Hungarian Helsinki Committee

The settlement to plead guilty and the confession at the preparatory session of the court

Recommendations for the protection of the rights of defendants

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1. Introduction

In many parts of the world, trials are being replaced by legal regimes that encourage suspects to admit guilt and/or waive their right to a full trial. The proliferation of trial waiver systems is seen by many as a response to address the overburdening of our criminal justice systems. In the light of austerity measures and budgetary cuts, there is a financial interest in resolving investigations and procedures as quickly as possible. In one of the few European Court of Human Rights cases dealing with trial waiver systems, the Court noted that they were becoming common features of European criminal justice systems and were "viewed as important in facilitating speedy adjudication, alleviating the workloads of the courts, and reducing sentences imposed and the number of prisoners".[1]

However, the problem of overloaded courts and consequent backlogs is not only due to criminality, but to increasing criminalisation on the one hand, and on the other, policies limiting economic and human resources. Whereas efficiency and costs should not be the parameters for measuring justice systems, it is an element that judicial systems cannot ignore.[2] As criminal justice systems continue to face increasing workload, the risk is for justice, fairness and truth to rapidly be overlooked when policy and lawmakers design the criminal justice system of tomorrow.

In addition, the increased recourse to trial waiver systems implies a shift of powers from the judiciary to prosecution services. Trial waiver systems can take investigation, prosecution and sentences outside of meaningful judicial oversight.

While trial waiver mechanisms can ensure a substantial acceleration of the criminal process and save resources, their application carries serious risks as regards compliance with the rule of law and the right to a fair trial. Strong guarantees, both structural and procedural, must be put in place to allow suspected and accused persons to give a fully informed and voluntary consent to waive their rights, and protect them from violations of procedural rights that might occur in the process. Fairness must always remain the goal of our criminal justice systems, not efficiency.

The international research project "Trial Waiver Systems in Europe", supported by the European Union and coordinated by Fair Trials, in the framework of which the present document has been prepared, aimed to gather comprehensive and comparative information on the use of trial waiver systems in the countries covered by the project. In Hungary, the research focused on two forms

1 *Natsvlishvili and Togonidze v. Georgia,* Application no. 9043/05, Judgment of 29 April 2014, § 87.

2 Lorena Bachmaier, The European Court of Human Rights on negotiated justice and coercion, *European Journal of Crime, Criminal Law and Criminal Justice,* 2018, pp. 236–237.

of procedures from among the various procedures introduced by Act XC of 2017 on the Code of Criminal Procedure (CCP) as of 1 July 2018 with a view to facilitate cooperation by the defendant and the timeliness of criminal procedures: on the settlement to plead guilty (which is concluded by the prosecution and the defendant in the investigation phase, before the indictment), and the procedure to be followed if the defendant confesses and waives their right to a trial at the preparatory session of the court.

In the present document, we summarise the most important conclusions of the research report pertaining to Hungary, prepared by the Hungarian Helsinki Committee,[3] and, building on those, we present our country-specific recommendations as well, which aim to ensure that the rights of defendants are respected also in the procedures of the settlement to plead guilty and the confession at the preparatory session.

3 The full research report is available on the Hungarian Helsinki Committee's website (www.helsinki.hu).

2. The need for systematic data collection and evaluation, and the need for a change in attitudes

A sufficiently in-depth examination of the practical functioning of the settlement to plead guilty and the confession at the preparatory session and their impact on the criminal justice system can only be carried out effectively on the basis of adequate quantitative and qualitative information, and only such assessments can serve as a basis for further, carefully considered reforms and amendments. Therefore, it is necessary to collect statistical data systematically, in such a way that trends can be clearly followed and that data collected by different bodies at different stages of the criminal procedure can be linked to each other. While not denying the importance of the extensive data collection carried out by the Chief Public Prosecutor's Office, it should be pointed out that currently, many important data points and correlations cannot be extracted from the available data tables.

