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## INVESTIGATIVE DIVERSION IN THE HUNGARIAN CRIMINAL PROCEDURE SYSTEM

**Abstract:** *The Act XC of 2017 on Criminal Procedure, which entered into force on 01 July 2018, contains significant reforms regarding investigation in criminal proceedings in Hungary. The legislation is a bold undertaking to improve the efficiency of criminal proceedings by reinterpreting the relationship between prosecution and the investigative authority, vertically separating investigations, and integrating diversionary possibilities into analyzes. It aims to overcome the weaknesses of the current system by clearly defining the procedures of responsibility for investigations and by dealing with the more uncomplicated „trivial” cases at the discovery stage. In the paper, the author provides an overview of the provisions of the Hungarian Criminal Procedural Act that are closely related to investigations, with a particular emphasis on the possibilities of diversion and the open questions that arise in this context and that are left to case law to elaborate.*

**Keywords:** *investigation, suspension, diversion, principle of opportunity*

### 1. INTRODUCTION

The question rightly arises as to why it is necessary to integrate diversion possibilities into the investigative phase. What makes the legislator think the existing institutions will operate in practice with significantly greater effectiveness by broadening the scope for diversion by the police process than in the prosecution phase. On reflection, no doubt bringing diversionary options (summary, opportunistic forms of procedure) forward from the intermediate stage of the prosecution phase to the conclusion of the investigation phase is intended to avoid subsequent procedural and, above all – lengthy and complex evidentiary acts. In some instances, with the victim's involvement, the prosecution and the defense can

already reach an agreement during the inquiry into how the criminal proceedings should be concluded. This solution may render the indictment itself and its alternative solutions unnecessary. In a less formalized framework, the proceedings can be completed in a way acceptable to the parties, while the damage caused by the crime and the costs of the proceedings are settled.

## DEFINITION AND PROCEDURAL ROLE OF DIVERSION

Divergence is derived from the Latin word ‚divertere,’ which means to deviate. Divergence was first used in justice in the United States of America in the 1960s concerning juvenile offenders. Diversion means moving something from one position to another.<sup>1</sup> It is used in this ordinary sense, but what does this diversion mean in criminal justice? “Diversion means the non-criminal disposition of a criminal case. Put another way, diversion is a summary name for ways of diverting from the usual ‘stages’ of criminal proceedings.”<sup>2</sup> Burgstaller’s interpretation also focuses on this aspect of diversity, i.e., removing less severe offenses by more minor dangerous offenders from the formal process and their disposition through informal means outside the criminal law.<sup>3</sup> The dominant purpose of diversion is to forgo further prosecution after a formal finding of a norm violation. Above all, the diversion strategy is about the possibility of resolving norm violations by means other than the criminal law, in some cases by dispensing with the formal framework of the procedure and dealing with them informally through social control instruments and alternative programs.<sup>4</sup> While in a broader sense, diversion implies a departure from the formal criminal procedure path, in a narrower sense, it also means developing a criminal sanctioning system that provides a departure from traditional forms of punishment. It tends to sanction more weakly the forms of behavior that are threatened with discipline, which is due to the underlying approach that emphasizes punitive forms of discipline with a repressive retributive system as opposed to preventive punishment with a preventive character.<sup>5</sup>

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<sup>1</sup> Sztaki, 2019, Available at: [http://szotar.sztaki.hu/search?fromlang=all&tolang=all&searchWord=diversion&langcode=hu&u=0&langprefix=&searchMode=WORD\\_PREFIX&viewMode=full&ignoreAccents=1](http://szotar.sztaki.hu/search?fromlang=all&tolang=all&searchWord=diversion&langcode=hu&u=0&langprefix=&searchMode=WORD_PREFIX&viewMode=full&ignoreAccents=1)

<sup>2</sup> Barabás Andrea Tünde, *Börtön helyett egyezség? Mediáció és más alternatív szankciók Európában*, Budapest, KJK-KERSZÖV Jogi és Üzleti Kiadó Kft, 2004, pp. 60

<sup>3</sup> Burgstaller Manfred, *Perspektiven der Diversion in Österreich aus der Sicht der Justiz. Perspektiven der Diversion in Österreich, Interdisziplinäre Tagung vom 27 bis 29 April in 1994 in Innsbruck*, Bundesministerium in Justiz, Wien, 1995, pp. 11

<sup>4</sup> Kaiser Günther, *Role and Reactions of the Victim and the Policy of Diversion in Criminal Justice Administration*. (From criminology between the rule of law and the outlaws. 1956, by c w g jasperse, – see ncj-38200), Kluwer Bv. Stromarkt 8, Deventer Holland, Netherlands, 1976, pp. 14

