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PLEA BARGAIN AS A MEDIUM IN THE FIGHT AGAINST ORGANISED CRIME

I. Institutions serving simplification of criminal procedure

The most common way to fasten and simplify criminal procedure is regulating it in special procedures.[1] The Recommendation R/87/18. of Ministres' Committee of European Council[2] recites several ways to simplify criminal procedure; from investigation, through accusation, to trial in the court:

- discretional act of accusation (and generally discretional criminal investigation) and within this right to abate (interrupt) procedures in discretional way, followed by a satisfactory compensation for the complainant.
- Measures of identical aims with discretional criminal investigation (in agreement with the offended, may be transferring the case under judicial competence);

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[2] See in details: ***Európa Tanács ajánlásai a büntetőeljárás egyszerűsítésére***. In Rendészeti Szemle 1991/5. 97-103. and: Ágnes KELEMEN: ***Az Európa Tanács Miniszteri Bizottságának ajánlása és a Magyarázó Megjegyzések a büntető eljárás egyszerűsítése tárgyában***. Magyar Jog 1991/12., 741-745.

- decriminalisation of lighter crimes (especially in cases of defrauder of tax or customs);
- shortened or written procedures (in case if the factual element is prior to the elements of guiltiness);
- agreement without criminal court (after paying for a state - or public interest institution with charitable intention, having the objects obtained by committing a crime returned or the damage of the offended compensated);
- questions of other ways to simplify criminal procedure (e.g. alternative punishment, so called preliminary inquiry procedure in case of confession of the accused, simplification of the record of trial or sentencing).

Since publishing the recommendation, for the last one and a half decades several new legal institutions have been introduced in Hungary (agreement with the accused, postponing the act of accuse, renouncing the trial etc). The regulations aiming at fastening the procedure were also modified the way that they could be applied in a wider circle (bringing before court, omission of the trial)[3]. But those institutions which represent a break on officiality but prefer the interest of the complainant (e.g. mediation), have still not been introduced. These new institutions cannot fulfil their functions, because their most relevant regulations were considered by the legislation as not competent with the Hungarian law[4].

Taking the process of the procedure as a basis, main methods to simplify and fasten the procedure were established as follows:[5]

a) during investigation:
   - diversion: two main ways of diverting the procedure from criminal passage have existed since the 1970's: discretional accuse principle and mediation;
   - paying a determined sum of money: in cases of less relevance, having the imposed sum settled, the procedure may be abated[6];

[3] Regarding the Recommendation of the European Council and concerning the question of simplifying criminal procedure see: HERKE Csongor: *Die Perspektiven der Vereinfachung des ungarischen Strafverfahrens im Spiegel der Empfehlung des Europarates.* In: FENYVESI Csaba – HERKE Csongor (editors.): Tanulmányok Erdősy Emil professzor tiszteletére. Pécs, 2002. 74-87.

[4] The European Council accepted further recommendations on simplification of criminal procedure and on applying other punishments and measures than imprisonment. Here to mention R 16 (92) on European rules of sanctions and measures of the Committee, R 8 (96) on European criminal policy in the period of changes, R 19 (99) on mediation in criminal cases and R 20 (99) on the overcrowded prisons and inflation of prisoners.

[5] Co.: IZSÁKI Mariann: A büntető eljárás egyszerűsítése, különös tekintettel a vádalkura. Diplom essay, JPTE ÁJK Pécs, 1995., 18.

b) following the act of accusation, but before trial:
   - resolution without trial: in cases of less relevance and in criminal acts sanctioned with lighter punishment, the court, following the prosecutor's appeal may make a decision based on the documents (see: special procedures with trial omission in Hungary)[7]
   - simplified trial: with agreement of the accused and reckoning on a lighter punishment, the criminal responsibility of the accused is concerned on a more simple trial (see: institution of renouncing of the trial in Hungary)[8]

c) agreement on the trial in court (see: plea bargain)[9] .

