judicial practice",[289] also with a view to the content of the sentencing motion. This is illustrated by a case covered by the research in which the defence counsel advised the defendant to confess, despite the fact that the defence counsel considered the sentencing motion excessive, because he knew the judge and trusted that the judge would, out of humanity, impose a lighter sentence than the one included in the sentencing motion. The judge did impose a lighter sentence, which was appealed against in vain by the prosecutor, and the sentence imposed in the final judgment at the second instance was still lighter than the one in the sentencing motion. It is also a difficult situation from the point of view of the defence counsel when the sentencing motion is only made at the preparatory session, and the defence counsel shall give advice to the defendant on the spot. According to defence counsels, the legal institution has brought about fundamental changes in the role of the defence counsel: greater emphasis is placed on the work of the defence counsel during the investigation phase, as there is a good chance that the court will not carry out a full evidentiary procedure and the facts and classification established in the bill of indictment are very likely to form the basis of the judgment. At the same time, multiple defence counsels argued in the interviewees that the confession at the preparatory session empties out the work of the defence counsel and makes it formalistic.

[288] Vass, p. 14.

[289] Gellér–Bárányosi, p. 307.

3.2.4. Defence rights

3.2.4.1. Access to a lawyer

If there is already a defence counsel participating in the procedure (i.e. the defendant already has a defence counsel, either an ex officio appointed or a retained one, and irrespective of whether defence is mandatory in the proceedings), **the preparatory session of the court cannot be held in his/her absence**.[290] This is an extra guarantee, since in general, the CCP "requires the presence of the defence counsel essentially when defence is mandatory".[291] According to the reasoning provided by the legislator, the reason for diverting from this main rule is that "the preparatory session has crucial significance both in terms of the cooperation by the defendant and the concentration of the evidentiary procedure".[292] It is an additional guarantee in relation to the right to an effective defence that the court shall appoint an ex officio defence counsel and postpone the preparatory session if the defendant does not have a retained defence counsel and

a) the court has doubts as to whether the accused understood the charges and the warnings included in the summons to the preparatory session (see in detail below) and the consequences thereof, or

b) the defendant motions for appointing an ex officio defence counsel.[293]

If the defence counsel did not participate in the investigation phase or proves that they were unable to consult the files of the investigation through no fault of their own, they will still be granted **time to prepare**: the CCP prescribes for these instances that if the defence counsel so requests within three working days of the receipt of the bill of indictment, the court will set the date of the preparatory session for a date later than one month after the date the bill of indictment was served.[294] With this solution the CCP "seeks to ensure both the timeliness of the proceedings and the uncompromising enforcement of the rights to representation and defence".[295] It also serves to ensure adequate time for preparation[296] that a new provision introduced as of 1 January 2021 provides that if a bill of indictment is deemed to have been served on the basis of a so-called "fiction of service",[297] the court shall, upon the motion of the accused or, with the

290 CCP, Article 499(5). According to the same provision of the CCP, the presence of the prosecutor and the accused is always obligatory at the preparatory session.

291 Draft Bill T/13972 on the Code of Criminal Procedure, Detailed official reasoning, https://www.parlament.hu/irom40/13972/13972.pdf, p. 476.

292 Draft Bill T/13972 on the Code of Criminal Procedure, Detailed official reasoning, https://www.parlament.hu/irom40/13972/13972.pdf, p. 477.

293 CCP, Article 502(4)

294 CCP, Article 499(3)

295 Draft Bill T/13972 on the Code of Criminal Procedure, Detailed official reasoning, https://www.parlament.hu/irom40/13972/13972.pdf, p. 477. o.

296 Cf.: Draft Bill T/9918 on the Amendment of the Code of Criminal Procedure and Other Related Acts of Parliament, Detailed official reasoning, https://www.parlament.hu/irom41/09918/09918.pdf, p. 202.

297 See: CCP, Article 132(2).

consent of the accused, of the defence counsel, postpone the preparatory session (unless the accused has refused to receive the bill of indictment).[298]

Defence counsels may actively participate in the preparatory session: they may pose questions to the accused person(s), make a motion for a question to be posed to the prosecutor (as can the accused),[299] and if the court questions the accused at the preparatory session also on the circumstances orienting the sentencing, the defence counsel may take the floor after that.[300]

3.2.4.2. Access to the case files and information on the charges

In the case of a confession at the preparatory session, the defence is of course in a better position when it comes to access to the materials of the case as compared to a settlement, since the CCP sets out that **the defendant and the defence counsel shall be provided with access to all case materials at least a month before the pressing of the charges**.[301] Furthermore, the bill of indictment shall contain, among other things, a precise description of the offence the defendant is charged with; its classification under the Criminal Code; an indication of the available means of evidence related to the offences or parts of the offences included in the charge; and the prosecution's evidentiary motions related to proving the offences or parts of the offences and the circumstances orienting the sentencing. Accordingly, in the case of a confession at a preparatory session, no legislative or practical problems emerge as regards the right of access to the materials of the case and the right to information about the accusation under Directive 2012/13/EU.