There is also a need for the relevant bodies of the participants of the criminal procedure and the legislator to evaluate the emerging practice on a qualitative basis, in a continuous and systematic manner, taking into account the experience of the defendants as well. This is crucial because a lot depends on the stakeholders of the criminal procedure and the practice established and shaped by them as to whether the new legal instruments will live up to the expectations, and without a continuous evaluation of this practice, the legislator cannot make an informed decision on whether any changes to the legislation are necessary.

A change of attitude on the part of the participants of criminal procedures, both as regards their own role and their relationship with each other, is also essential for the proper functioning of the two legal institutions.

Recommendations for the Ministry of Justice:

- 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 trial waiver procedures.
- 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 so-called "sentencing motions" (i.e. the prosecutor's motion for the amount and length of the punishment or the measure acceptable for the prosecution, would the defendant plead guilty at the preparatory session), 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 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 on the two legal institutions and by organising joint trainings and joint professional discussions.

3. Limiting the pressures on defendants and using fair incentives

Systemic pressures

International research indicates that defendants may plead guilty when innocent even where they do not believe they would be convicted at trial.[4] The reasons behind that vary: in many cases, defendants are pressured to waive their rights as a result of their own economic situation, because they cannot afford legal assistance and other costs that a full trial may induce, and would like to avoid lengthy and costly proceedings. This is amplified if acquittal rates are systemically low, because in that case defendants have the impression that they have very little chance to get acquitted anyway. Defendants can be motivated to waive their right to a trial if they believe that if they plead guilty, they will get out of or at least avoid lengthy pre-trial detention. Furthermore, defendants' decisions in this regard can also be influenced by their family or work situation. Thus, defendants can also be incentivised to plead guilty by various "external" factors, independent from the likely outcome of the trial.

Where trial waiver decisions are determined by the projected trial outcome, defendants mainly face the following rational choice: is the option to waive rights and receive a certain penalty more desirable than the option to risk a more severe penalty at trial? In this situation, provided that defendants receive quality legal assistance, they should be able to weigh up risks and rewards properly to minimize their loss. When the same decision is influenced by external factors like the ones listed above, defendants are no longer able to make rational decisions.[5] Thus, international research raises the issue that when the choice of waiving trial rights does not depend on the projected outcome of the trial, but on external factors, it is not certain how waivers can ever be exercised without constraint or external pressure, voluntarily.

All of this can lead to innocent people pleading guilty, and it also puts discriminatory pressure on certain groups of defendants.[6] For example, wealthy defendants could accept a temporary economic disadvantage and be acquitted at the end of a full trial, while others, who cannot afford such an economic disadvantage, do not have another choice but to accept the trial waiver and get convicted.[7]

4 Rebecca K. Helm: Constrained Waiver of Trial Rights? Incentives to Plead Guilty and the Right to a Fair Trial, *Journal of Law and Society*, vol. 46, 2019, p. 440.

5 Josh Bowers: Punishing the Innocent, *University of Pennsylvania Law Review*, vol. 156, 2008, p. 1117.

6 Rebecca K. Helm: Constrained Waiver of Trial Rights? Incentives to Plead Guilty and the Right to a Fair Trial, *Journal of Law and Society*, vol. 46, 2019, p. 433.

7 Alexandra Natapoff: Misdemeanors, *Southern California Law Review,* 2012, p. 1313.

Accordingly, the various trial waiver systems are not only undermined by structural shortcomings of national criminal justice systems (such as the lack of accessible information on rights or the lack of guarantees to receive quality interpretation), but they often reproduce and amplify these structural shortcomings and their effects on defendants.

The Hungarian research results also show that the dangers inherent in the various 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.

In line with the international experiences, Hungarian research interviews also showed that it may serve as an incentive for defendants to conclude the settlement if they are subject to a coercive measure. Based on the research interviews, defendants can be motivated to confess at the preparatory session of the court beyond the factors above by the fact that in this way they will not have to pay the defence counsel's retainer for the trial phase or that they may be released from pre-trial detention, and their personal and family circumstances may also play a role in their decision. Some defence counsels argued that the concept of the confession at the preparatory session carries the risk that defendants make a confession even if the bill of indictment does not fully correspond with the truth, just to speed up the proceedings.