II. Types of plea bargain

When reciting evidences, Art 61 of Sec (1) of CPA places the confession of the accused at the last place, referring this way to the fact that confession is no longer the queen of evidences. Underlining this, Art 87 Sec (5) states that even in case of confession all other evidences are to be collected. In spite of that (just in order to increase the effectiveness of procedure and to make its process faster) the Act assigns particular significance to the confession of the accused. This way one of the conditions of "rapid trial" (alternatively with catching in the act) is a (factual) confession of the accused, and the same way, confession is necessary for special procedures with omission[10] or renouncing trial. The latter (renouncing the trial) is a procedure similar to plea bargain, but different from it in some respects. Some authors mention the agreement with the accused as plea

[6] The institution has existed in France since 1940: after settling the criminal charges and compensating the damage of the offended the prosecutor canabstain from accusation. In the Dutch Criminnal Procedure Act, besides the prosecutors ensures this right for the police also. See: IZSÁKI Id. 5 , 20

[7] However, based on the Austrian Act Criminal Rules on Court there is no need for prosecutor's proposal. Co: FARKAS Ákos: Konsenzuális elemek a büntetőeljárásban. Magyar Jog 1992/8., 508.

[8] In England and in the USA an agreeing declaration of the accused is enough, but in Denmark and Spain (just like in Hungary) the admitting confession concerning the important element of fact establishment is also necessary. See: IZSÁKI Id 5, 22.

[9] Similarly, agreements between the single authorities aor participants can help the procedure become faster. See in details : HERKE Csongor: *Die Absprache als ein Institut der Strafverfahrenserleichterung.* In: FENYVESI Csaba – HERKE Csongor (editors:): Emlékkönyv Vargha László egyetemi tanár születésének 90. évfordulójára. Pécs, 2003. 97-106.

[10] About the requirements regarding confession in a procedure with omitting the trial see in details: see in details: HERKE Csongor: *A tárgyalás mellőzéses eljárás*. Jura 1997. December, 16-21.

bargain, when in return for some information from the accused the authorities discontinue criminal investigation against him, (denying or abating investigation). In case of agreement with the accused almost all elements of plea bargain are missing. (neither confession is necessary, nor the accused is impeached), but it is still to be referred because of its bargain-nature.

Plea bargain in a wider sense is a procedure, based on an agreement when the accused, hoping of an indulgent sentence in return, confesses guiltiness.[11] In contrary to the renouncing the trial, in case of plea bargain a further element is that a bargaining process begins based on confession between the prosecutor and the attorney (often in the presence of the judge), the result of which is taken into consideration when imposing the sentence .

Plea bargain (similarly to mediation) has more forms.

a) In the USA plea bargain was established in the second half of 19th cent, based on the wide discretional legal state of the prosecutor. It is divided in two sections:[12] plea bargaining (a legally unregulated bargaining process between the prosecutor and the attorney) and guilty plea, when guiltiness is confessed before the court. Plea bargain can be accomplished during the preliminary process (charge bargaining), or on the trial also (sentence bargaining). In the former case, confession of the accused is offered by the attorney in return for changing given heads of charge (the changes in charge can be initiated by the prosecutor also). Sentence bargain can be established in two ways: the judge personally can take part in the bargain, indicating a possible punishment, or the judge resigns to participate in the bargain, and accepts the parties' proposal on the punishment.

The agreement based on bargain is necessary, but not satisfactory condition. Voluntary and conscious confession is also required in the States (the accused has to confess in view of his rights, and has to be aware of the right not to confess and then the case is concerned by the jury). The judge can refuse to accept the confession if it does not have satisfactory factual basis (e.g. contradicts to other evidences) or in case if he does not agree with the proposed punishment.

b) In England the confession of guiltiness is prior to bargain. The bill of indictment is read on the trial, and the judge calls upon the accused to declare whether he wishes to admit guiltiness before establishing the jury (plea of guilty). If so, the judge brings verdict without the jury. Then the bargain-nature of the procedure is represented by the fact that the confession can be anticipated by the prosecutor's appeal, re-

[11] Co. IZSÁKI Id 5, 24.