The only factor that may prevent the defendant from making a fully informed decision about confessing at the preparatory session and waiving the right to a trial is the issue of translation. As we have already explained in the context of the settlement, it may pose a difficulty for defendants who do not understand the Hungarian language that the CCP only requires the authorities to translate the "documents to be served",[302] which includes the bill of indictment but not most of the other case materials.

3.2.4.3. Information on rights

In addition to the information received about the rights listed in Article 3(1) of Directive 2012/13/EU in the investigation phase (see in detail Chapter 3.1.4.3. in relation to that), defendants shall be informed about their rights by the court as well, on two occasions, and in two formats.

In the **written summons** to the preparatory session (which should be issued in a way that it is served at least 15 days before the preparatory session[303]), the court shall warn the accused about the following in relation to confessing at the preparatory session:

298 CCP, Article 502(4a)

299 CCP, Article 502(6)

300 CCP, Article 504(4)–(5)

301 But this time period may be shortened or fully disregarded if the defendant and the defence counsel give their consent. See: CCP, Article 352.

302 CCP, Article 78(7)

303 CCP, Article 500(4)

a) the defendant may plead guilty and may waive their right to a trial at the preparatory session with regard to that criminal offence to which they plead guilty;

b) if the court accepts the confession, it will not examine whether the facts of the case as included in the indictment are well-founded, and will not examine the question of guilt;

c) if the defendant does not plead guilty in accordance with the indictment, he/she may present at the preparatory session the facts and the related evidence serving as a basis for his/her defence, and may put forth a motion to conduct an evidentiary procedure or to exclude certain evidence.[304]

The court shall repeat the warnings above **at the preparatory session, before starting the defendant's interrogation**, and at that point, the general cautions about the defendant's rights and obligations are repeated as well,[305] which cover the rights listed in Article 3(1) of Directive 2012/13/EU. Thus, no legislative deficiency can be detected in terms of the implementation of the provisions of the EU directive, and the research has not signalled any practical problems either in this regard.

3.2.4.4. Effective judicial control and remedy

At the preparatory session, the court shall question the accused "with a view to the nature of the preparatory session",[306] which means that **the questioning may only entail the examination of the fulfilment of the conditions for accepting the guilty plea**.[307] Accordingly, just as in the case of the settlement, the most important question in terms of the effectiveness of judicial control is how the court ascertains for example whether the defendant understood the nature of his/her statement and the consequences of the court approving it, or whether there is no reasonable doubt as to the sanity of the defendant and as to the voluntariness of the confession, or whether the defendant's confession is supported by the case files – while being mindful of the limitation that no full evidentiary procedure may be carried out at the preparatory session. This is of particular importance also because there have been reports of cases where it has turned out after the judicial acceptance of a guilty plea that "the accused was not fully aware of the possible consequences of their confession".[308]

According to the CCP's Commentary, "it is no obstacle to the conclusion of the case at the preparatory session that the accused does not wish to make a detailed testimony beyond a definite confession that includes the admission of guilt",[309] but "it may be necessary for the judge to be convinced that the confession contains the facts necessary to identify the statutory elements of

304 CCP, Article 500(2)(a)–(c)

305 CCP, Article 502(3)

306 CCP, Article 502(3)

307 CCP, Article 504(1)

308 Vass, p. 19.

309 Balázs Elek in: Péter Polt (ed.): *Kommentár a büntetőeljárásról szóló 2017. évi XC. törvényhez (Commentary of Act XC of 2017 on the Code of Criminal Procedure)*

the criminal offence in question".[310] Furthermore, according to the CCP's official reasoning, "the judicial assessment of the sincerity of the confession may require the accused to present, in addition to the confession, facts supporting that he/she committed the offence".[311]

It is also necessary to examine **whether the confession is supported by the case file**. In the official reasoning attached to the amendments that expressly defined the scope of the interrogation as referred to above, the legislator stated in this connection the following: "In the framework of the preparatory session, it is therefore necessary to identify, or at least to attempt to identify, in order to ensure the admissibility of the confession, any inconsistency between the accused person's confession and his/her own previous testimony or even the case file, since the court must find an acceptable explanation also for these in the context of examining of the sincerity of the confession."[312] It is linked to the same problem that, according to the official reasoning, "it is an important realization of the time period passed since the entry into force of the CCP that a large number of defendants confess to the offence they are charged with who did not do so during the investigation or who expressly denied that they had committed the offence. […] If the accused can give a convincing explanation as to why he/she changed his/her previous statement/confession, the court may accept the confession. If the court has reasonable doubts about the guilty plea because of the contents of the case file, the circumstances of the confession or for any other reason, it shall refuse to accept it."[313]

The Memorandum shows that the prosecution also attaches great importance to the defendant's questioning at the preparatory session being substantive. Accordingly, the Memorandum states that the questioning "should not be limited to a brief statement (of few words) related to the admission of guilt. The court must question the defendant making a confession to such an extent and with such content that it can reasonably assess the fulfilment of all the conditions [for accepting the confession as set out in the CCP]".[314] The Memorandum further adds that "the thoroughness of the interrogation is of particular importance in cases where the accused admits guilt at the preparatory session without having confessed at all during the proceedings before that or has previously denied that he committed the offence he/she is charged with". The Memorandum also sets out tasks for the prosecutors in the event that the judge does not conduct the hearing in line with the above. In such cases, "the prosecutor present shall draw the court's attention to [the above] in the form of a comment or, if this proves to be unsuccessful, should endeavour to […] make up for the [court's] omission by asking questions. In the event that the court does not provide an opportunity to do so […], the prosecutor shall request that this fact be included by the court in the minutes of the preparatory session."[315]