It is inevitable that both the various participants of the criminal procedure and the legislator recognise and are conscious about the fact that a significant proportion of defendants are under strong pressure to plead guilty, and that every effort should be made to ensure that, if they choose to do so, defendants waive their right to a trial truly voluntarily and aware of the consequences.

The role of incentives

The first problem in terms of the incentives for a **settlement to plead guilty** is that, according to the literature, the substantive criminal law "benefit" allowed in the case of a settlement does not provide a real benefit to the defendant.

It is also an issue that even though the CCP lists several so-called optional elements for the settlement that go beyond the punishments or measures that can be imposed and applied also in the absence of a confession and that can serve as an incentive (e.g. that the prosecution may agree with the defendant that it would terminate the criminal procedure or refuse to launch an investigation with regard to certain criminal offences with a view to the defendant's cooperation with the authorities; that the defendant pays the damages claimed by the victim before the preparatory session on approving the settlement; or even that the defendant performs work of public interest; etc.), research experience shows that in practice, these optional elements are very rarely used. This also reduces the criminalistic value of the settlement and does not necessarily guarantee adequate remedy for the victims.

Furthermore, the guidance included in Memorandum LFNIGA//142/2019. of the Chief Public Prosecutor's Office on Certain Issues Related to the Application of the CCP (hereafter: Memorandum) 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", affects defendants with financial difficulties adversely. This unjustifiably narrows the options available under the CCP, and it is also contrary to the CCP's wording, along with the victim's potential interest in partial compensation or remedy.

Furthermore, the limited scope of the negotiations could also influence the attitude of the defence towards the settlement: according to the CCP, the facts of the case and the legal classification of the criminal offence subject to the settlement are determined by the prosecution, 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.

When it comes to **confession at the preparatory session**, from the defendant's perspective, beyond the quick closure of the proceedings, it is also a benefit that if the court accepts the confession, it may not impose a harsher punishment or may not apply a harsher measure in its judgment than the one indicated in the prosecutor's sentencing motion – and so, accordingly, it may impose a lighter sentence than the one included in the sentencing motion. However, it is important to note that making a sentencing motion is not obligatory for the prosecution, which can make the situation of the defendant very difficult, since in the absence of any prior knowledge of the prosecution's position, the defendant undertakes a great risk by confessing. 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.

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 they are 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 a good practice in this regard that the Memorandum issued by the Chief Public Prosecutor's Office provides the guidance in this respect that "if, however, the defendant's confession reveals additional mitigating circumstances, the prosecutor representing the charges may indicate in their oral statements that, in the light of the new circumstances, they consider it acceptable to impose a lighter sentence than the one proposed in the sentencing motion".

Recommendations for the legislator:

- 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 negotiations.
- 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.
- 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.
- 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.

Recommendations for the prosecution service:

- 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.

Recommendation for the police:

- The police should take steps to increase the number of suspect and witness interrogations audio and video recorded, which may, among other things, serve as an important safeguard for ensuring that procedural rights of those interrogated are respected.

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.

Recommendation 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.

4. Counterbalancing the risks flowing from the prosecution's powers

The trial waiver forms covered by the research further strengthen the role of the prosecution in the criminal justice system and its control over the outcome of the criminal proceedings. This increased influence manifests itself in different ways in the case of a settlement and a confession and trial waiver at the preparatory session. This may upset the delicate balance between the participants to the proceedings.

Statistical data shows that the prosecution initiates a **settlement to plead guilty** in much less cases than the defendant and the defence counsel. This 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.

One of the reasons is the prosecution's demand that the investigating authority ought to conduct a full-fledged investigation even if there is a settlement, which greatly contributes to the prosecutors frequently dismissing the defence's initiatives as premature or not expedient. The respective provisions and guidelines strongly push the practice into a direction whereby the prosecution requires full proof even in cases where a settlement could be reached. Accordingly, while it is the interest of the prosecution that the settlements "bridge" certain gaps in the evidence, and the settlements that are concluded do meet this expectation, the very strict interpretation adopted by the Chief Public Prosecutor's Office in this regard pushes the practice into the direction of more reliance on the sentencing motions.