[12] Co. GRMELA Zoltán: A vádalku – az amerikai modell. Magyar Jog 1993/6., 368.

nouncing certain heads in the charge (all in all, the accused here also confesses guiltiness in hope of a lighter punishment). In the English sentence bargain the prosecutor has no role in determining the degree of punishment[13].

c) In Italy, one of the five special procedures of the Italian Criminal Code came into force in 1989, was also similar to plea bargain. During this procedure the prosecutor and the accused compound an agreement and proposes for a concrete punishment commonly**.** However, the judge does not have right to deliberate the degree of punishment: either imposes the proposed punishment and the procedure is finished; or can continue the procedure without accepting plea bargain.
d) The procedure based on confession of guiltiness has existed in Spain since the end of 19th Cent. (conformidad). During this the prosecutor sends a proposal on the type and degree of punishment together with the bill of indictment to the court (max. 12 months imprisonment since 1989). If the accused accepts punishment or gets entered into a bargain, as a result of which compounds an agreement with the prosecutor, the court imposes the punishment without continuing the procedure.[14]
e) In Germany there is a possibility of agreeing procedure between the prosecutor and the attorney without act of charge (so called German guilty plea). In return for the confession the accused may rely on a shorter trial and receives the prosecutor's promise to omit the act of charge in some crimes committed and to apply to the court for a lighter punishment.
f) In France there exists a correcting institution: in case of confession the prosecutor can requalify the crime into delinquency, this way not the jury but the judge of the regional court is competent to pronounce the sentence.

III. Agreement with the accused

In case of well established suspect of committing the crime, the prosecutor (the inspecting authority with the permission of the prosecutor) can repudiate the denunciation, if the person to be suspected with committing the crime cooperates in discovering of this or any other criminal case to such an extent,

[13] Co. FARKAS Id 7., 511.
[14] Co . FARKAS Id 7, 512.

that the criminal or national security[15] significance of his cooperation is more important than the interest of the government to force its criminal request. In fact, the Sec (1) Art 192 CPA makes the abatement of the investigation possible with almost the same words.[16]

Art 57 of 11/2003 Chief Public Prosecutor Regulation states that repudiation of denunciation or abatement of investigation are to be permitted by the head prosecutor competent in the case (or the deputy in case the prosecutor is unable to attend). The public county prosecutor can assign the right of permission to the deputy when investigates in criminal cases belonging to the sphere of competence of the county court. If the authority accomplishes investigating work independently, the prosecutor, having deeds necessary for the decision examined, after the proposal of the competent leader of investigating authority, can make a decision of the permission.

The Act also determines an exclusion, stating that the denunciation cannot be denied (the investigation cannot be abated) if the established suspect concerns a crime of intentional murder.

Repudiating denunciation against a cooperating accused (abating investigation) does not deprives the offended of his right to receive compensation, based on general rules of civil law. In these cases damage is compensated by the state and the state is represented by the Minister of Justice during the validating process of the request. In case the resolution on compensation is passed in civil a legal action, the base of the request for compensation is to be presumed, this way the burden of evidence does not rest on the offended .

In the interest of this agreement, lying in the foreground of the denunciation (investigation) abating resolution, could be kept in secret Sec (5) Art 175 (and referring to this Sec (4) Art 192 states that the order consists only of the

[15] The national security interest, based on Art 74 of Act 125 (1995) on National Security Services is to provide the sovereignity, and secure costitutional order of Hungary, within that

- discover all intention to offend independence or territorial wholeness of Hungary,
- discover and prevent all secret intention infringing or threatening political, economical or national defence of Hungary,
- obtain all information referring to or originated from foreign countries, and necessary for decisions of the government
- discover and prevent all secret intention, which with the help of illegal means aims at changing or disturbing constitutional order of Hungary ensuring basic human rights, democracy based on multi-party system, or the operation of costitutional authorities,
- discover and prevent terror actions, illegal commerce with arms or drugs, or illegal transport of internationally controlled products and technologies.

[16] The CPA, not unambigously, regulates the agreement with the accused with the same words among the reasons for denying denounce or for abating investigation See in details: FENYVESI Csaba – HERKE Csongor – TREMMEL Flórián: *Új magyar büntetőeljárás.* Dialóg-Campus Kiadó, Budapest-Pécs, 2004. 415.

ordering part itself and the date. The ordering part inc1udes denotation of crime, fact of denying denunciation (investigation abating), and information about how damages, emerging in connection of committing the crime were to be validated by the state.