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310 Balázs Elek in: Péter Polt (ed.): *Kommentár a büntetőeljárásról szóló 2017. évi XC. törvényhez (Commentary of Act XC of 2017 on the Code of Criminal Procedure)*

311 Draft Bill T/9918 on the Amendment of the Code of Criminal Procedure and Other Related Acts of Parliament, Detailed official reasoning, https://www.parlament.hu/irom41/09918/09918.pdf, pp. 200–201.

312 Draft Bill T/9918 on the Amendment of the Code of Criminal Procedure and Other Related Acts of Parliament, Detailed official reasoning, https://www.parlament.hu/irom41/09918/09918.pdf, p. 200.

313 Draft Bill T/9918 on the Amendment of the Code of Criminal Procedure and Other Related Acts of Parliament, Detailed official reasoning, https://www.parlament.hu/irom41/09918/09918.pdf, p. 201.

314 The section regarding Articles 499–503 of the CCP in the Memorandum, Point 6)

315 The section regarding Articles 499–503 of the CCP in the Memorandum, Point 6)

Of course, the Memorandum is not binding on the courts, and on the basis of the research experience, diverging practices regarding the depth of questioning and the failure to conduct a questioning of adequate depth and content in many cases indicate that there is a need for more detailed legislation on the depth and content of questioning, and closer cooperation between the court system and the prosecution service would be necessary. The need for this is also shown by the fact that in 22 of the cases made available to us by attorneys, the accused was questioned as prescribed by the CCP (the defendant was not questioned in two cases and in four cases this could not be established from the available documents), but in nine of those the court only asked the accused a yes-no question on whether he/she admitted his/her guilt in relation to the criminal offence he/she was charged with, while the questioning was "substantive" in 11 cases (in two cases this could not established on the basis of the available documents).

It would also be necessary to clarify on a legislative level what exactly is meant by **"admission of guilt"**. According to the Memorandum, the respective statement of the accused "can be considered as an admission of guilt if they have fully admitted the facts set out in the (amended) indictment and their admission also covers their culpability (for example, they do not invoke a ground for the exclusion or termination of criminal responsibility)".[316] In contrast, according to the CCP's official reasoning, accepting the confession "is not conditional upon the accused making a confession with respect to the act(s) underlying the proceedings that includes the admission of [culpability]".[317]

In relation to the **reasonable doubt as to the defendant's sanity**, the CCP's Commentary states that, for example, a guilty plea is excluded "in the case of an accused whose pathological mental state was the reason why the prosecutor is seeking his acquittal and compulsory treatment", since a pathological mental state excludes criminal responsibility, and a defendant with a pathological mental state cannot be found guilty by a court. According to the Commentary, "accepting a confession from a defendant with limited mental capacities can also raise concerns".[318] In addition, leading court decision BH2021. 160. provides further guidance, as follows:

> "I. The possible – established – limitation of the accused person's mental capacities does not in itself automatically exclude the acceptance of the confession. In this case, however, it must be examined, inter alia, in the light of the mental state of the accused, whether, in the specific case and in respect of the specific offence, they understood the nature of their statement and the consequences of [the court] accepting it. [...].
>
> II. Sanity must always be examined in relation to the offence underlying the given case; neither the proximity in time nor the similarity of the offences in question provide a basis for the court to find that the accused was competent or not competent in relation to the offence in question on the basis of an expert opinion prepared in another case and in relation to another offence. Such an expert opinion raises the possibility that the defendant's mental capacity

316 The section regarding Articles 504–505 of the CCP in the Memorandum, Point 1)

317 Draft Bill T/9918 on the Amendment of the Code of Criminal Procedure and Other Related Acts of Parliament, Detailed official reasoning, https://www.parlament.hu/irom41/09918/09918.pdf, pp. 200–201.

318 Draft Bill T/9918 on the Amendment of the Code of Criminal Procedure and Other Related Acts of Parliament, Detailed official reasoning, https://www.parlament.hu/irom41/09918/09918.pdf, p. 202.; cf.: CCP, Article 522.

was also limited in respect of the act underlying the new case. This is a doubt which precludes the acceptance of the confession and the conclusion of the case at the preparatory session."

Finally, it should be noted that the CCP "does not explicitly state **whether the court has the discretion to depart from the prosecution's legal classification**" in the case of a sentencing motion and confession at a preparatory session.[319] Opinions in literature point in the direction that if it disagrees with the classification, the only option for the court is not to accept the confession at the preparatory session and to hold a trial in the case,[320] but this is yet another issue where legislative guidance seems to be warranted. Based on the experience of judges, it is now standard practice that if they disagree with the classification or, for example, the punishment or measure proposed is unlawful, they bring this to the attention of the prosecutor, who can amend the sentencing motion on this basis.