Another reason for the severe underuse of the settlement to plead guilty is that a settlement means more workload for the prosecution than pressing charges in accordance with the general provisions, also because of the prosecution service's internal processes. This can also result that the prosecutors "choose" to submit a sentencing motion instead of negotiating a settlement.

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. 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, 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 settlement.

Settlements 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. Furthermore, it is also true for the police that they have no real "benefit" from the settlements, and so they are not interested in opting for it.

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. Firstly, making a sentencing motion is not obligatory for the prosecution, but in the absence of any prior knowledge of the prosecution's position, the defendant undertakes a great risk by confessing. Secondly, the legal institution can achieve its purpose only if the prosecutor actually makes a motion for the instance of a confession that will be worth considering by the defendant.

As far as the content of the sentencing motion is concerned, the Memorandum states that the sentencing motion may differ from the general motion only in that the fact of the confession must necessarily be taken into account, and 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". Meanwhile, the impression of the interviewees in the research was that the sentencing motions are strict and thus confessing at the preparatory session does not necessarily result in a more lenient sanction than if the case were to go to trial. This is at odds with the aim of the legal institution to reward and thus facilitate cooperation by the defendant.

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.

Recommendations for the legislator:

- 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 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.
- 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 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.

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.
- 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. 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 trial 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.

Recommendations for the courts:

- 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.

5. Guaranteeing the right to effective defence

5.1. Access to a lawyer

Access to a lawyer is guaranteed both in terms of the settlement to plead guilty and the confession at the preparatory session, and additional safeguards have been added.

In the case of the **settlement to plead guilty**, 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. 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. It facilitates effective defence that 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.

In relation to the **confession at the preparatory session**, the CCP prescribes as an extra guarantee that if there is already a defence counsel participating in the procedure, the preparatory session of the court cannot be held in their absence. 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 the court has doubts as to whether the accused understood the charges and the warnings included in the summons to the preparatory session and the consequences thereof, or the defendant motions for appointing an ex officio defence counsel. It is an additional safeguard that 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.

This does not mean, however, that the systemic problems that otherwise exist in the Hungarian system regarding the right of access to a lawyer and legal aid do not have a negative impact also in the case of the settlement to plead guilty or the confession at the preparatory session. These include, for example, that although under the new CCP the attorney acting as a defence counsel on the basis of an appointment (ex officio / legal aid defence counsels) is selected by the regional bar association instead of the proceeding authority, the possibility of selecting a “substitute defence

counsel" (in which case the selection is made by the proceeding authority instead of the bar association) may in practice be abused, in effect reverting to the previous system. It is also a matter of concern that there is still no meaningful quality assurance system for ex officio defence counsels in Hungary. It remains a problem that, although the remuneration of ex officio defence counsels has been increased, it is still significantly below market rates, which may have an impact on the number of lawyers on the ex officio defence counsel register and the quality of their work. As regards the conditions for legal aid ("cost reduction"), the question arises as to whether the conditions are not too strict, and whether free defence is indeed available for all indigent defendants.

Finally, it should also be mentioned that both the settlement to plead guilty and the possibility of making a confession and waiving the right to a trial at the preparatory session significantly transforms the tasks of the defence counsels, and has brought about changes in their role: 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.

Recommendations for the legislator:

- If the sentencing motion is only submitted by the prosecution at the preparatory session, there should be an express statutory possibility for the defence to request the adjournment of the hearing.
- Steps must be taken to ensure that cost reduction be granted to all indigent defendants irrespective of whether defence is otherwise mandatory in their cases. We recommend reviewing the conditions for granting cost reduction, and performing an impact assessment as to whether the current conditions for cost reduction – taking into account also the income and financial situation of the defendant population – are adequate for achieving the aim of the institution.