IV Renouncing the trial

Rules of renouncing the trial are included in Title 25 CPA Art 533-542. In case of renouncing the trial the court may establish guiltiness of the accused in a sentence brought on an open trial, if the conditions are realized as follows:

Prosecutor's proposal (private charge, no additional private charge)	**Crime punishable with max. 8 years imprisonment** (but: the crime can be graver in case of organised crime if the accused cooperates)	**The accused renounces of the trial**	**Admitting confession**

In case of renouncing the trial, the crime committed by the accused is judged within the frames of lighter punishments (in return for confession and for the renouncing of the right for trial):

1. max. 3 years, in case of crimes possibly being punished with imprisonment longer than 5 years but max. 8 years
2. max. 2 years, in case of crimes possibly being punished with imprisonment longer than 3 years but max. 5 years
3. max. 6 years can be imposed in case of crimes possibly being punished with 3 years

Against those who committed a crime in criminal organisation,[17] and during the investigation significantly cooperate with the prosecutor or the investigating authority, contribute to the proving process of the given or any other case, but the abating of the investigation against them did not occur of any reason, there is a room for renouncing the trial, even in cases to be punished with imprisonment longer than 8 years. Then the strict measures described in the General Part of Criminal Code cannot be applied.

Renouncing the trial can take place both during the investigation and within 15 days following the act of accuse. In these cases (if all conditions are realised) the prosecutor can propose for renouncing the trial. The prosecutor, taking into consideration the circumstances of the case (particularly the person of the accused and the crime committed) can propose for considering the case on an open session. The accused is informed about the possibility of renouncing the trial and its consequences by the prosecutor before the act of accuse. The document with this information and the declaration of the accused are to be included in a protocol. The prosecutor can enclose this protocol into the court's copy of the act of accuse as a part of investigation documents, if the consideration of the case on open session was initiated by the accused.

If the prosecutor agrees with the initiation, interrogates the accused and informs him about the acceptation of the initiation. Then the prosecutor proposes to the court for considering the case on open session, without delay. The prosecutor appoints an attorney for the accused (if the accused has no attorney) and provides possibility for the attorney to get familiar with the documents of investigation.

The prosecutor cannot repeal a proposal for consideration of the case on open session. If case in the prosecutor's opinion, as compared to the result of the session, the accused is guilty in a graver crime or in an other crime also, proposes for sending the case to trial.

In case of renouncing the trial, the court proceeds as single judge and holds an open session, on which the presence of both the prosecutor and the attorney is obligatory. On the open session the prosecutor exposes the charge and the proposal for considering the case on open session. Having the charge and the proposal exposed, the court informs the accused about the consequences of the renouncing the trial and the confession before court. Following this the court calls upon the accused to declare about renouncing the trial (before this,

[17] See 8 Art. 137. Criminal Code crime organisation is a group of three or more persons, operating together for a longer period, the aim of wich is to commit a crime, presumably being punished with imprisonment five years or more.

the accused may consult with the attorney). The court hears the accused about the actions representing the subject of the charge after this declaration.

Following the confession the court decides whether the procedure with renouncing the trial can be applied in the given case. During this the court examines particularly whether

- the accused is compos mentis
- the confession is made voluntarily
- there is any doubt concerning the authenticity of the confession, and
- there are significant differences between the confession of the accused and the earlier confession made during the investigation.

If based on any of these circumstances the court regards solicitous the negotiation on open session, or a graver qualification, different from charge, is probable to be predicted, the case will be sent for trial (in this case there is no room for application). If the court does not find any reason for doing so, the accused is heard for the circumstances, which possibly determine the imposable punishment. After hearing the accused first the prosecutor, then the attorney can held the speech.

There is no room for appeal regarding the establishment of guiltiness, facts agreeing with

the charge, or qualification agreeing with the act on accuse.

Regulations, concerning reasonableness of fact establishment of the appealed sentence, statement of guiltiness and qualification of crime, are overreviewn by the court of second instance. However, in case of established facts agreeing with the charge and qualification identical to those stated in the bill of indictment the sentence of first instance can only be changed if

- there is a room for releasing the accused, or
- abating the procedure, or
- as a result of the changes a significantly lighter punishment is to be imposed, or instead of punishing a given measure is to be applied.