3.2.4.5. Impact of the confession on the rights of co-defendants not confessing at the preparatory session

Similar to the settlement to plead guilty, in cases with multiple defendants a confession at the preparatory session can **significantly limit the possibilities of the co-defendants who do not confess in terms of their own defence**, and this is not a theoretical situation: from the eight cases provided by the attorneys in the research in which there were multiple defendants, in seven cases not all the defendants confessed at the preparatory session (and these included one case in which at least one defendant had concluded a settlement to plead guilty). Out of these, in three instances the cases were separated in respect of the defendant who confessed at the preparatory session, in three instances they were not, and in one case we had no information on this. Of the 20 decisions published by the courts which concerned cases with multiple defendants, in 14 cases not all the defendants confessed at the preparatory session (and these included three cases where at least one defendant had concluded a settlement to plead guilty earlier).

One of the ways in which the CCP seeks to counterbalance the effect of a co-defendant's confession on the rights of the other defendants is setting out the following: "if the court holds a preparatory session separately [for each defendant] in a proceedings conducted against multiple accused persons but without separating the cases as such, it shall notify the co-accused and their defence counsel not covered by the preparatory session in accordance with the general rules"; and, on the basis of the notification, the defence counsel appearing at the preparatory session may, within the limits otherwise applicable to the preparatory session, pose questions to the other co-defendants.[321] (It should be noted that it has been reported that there is no uniform practice across the country as to whether the other defendants' defence counsels may be present at the preparatory session.[322]) The "co-defendant who has already been questioned may be present at

319 Szigeti, p. 98.

320 Cf. Szigeti, p. 98. and Bérces–Gyulay, p. 28.

321 Draft Bill T/9918 on the Amendment of the Code of Criminal Procedure and Other Related Acts of Parliament, Detailed official reasoning, https://www.parlament.hu/irom41/09918/09918.pdf, p. 201.; cf.: CCP, Articles 500(1) and 502(6).

322 Gellér–Bárányos, p. 307.

the interrogation of his/her co-defendant, and may also ask questions"[323] (but the interrogated co-defendant is not obliged to answer them of course). In addition, it was explicitly stated in some of the judgments published by the courts that "the questioning of a defendant who waived their right to a trial [at the preparatory session] cannot serve to obtain for later use evidence related to co-defendants who have not waived their right to a trial".[324]

It is a recurring criticism that the CCP's related rules "have been essentially designed for cases with a single defendant", and if not all of the co-defendants confess at the preparatory session, then "in the case of the defendants who wish to present a defence on the merits and who do not confess to committing the criminal offence they are charged with, the right to a trial, the right to an effective and substantive defence and the right to a remedy only formally prevail",[325] for the following reasons.

If the cases of the accused person(s) who confessed are separated and separately closed, the accused person(s) whose cases have been closed **may be heard as witnesses** at a later stage of the proceedings against their co-defendants, **and even if they refuse to testify as witnesses, their testimony previously given as accused persons may still be used**.[326] In addition, the confession accepted by the court practically "fixes the facts and the legal classification", and so even though a trial is held in the case of the co-defendant(s) who do not confess, "there is no effective defence", since "the establishment of the facts, the legal classification and, in some respects, even the sentencing issues are in fact determined by the bill of indictment and the confession [at the preparatory session] of the co-accused".[327] Thus, the statutory construction (just as in cases with multiple defendants where not all the defendants concluded a settlement to plead guilty or not all the settlements have been approved by the court) places the non-confessing defendants at a disadvantage compared to their co-defendants who have confessed at the preparatory session. (One defence counsel also raised the point that, on top of the latter, the first defendant to confess does not have equal chances.) In addition, just as in relation to settlements, it is unclear what the procedure to follow is if a defendant who has previously confessed at the preparatory session is called to make a testimony as a witness, but his/her testimony as a witness does not match his/her confession previously accepted by the court.

However, it can be an advantage not only for the criminal justice system, but also for defendants who play a minor role in a given offence, that "in particular in cases with a lot of defendants and in 'huge' cases it can easily occur that for the defendants having a marginal role a final decision is issued already at [the preparatory session], so the case ceases to be an unmanageable case with a lot of defendants, the evidentiary procedure can be concentrated on the main perpetrators, and it is not necessary to summon all the defendants to a significant number of trial hearings".[328]

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323 Draft Bill T/9918 on the Amendment of the Code of Criminal Procedure and Other Related Acts of Parliament, Detailed official reasoning, https://www.parlament.hu/irom41/09918/09918.pdf, p. 201.

324 Metropolitan Tribunal, B.713/2018/15.; in agreement with that on the second instance: Metropolitan Regional Court, Bf.261/2018/6.

325 Gellér–Bárányos, p. 309.

326 CCP, Article 177(5)

327 Gellér–Bárányosi, pp. 309–310.

328 Balázs Elek in: Péter Polt (ed.): *Kommentár a büntetőeljárásról szóló 2017. évi XC. törvényhez (Commentary of Act XC of 2017 on the Code of Criminal Procedure)*

It should be mentioned that, following a judicial initiative to declare it unconstitutional, the Constitutional Court examined one of the provisions of the CCP that concerns cases with multiple defendants.[329] In the petitioning judge's view, in cases with multiple defendants where the actions of the accused are closely linked and their conduct is complementary, the fundamental right to an impartial tribunal is violated if the same judicial panel which accepts the confession of one of the accused persons on the basis of the case files at the preparatory session continues the trial against the other accused persons who have not plead guilty, in which trial the same case file constitutes evidence. However, the Constitutional Court rejected the petition in Decision 26/2021. (VIII. 11.) AB.