Recommendations for attorneys:

- Greater emphasis should be placed in the training of attorneys on the two trial waiver forms.
- 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.
- For our detailed recommendations related to the notification of the defence counsels, the practical functioning of the appointment system, the appointment of substitute defence counsels, urgent investigative measures and the remuneration of ex officio / legal aid defence counsels, see: Effective Legal Assistance in Pre-Trial Procedures – A Handbook for Attorneys (June 2019).[8]
- Introduce a general system to ensure the quality of the services provided by ex officio / legal aid lawyers, in order to ensure the regular monitoring and evaluation of the appointment system.

8 The handbook is available only in Hungarian.

5.2. The right to information

The authorities shall inform the defendants 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. However, in the investigation phase it is a problem in general that when the police provide information to the defendants about their rights orally, the information given is not whole and it is not accessible. This can be problematic also 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 their decision. The risk of this is increased by the laconic nature of the warning generated by RobotZsaru NEO (police provide the information by reading this out loud or provide the information on the basis of that), which is not suitable for the defendant making a well-founded and deliberated decision on its basis alone.

As far as the right of access to the materials of the case is concerned, its potential restriction can cause difficulties for the defendant when it comes to the settlement to plead guilty. In this regard, the new CCP has brought a fundamental – and, in terms of complying with Article 7 of Directive 2012/13/EU on the right to information in criminal proceedings, positive – change by setting out that defendants and defence counsels are, as a main rule, entitled to get access to all the case materials already during the investigation, after the defendant's interrogation. However, the law provides for exceptions to this main rule, and the scope of these exceptions has been widened by the legislator as of 1 January 2020.

Recommendations for the police and the prosecution:

- 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.
- Both the police and the prosecution service should facilitate for example by holding trainings that their staff members have the necessary knowledge and skills to be able to communicate with defendants in a simple and accessible language, having regard to the condition and personal characteristics of the person participating in the criminal proceeding, in accordance with the requirements of Directive 2012/13/EU.

Recommendation for attorneys:

- Attorneys should pay particular attention to ensuring that the defence can access all the materials of the case as soon as possible after the defendant has been interrogated, and should exercise their right to remedy against decisions restricting the right of access or the means of access consistently.

5.3. The right to interpretation and translation

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 gives rise to concerns in general. This provision 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 for interpretation and translation in criminal procedures.

It has been a positive change that since the coming into force of the new CCP, the law expressly allows for defence counsels to communicate with their clients during their consultation by using the interpreter appointed by the authorities. 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 also because of the quality concerns around the work of interpreters. 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.

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. At the same time, it 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 the right to interpretation and translation in criminal proceedings. 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 defendants who do not understand Hungarian are when deciding to initiate a settlement or not to exclude the possibility of a settlement at the initiative of the prosecution.

Recommendations for the legislator:

- In order to comply with Article 3(3) of Directive 2010/64/EU, legal provisions should provide defendants or their legal counsels the possibility to submit a reasoned request for the translation of documents beyond documents served (and so, translated) on the basis that they regard those essential for the given case.
- In order to achieve compliance with the requirements of Articles 2(8) and 3(8) of Directive 2010/64/EU, prescribing that interpretation and translation shall be of a quality sufficient to safeguard the fairness of the proceedings, we recommend the following:
    - Review the provision in the CCP saying that if it is not possible to appoint a person having the qualification stipulated in a separate legal regulation as interpreter or translator, "any other person having sufficient knowledge of a certain language could be appointed as an ad hoc interpreter". In relation to that, consider prescribing on a legal level the aspects to be taken into consideration when establishing that a person has "sufficient knowledge of a certain language" (e.g. language exams, certified experience, citizenship,

etc.), or prescribing that the authorities shall establish such rules in an internal binding rule or in another format (e.g. in a manual or guideline).

- A quality assurance system with regard to interpreters and translators should be introduced on a legal level, or it should be prescribed that the police and the courts shall introduce such a quality assurance system.

► The law should provide for the mandatory video and audio recording (or at least audio recording) of procedural acts involving a defendant using a foreign language in the procedure, so that they can be reviewed later by the proceeding authorities in case of doubt as to the quality of the interpretation.