V. Agreements in the frames of Defence Program

Measures on Defence Program — in which those engaged in criminal procedure and supporters of jurisdiction take part — are included in the Act 85 2001 (further: DPA). Defence Program was introduced in order to provide

security not provided in the frames of personal security, for the witness, the offended, the accused engaged in the criminal procedure, their relatives or any other person possibly being threatened. Defence Program is executed by the police (in frames of civil rights's legal state and based on an agreement compounded with the person threatened). During executing the program

- special measures are applied, or
- mental, social, economical, human or legal support is provided.
- Art 2, DPA states that the Defence Program (similarly to personal security) can be applied during the criminal procedure or having it finished, if the person to be secured
- made or wishes to make testimony on circumstances of an extremely grave crime
- the testimony supported or may support the discovery of facts, and otherwise it is expected to be very difficult or not possible to collect all evidence
- against the accused crime was committed or possibly will be committed because of taking part in the criminal procedure, or fulfilling obligations or rights
- it is not possible to provide personal security for the threatened person concerned in the case.

This agreement can be initiated during the process of the criminal procedure by the investigating organ in agreement with the prosecutor, by the prosecutor or by the president of the council, competent in the procedure. Having the criminal procedure finished, compound of the agreement can be initiated by the investigating organ competent in the procedure (in cases of persons imprisoned in criminal executing institution, compound of the agreement is accomplished by the criminal executing institution, the prosecutor, or the criminal executing judge).

The agreement is to be initiated by the Witness Security Service, which within 15 days

- denies the initiation if the threatened is considered as inappropriate for being secured, based on the preliminary psychological examination or on the examination measuring the security risk;
- if accepts the agreement, proposes a motivated recommendation intended to the Head of Hungarian Police Offices.

The Head of Hungarian Police Offices takes a stand on denying the initiation or on intention to compound an agreement within 3 days from the date of the initiation. If the Head of Hungarian Police Offices accepts the agreement, the Service signs an agreement with the threatened person independently, supposing he

- makes the necessary declaration,
- fulfils all obligations connected to his original identification, or validates his requests, interests (e.g. if contracted a loan or credit in his original identity, then before changing identity has to refund it). In case of extreme criminal or juridical interest the Witness Security Service fulfils these requirements, but the concerned person has to settle it later.

Defence Program is abated:

- if the conditions of defence no longer obtain,
- if the person concerned renounces the defence or
- if the Service denounces the agreement.

The Capital Court is competent to accomplish all out plea procedures originated from debates generated by the agreement.[18]

VI. Summary

Institution of renouncing the trial has not reached the expected effect. There are more reasons for that (e.g. exclusions, in case of the juvenile or applicability in cases of crimes to be punished with maximum 8 years imprisonment), but I consider non-predictability of punishment as the most significant reason, and related to this the prosecutor's limited circle of rights. Namely, the accused confesses to commit the crime easier if receives a concrete promise of a predictable punishment in return. Regulation of plea bargain in narrower sense could occur through modifying present regulations on renouncing the trial, but also through establishing a separated special procedure.

When balancing the possibility to introduce plea bargain, IZSÁKI lists arguments pro and contra as follows[19]:

[18]Such strict regulation would be, as noticed in Art 98, Ciminal Code, if the limit of punishment become twice higher (but no longer than 20 years)

[19] About the rules of Defence Program see in details: HERKE Csongor: *Büntető eljárásjog*. Dialóg-Campus Kiadó, Budapest-Pécs, 2003., 73-76.

Advantages of plea bargain:	**Disadvantages of plea bargain:**
faster consideration of cases	there is a danger of not always the real perpetrator confesses guiltiness;
the accused, when making confession, assumes the consequences of his earlier behaviour ;	during bargain prosecutors are inspired only by the result of the charge and not by imposing a punishment answering special and general preventing aims ;
it is easier to collect proofs in better quality; witnesses and experts are not be summoned in vain;	lighter punishment has smaller detaining effect; those insisting on normal procedure are usually imposed a graver punishment.
in return for co-operation the accused comes in for allowances .	

After comparing the advantages and disadvantages, it is still worth deliberating the collation of plea bargain models introduced above and it may be useful to emerge and introduce applicable elements as soon as possible. Although, beyond legislative duties a specialisation of authorities, and in the opinion of FENYVESI, a specialisation of attorneys would be necessary for an effective application.