[329] CCP, Article 503(2) Where the proceedings involve multiple defendants and other conditions for separating the cases are met as well, the court may separate the cases pending before it with respect of the defendant who pleaded guilty in order to deliver the judgment.

4.

The systemic effects and risks of trial waiver forms

Since relatively little time has passed since the entry into force of the new CCP, it is still relatively early to assess the impact of the two forms of trial waiver covered by the present country report and of the other legal institutions serving the acceleration of the proceedings, on, for example, the development of the already high prosecutorial success rate of over 98% and on the number and proportion of custodial sentences handed down. It is also premature to draw conclusions on the impact of the various forms of trial waivers on the use of coercive measures restricting personal liberty that require a judicial authorisation, also because the new CCP has introduced important and positive changes to the system of coercive measures on a legal level, and it would be necessary to assess separately the practical impact of these changes as well. (It should be noted here that the decrease in the number and proportion of pre-trial detainees since 2014 unfortunately stopped in 2020, and the trend got reversed: while on 31 December 2019, 2,709 persons, 16.59% of the total prison population were in pre-trial detention,[330] on 31 December 2020, 3,421 persons, 20.4% of the total prison population consisted of pre-trial detainees.[331]) The interviewees have not expressed such a view that pre-trial detention is used by the authorities specifically to push defendants towards these forms of cooperation, but the view expressed in our previous researches that there are instances when the authorities use pre-trial detention as a means of exerting pressure and to coerce defendants to plead guilty, remains valid.[332]

At the same time, it was raised in the interviews that the sentencing motions perceived as generally severe by the interviewees and the circumstance that it is not in the interest of judges to impose or apply a lighter punishment or measure than the sentencing motion may have the effect of tightening judicial sentencing practices in the medium term. However, it was beyond the scope of the present research to answer the question of how strict sentencing motions actually are, and whether there is any change in the judicial sentencing practice in this context.

As for the risk of an increase in the number of wrongful convictions, often raised in the context of plea bargains,[333] we did not encounter any cases in the research where such a conviction was the result of the possibility of a form of cooperation and trial waiver. However, our sample was of course distorting in this respect, since we were only able to examine cases where the defendant had a defence counsel at least from a certain point in the proceedings, whereas the risk of wrongful conviction is obviously higher for defendants without a defence counsel, so the scope of the research was limited in this respect. However, it was noted both in the literature and in the interviews that both forms of cooperation by the defendant carry the risk of guilty pleas that do not fully reflect the reality of the facts of the case from the viewpoint of the defendant, or do not

330 *Évkönyv – Büntetés-végrehajtási szervezet – 2019 (Yearbook – National Penitentiary Service – 2019)*. National Penitentiary Headquarters, https://bv.gov.hu/sites/default/files/A%20B%C3%BCntet%C3%A9sv%C3%A9grehajt%C3%A1si%20Szervezet%20%C3%89vk%C3%B6nyve%202019_0.pdf, p. 14.

331 *Évkönyv – Büntetés-végrehajtási szervezet – 2020 (Yearbook – National Penitentiary Service – 2020)*. National Penitentiary Headquarters, https://bv.gov.hu/sites/default/files/BVOP%20%C3%A9vk%C3%B6nyv%20-%202020.pdf, p. 21.

332 See: Tamás Fazekas – András Kristóf Kádár – Nóra Novoszádek: *The Practice of Pre-Trial Detention: Monitoring Alternatives and Judicial Decision-Making. Country report – Hungary*. Hungarian Helsinki Committee, October 2015, https://helsinki.hu/wp-content/uploads/PTD_country_report_Hungary_HHC_2015.pdf, pp. 57–58.

333 See for example: Hack, p. 83.

contain the legal classification that the defence considers appropriate. This trend is reinforced by the rule in the CCP that in the case of a settlement to plead guilty, the statement of facts and the legal classification cannot be subject to negotiation.

The two forms of cooperation by the defendant discussed in the present report have a significant impact on the right to an effective defence in cases with multiple defendants as explained above, because if one of the defendants makes use of these possibilities, the defence of the other co-defendants who do not conclude a settlement or who do not confess at the preparatory session becomes difficult or even impossible.

From the point of view of the defendants, it should also be added that the dangers inherent in these forms of cooperation and trial waiver by the defendant will mostly make the situation of those more difficult who are already more vulnerable than the average in a criminal procedure. Naturally, the risks inherent in both forms of cooperation, including pressure from the authorities, are greater for defendants with poor advocacy skills, indigent defendants, defendants without a defence counsel, and defendants who cannot afford or have great difficulty in paying for a retained attorney. Similarly, the guidance included in the Memorandum issued by the Chief Public Prosecutor's Office that when negotiating a settlement, the prosecution "shall require the defendant to pay compensation for the total financial loss caused, and this shall be the starting point in the negotiation aimed at concluding a settlement",[334] affects defendants with financial difficulties adversely (but from a different direction), and may make it impossible for a significant proportion of defendants to conclude a settlement.