Recommendations for the police and the courts:

► In accordance with Article 2(4) of Directive 2010/64/EU, the police should determine a mechanism or procedure "to ascertain whether suspected or accused persons speak and understand the language of the criminal proceedings and whether they need the assistance of an interpreter".

► In order to achieve compliance with the requirements of Article 2(8) and 3(8) of Directive 2010/64/EU, prescribing that interpretation and translation shall be of a quality sufficient to safeguard the fairness of the proceedings, we recommend the following for the police and the courts:

- Identify the aspects to be taken into consideration when establishing that a person to be appointed as an ad hoc interpreter has "sufficient knowledge of a certain language" in an internal binding rule or another format (even if no legal provision prescribes this). The aspects included in these regulations shall be clear and accessible to the public.
- A quality assurance system with regard to interpreters and translators should be introduced (even if no legal provision prescribes this).
- Procedural acts requiring interpretation (even in the absence of a legal provision to this effect) should always be recorded on video and audio recordings (or at least audio recordings), so that they can be reviewed later by the proceeding authorities in case of doubt as to the quality of the interpretation.

Recommendation for attorneys:

► Pay particular attention to ensuring that interpretation is of adequate quality, and, where justified, make use of the possibility to request another interpreter because of the poor quality of the interpretation.

5.4. The use of evidence

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. However, 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. 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 – the prosecution nevertheless presses charges under the general rules.

Recommendations for the legislator:

- 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.
- 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.

5.5. Cases involving multiple defendants

It is a recurring criticism from legal practitioners both in relation to the settlement to plead guilty and the confession at the preparatory session that their rules 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.

It is an issue regarding both trial waiver forms that if one of the defendants settles or confesses, that can significantly limit the possibilities of the co-defendants who do not confess in terms of their own defence. One of the reasons for that is that after the cases of the accused person(s) who concluded a settlement or confessed at the preparatory session have been 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.

Recommendations for the legislator:

- 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 their 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.

6. Strengthening the effectiveness of judicial oversight

In the case of the **settlement to plead guilty**, the court shall examine at the preparatory session whether the conditions for approving the settlement are met from the point of view of lawfulness. 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 has been a positive legislative change in this respect that, since 1 January 2021, the wording of the CCP makes it clear that the questioning (interrogation) of the defendant is not optional for the court. However, at the same time the respective legal provisions do not give any guidance as to the nature and depth of the questioning of the defendant in this situation. The research showed 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, and it happens that the judge simply asks the accused a yes-no question about whether they admit their guilt. The latter does not allow judges to reach a well-founded decision about whether to approve the settlement or reject its approval.

In the case of a **confession at the preparatory session**, the court shall question the accused "with a view to the nature of the preparatory session", which means that the questioning may only entail the examination of the fulfilment of the conditions for accepting the guilty plea. 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 that the defendant understood the nature of their guilty plea and the consequences of the court approving it, 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. On the basis of the research experience, there are diverging judicial practices regarding the depth of questioning, and in many cases, courts fail to conduct a questioning of adequate depth and content: it happens that the court only asks the accused a yes-no question on whether they admit their guilt.

In this respect, the Memorandum issued by the Chief Public Prosecutor's Office represents a good practice, since it states that the questioning of the defendant "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]". In addition, 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 (e.g. that they should draw the court's attention to the above in the form of a comment, or should ask questions from the defendant themselves).

It would also be necessary to clarify on a legislative level in relation to the judicial control what exactly is meant by "admission of guilt", i.e. whether the confession of the defendant shall also cover culpability. It similarly leads to varying practice 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.

In the case of the **confession at the preparatory session**, the judge has an important role also with regard to imposing the punishment or measure, since they may impose a lighter sanction than the one proposed by the prosecution in the sentencing motion. However, research interviews showed that the system does not favour such divergences in practice: 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 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.

Recommendations for the legislator:

- 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 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 their 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.

Recommendation for the courts:

- 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.

Recommendation for attorneys:

- Attorneys should contribute by making use of their possibilities flowing from their procedural position 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.