The forms of cooperation discussed also change the role and weight of the participants of the criminal proceedings. On the one hand, they obviously further strengthen the role of the prosecution in the system and its control over the outcome of the criminal proceedings, but they also increase the influence of the investigating authority, as research interviews show that it largely depends on them whether the prosecution initiates a settlement at all. The legal framework allows in the case of both forms of cooperation for a meaningful judicial control of their lawfulness, but, due to the lack of sufficiently detailed legal provisions, much depends here on the individual attitude of the judge and how they perceive their own role. This is also reflected by the fact that, based on the research, judicial practice varies in terms of the depth and manner in which the defendants are questioned at the preparatory session, and the manner in which judges ascertain whether the settlement or the confession made at the preparatory session may be approved or accepted. It was also raised at the workshop in relation to the role of judges and of the trial, whether for example in high-profile cases of high public interest the aim of the criminal procedure is surely achieved by applying these trial waiver forms, where procedures are resolved more quickly but at the same time with the exclusion of the public, and whether it would not be appropriate to allow the possibility of refusing to use these forms of cooperation if the "nature of the case" so requires.

[334] The section concerning Article 411 of the CCP in the Memorandum

As indicated earlier, research interviews and the literature suggest that both forms of cooperation and trial waiver also entail changes in the role and work of the defence counsels. The forms of cooperation discussed require "new ways of thinking and careful client management. The favoured strategy of refusing to confess in the course of the investigation, which does not require to fully get to know the case or the time-consuming preparation of the client, can no longer be maintained. The defence counsel shall have all the information at their disposal to decide whether or not to use a consensual solution."[335] In particular, the settlement to plead guilty "changes the role of defence counsels as well, who must get to know the case in-depth and prepare their client thoroughly already in the investigative phase".[336]

[335] Békés, p. 35.

[336] Bérces-Gyulay, p. 32.

5.

Conclusions and recommendations

For a summary evaluation of the functioning of the settlement to plead guilty and the confession at the preparatory session, it is worth briefly reviewing the extent to which they have fulfilled the legislator's expectations and achieved the objectives previously set by the legislator.[337] However, it should be stressed again that the two legal institutions covered were introduced only a relatively short while ago, so our assessment can obviously only be limited.

As far as the **settlement to plead guilty** is concerned, this legal institution naturally contributes to improving the timeliness of criminal proceedings by significantly shortening the court phase, but this advantage does not apply in practice to the investigative phase. One of the reasons for this is the interpretation of the law by the prosecution, which requires a complete investigation of the cases before entering into a settlement. In addition, carrying out a settlement process entails an additional workload both for prosecutors and members of the investigating authority as compared to pressing charges under the general rules. For the defendants, there is also the benefit of getting a lighter sentence, in addition to the proceedings being shorter. However, it should be pointed out that in practice, the optional elements of a settlement that go beyond the punishments or measures that can be imposed and applied also in the absence of a confession are very rarely used. This also reduces the criminalistic value of the settlement and does not necessarily guarantee the victims adequate remedy.

The possibility to **confess and waive the right to a trial at the preparatory session**, as well as the rapid and significant spread in practice of this legal institution, has significantly reshaped the criminal proceedings. Naturally, this form of cooperation shortens only the court phase from among the phases of a criminal procedure, and does not save time or work for the prosecution and the investigating authority in the investigative phase. The benefit of lighter sanctions imposed on the defendants is limited in practice due to the guidelines of the Chief Public Prosecutor's Office on sentencing motions and the sentencing motions themselves, which are perceived as strict by stakeholders.

It is important to highlight that the amendments to the CCP which entered into force on 1 January 2021 have addressed a series of problems signalled by practitioners, both in relation to the settlement to plead guilty and the confession at the preparatory session. Both the direction of the amendments and the fact that they were adopted relatively quickly after the entry into force of the new CCP, are to be welcomed, but further changes would be necessary at the legislative and internal regulatory level to come closer to achieving the legislative objectives. It is also to be welcomed that the Kúria (Hungary's highest judicial forum) established an expert group to analyse the practice in relation to preparatory sessions. Finally, it should be stressed once again that the future success of both legal institutions, and in particular of the settlement, depends on whether "the institutional culture can follow the legislative changes",[338] and whether the attitude of the participants of the criminal procedure will change or not, both in terms of their role and their relationship with each other.

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337 Draft Bill T/13972 on the Code of Criminal Procedure, Detailed official reasoning, https://www.parlament.hu/irom40/13972/13972.pdf, pp. 453–454 and 554–555.

338 Hack, p. 83.

Our recommendations seek to reflect on the dilemmas above on the basis of the research results. In addition to the recommendations below, we also maintain our earlier recommendations aimed at guaranteeing the enforcement of the rights of defendants.[339]

Recommendations for the legislator and the Ministry of Justice:

- Make it legally possible for the facts of the case and the legal classification to be the subject of the negotiations aimed at concluding a settlement, or at least for the defence to make a motion for these in the framework of the negotiation.
- Address on a legislative level the issue of amending a settlement, allowing for the amending of the settlement before the indictment, but excluding the termination of the settlement. In this context, in order to ensure that the rule does not remain a *lex imperfecta*, it is necessary to regulate the exceptional cases in which it is possible to press charges not in line with the content of the settlement.
- The substantive rules on sentencing in the event of a settlement should be reviewed and amended in favour of the defendants.
- It would be necessary to adopt rules that reduce the workload of the prosecution and the investigating authority in the context of settlements.
- Amend the CCP in order to ensure that there is a possibility in every case to involve the victim in the process of concluding the settlement.
- It should be prescribed by law or internal binding rules that the prosecution is obliged to react either orally or in writing to the initiatives of the defence counsel or the defendant to negotiate a settlement, irrespective of the initiative's format.
- It should be made compulsory on a legislative level that, if the prosecutor does not agree with the initiative aimed at the settlement, they shall state their reasons for that in sufficient detail to properly instruct the defence as to whether it is worthwhile to try to initiate a settlement again at a later stage of the investigation. Consideration should be given to ensuring that if the prosecution rejects the initiative aimed at concluding a settlement without adequate justification, this has explicit consequences at a later stage – for example, the court would be entitled to apply the more lenient sentencing rules prescribed for settlements.
- A rule should be included in the law that makes it clear that a settlement does not require a full investigation of the facts.
- It would be necessary to adopt rules that reduce the workload of the prosecution and the investigating authority in the context of settlements, for example by expressly setting out that the defence can submit to the prosecution the proposed text of the settlement, drafted in line with the law.
- The CCP should be amended to exclude the use as evidence or evidentiary means of case materials generated in relation to the initiation of the settlement or in connection with the settlement also if (i) the settlement is concluded but the prosecution presses charges under the general rules of the CCP, despite the express prohibition of the CCP; and if (ii) the settlement has been concluded but has not been approved by the court.

339 In detail, see: Kádár–Novoszádek–Szegő, Chapter 5.2.

- The CCP should be amended in a way that if the settlement is not concluded or is not approved, the use of evidence obtained on the basis of the defendant's testimony made in the framework of the settlement shall be excluded.
- The CCP should be amended so that the prosecution has to submit a sentencing motion in all of the cases, and if it does not, shall state its reasons for not doing so.
- Make it explicitly possible on a legal level to modify a sentencing motion in favour of the defendant at the preparatory session also after the defendant's testimony has been heard.
- If the sentencing motion is only submitted at the preparatory session, there should be an express statutory possibility for the defence to request the adjournment of the hearing.
- Regulate in more detail on a legislative level the scope and content of the questioning in the context of the judicial review of the lawfulness of a settlement, ensuring uniform application of the law, in order to ensure that courts examine in merit the conditions for approving a settlement.
- Ensure at a legislative level also with regard to confessions at the preparatory session, that the scope of questioning is appropriate, clarifying at the legislative level the principle stated by the Memorandum that questioning should not be limited to a brief statement (of few words) related to the admission of guilt, and that instead, the court shall question the defendant making a confession to such an extent and with such content that it can reasonably assess the fulfilment of all the conditions for accepting the confession as set out in the CCP.
- In the context of the confession at the preparatory session, it should be clarified on a legislative level what exactly is meant by "admission of guilt", and whether the confession of the defendant shall also cover culpability.
- There should be an explicit legal possibility for the judge to indicate to the prosecutor his/her disagreement with the legal classification as included in the bill of indictment in the case of a confession at the preparatory session, and the prosecutor should then be able to modify the legal classification.
- The CCP should be amended in a way that if, in a case involving multiple defendants, the court approves the settlement concluded with one of the co-defendants or accepts the confession of one of them at the preparatory session, the testimony of that defendant may not be used as evidence in the case against his/her co-defendants.
- The CCP should be amended in a way that if, in a case involving multiple defendants, the court approves the settlement concluded with one of the co-defendants or accepts the confession of one of them at the preparatory session, the case of the "remaining" defendants cannot be adjudicated by the same judge or judicial panel.
- The related statistical data collection systems should be reviewed, and proposals should be made to the authorities and the court system that they be fine-tuned in order to provide the legislator with a comprehensive picture of the application of these legal institutions.
- Ensure that the prosecution service and the courts collect data on the practical functioning of the legal institutions in a way that can be connected and is comparable.

- Ensure that, as a minimum, the following data are collected, in addition to those currently collected, disaggregated by year and by county, according to the number of defendants affected:
  - the number of settlements concluded, and of these, the number of settlements approved and not approved by the court, and their distribution by the typical criminal offence, as well as by the gender, nationality and age group (juvenile/adult) of the defendant;
  - the number of sentencing motions and the number of the confessions made and accepted or rejected following such motions, as well as their distribution by the typical criminal offence and by the gender, nationality and age group (juvenile/adult) of the accused;
  - the number of first instance and final convictions/acquittals by the type of procedure ("ordinary" procedure, settlement to plead guilty, confession at the preparatory session, penal order, arraignment);
  - the distribution of punishments imposed and measures applied by type of procedure, broken down by the typical criminal offence, both at first and second instance;
  - the number of first instance convictions based on a settlement or a confession at the preparatory session within the number of first instance convictions quashed at second instance.

Recommendations for the prosecution service:

- Revise the prosecutorial guidelines that require a full investigation of the facts and the gathering of all evidence before the prosecution can even get to be open to the possibility of a settlement.
- Restructure the internal workflow of the prosecution in relation to settlements in a way that concluding a settlement requires less resources from the prosecution service than at present.
- It should be reviewed whether it is necessary for the leading prosecutor to be involved in all of the settlement processes.
- Make the assessment of their activities regarding the initiation of settlements, the content of settlements, and the process of concluding settlements part of the prosecutors' performance evaluation, thereby encouraging the conclusion of settlements.
- Even in the absence of a statutory provision to this effect, it should be described in a mandatory manner that if the prosecutor disagrees with the initiative aimed at concluding a settlement, they shall be obliged to provide their reasons in sufficient detail to properly instruct the defence as to whether it is worthwhile to try to initiate a settlement again at a later stage of the investigation.
- Take steps to ensure that optional elements, such as prescribing certain behavioural requirements, are given greater weight in settlements.
- Abolish the provision in the Memorandum that the settlement should require the defendant to pay compensation for the total financial loss caused, and this shall be the starting point in the negotiation aimed at concluding a settlement. In order to establish the appropriate remedy, financial or otherwise, for the harm caused to the victim, it should be possible in all cases to involve the victim in the process of determining the respective condition in the settlement.

- Revise the Memorandum's rule that the fact of the confession should be given the same weight as a mitigating circumstance in a sentencing motion as it would otherwise be given, and instead, the Chief Public Prosecutor's Office should encourage prosecutors to give greater weight to confessions made at the preparatory session than to confessions made later in the court phase.

Recommendations for the police:

- Make the assessment of police activities regarding the settlements and the process of concluding settlements part of the police's performance evaluation, and encourage their contribution to the conclusion of settlements.
- Issue internal police regulations and professional guidelines for police officers on the criteria to be taken into account when assessing whether a settlement is justified and expedient.
- In police training, special emphasis should be placed on the system of criteria used for identifying whether a settlement would be justified and expedient in a particular case.
- The template for the questioning of the suspect in the central template-collection of the RobotZsaru NEO system should be reviewed, with a view to ensure that defendants are informed about the possibility, nature and consequences of the settlement to plead guilty in an adequate and accessible manner.

Recommendations for the courts:

- Take steps to ensure that the courts examine in merit the fulfilment of the conditions for approving a settlement and accepting a confession as provided for in the CCP, and in doing so, pay particular attention to the personal circumstances of the defendants, their possible vulnerability, and any external factors which may contribute to the defendant not confessing voluntarily, in particular in the case of those who do not have a defence counsel.
- Take steps to ensure that the questioning of the defendants is of sufficient scope and content both when the court examines the lawfulness of the settlement and when the defendant confesses at the preparatory session, and that the courts examine in merit the fulfilment of the conditions for approving a settlement and accepting a confession as provided for in the CCP. This should be facilitated by the court system through issuing professional guidelines and training.
- Conduct a comprehensive, nationwide and representative research on the strictness of prosecutorial sentencing motions as compared to the judicial sentencing practice.
- Conduct a comprehensive, nationwide and representative research and on the impact of sentencing motions on the judicial sentencing practice.

Recommendations for attorneys:

- Encourage the use of optional elements in settlements.
- If attorneys detect a violation of a procedural safeguard in connection with the settlement to plead guilty or the confession at the preparatory session, they should exercise their right to submit a complaint and seek remedy.

- Every time a defence counsel did not participate in the investigation phase of the procedure or was unable to consult the files of the investigation through no fault of their own, they should request, within three working days of the receipt of the bill of indictment, that the court sets the date of the preparatory session for a date later than one month after the date the bill of indictment was served.
- Contribute by making use of their possibilities flowing from their procedural position as defence counsels to ensuring that when the courts examine the lawfulness of a settlement and when the defendants confess at the preparatory session, the questioning of the defendants is of sufficient scope and content, and that the courts examine in merit the fulfilment of the conditions for approving a settlement and accepting a confession as provided for in the CCP.
- Greater emphasis should be placed in the training of attorneys on these two legal institutions.

Recommendations for all professional stakeholders:

- Evaluate, also on a qualitative basis, in a continuous and systematic manner, the practice of the settlement to plead guilty and the confession at the preparatory session, with particular attention to the practice of sentencing.
- The various professional stakeholders should contribute to the development of a nationally uniform interpretation and practice of the law and to the recontextualization of the relationship between the actors of the criminal proceedings by issuing common internal rules and guidelines[340] on the two legal institutions and by organising joint trainings and joint professional discussions.[341]

[340] Cf.: "the Chief Public Prosecutor's Office and the Hungarian Bar Association should issue jointly agreed guidelines and procedural aids for the development of settlements, thus strengthening the existence of the principle of trust" (Békés, p. 32.).

[341] Cf.: "it would be key for prosecutors and members of the investigating authorities to prepare together for the new division of labour in the investigative phase, and that police officers conducting investigations should prepare for the same as prosecutors in the course of their training" (Hack, p. 84.).

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