<sup>5</sup> Walter Michael, *Wandlungen in der Reaktion auf Kriminalität (Hamburger Antrittsvorlesung)*. ZStW 95, 1983, pp. 34

Diversion is therefore closely related to alternative sanctions, which are sanctions to be applied in criminal proceedings to replace imprisonment, again to avoid the adverse consequences of this punishment, as already mentioned. This could be called the criminological purpose of the diversion by criminologists.<sup>6</sup> Heinz has conducted a comparative analysis of the recidivism rates of a group of young people who were traditionally sentenced and diverted in the diversion form in ordinary everyday cases. The interpretation of his research is that the positive preventive benefits of a well-chosen treatment approach are predictable.<sup>7</sup> In 1982, the number of people sentenced to imprisonment in Germany was 69% of all sanctions, but in 2000 it had fallen to 6.3%, while the proportion of fines had risen to 80.3%.<sup>8</sup> In Japan, imprisonment is the least used form of punishment. While in Germany, 15,824 out of 40,542 prison sentences in 2000 were for one year or more, which corresponds to 39%, in France, 16,146 out of 8,005 (21.1%) were for one year or more in 1997, in Austria, 25.2% out of 5,988 (also in 1997), and in Switzerland, the same proportion was 11.1%. The research results on effectiveness and success should form the basis for a goal-oriented argument that selects between different sentencing genders and treatment forms, with the sole and practical aim of achieving resocialization and reducing recriminalization.<sup>9</sup> Diversification also plays an important role in the German Criminal Procedure Code (German StPO)<sup>10</sup>. The use of diversionary instruments is of particular importance in juvenile cases and has developed considerably in Germany: ‘Especially in the last two decades, thanks to §. 45 of the Juvenile Code (JGG),<sup>11</sup> the prosecutor has increasingly made use of diversion in more and more cases, with the result that in the majority of cases the prosecution ends the case with diversion. Judicial diversion under §. 47 has also increased, with almost 30% of cases ending in this way, which means that only one-third of all juvenile cases in which criminal proceedings are initiated are concluded with a judicial sanction. This means in figures that only 41,403 out of 144,954 such sentences were handed down.’<sup>12</sup>

<sup>6</sup> Fakó Edit, *Divergence in German, Austrian and Hungarian criminal procedure*. PhD thesis, University of Miskolc, Faculty of Law and Political Sciences – Deák Ferenc Doctoral School, 2003, pp. 10

<sup>7</sup> Heinz Wolfgang, Storz Renate, *Diversion in Jugendstrfverfahren der Bundesrepublik Deutschland*. Berlin, BMJ – Recht, 1992, pp. 59

<sup>8</sup> Kaiser Günther, Schöch Heinz, *Strafvollzug. Eine Einführung in die Grundlagen*. C.F. Müller Verlag. Heidelberg, 2003, pp. 97

<sup>9</sup> *Ibid.*, 12

<sup>10</sup> Die Strafprozessordnung in der Fassung der Bekanntmachung von 7. April 1987 (BGBl. I S. 1074, 1319) die zuletzt durch Artikel 4 des Gesetzes vom 5. Oktober 2021 (BGBl. I S. 4607) geändert worden ist“.

<sup>11</sup> Youth Courts Law “Youth Courts Law in the version of the promulgation of 11 December 1974 (Federal Law Gazette [BGBl.] Part I p. 3427, most recently amended by Article 1 of the Act of 8 July 2008 (Federal Law Gazette Part I p. 1212)” (Jugendgerichtsgesetz, JGG), 45.§.

<sup>12</sup> *Ibid.*, 99

In the narrower sense, diversion refers to solutions that can be applied at the entry stage of criminal proceedings.<sup>13</sup> As the commentary on Austrian diversion puts it, diversion can be contrasted with decriminalization, since no criminal law amendment is required here, as it only changes the way the state reacts to the particular facts and does not make the offense a non-historical one, it is primarily a matter of penal reform and does not require a criminal code amendment. As a general diversion takes several forms, so there are several possibilities to conduct the proceedings in a way that is not the “classical” way. While some labeling theories argue strongly for non-intervention, others prefer to opt for little and targeted effective intervention. On one hand the crime is essentially associated with those age groups in which intervention through informal social control has a more significant deterrent effect than the use of criminal law. Additionally, it also makes the offender interested in reparation for the crime after it has been committed by offering a victim-offender reconciliation in response to the crime, thus reducing the reaction to the crime.<sup>14</sup> Divergence is not only a pro-offender theory but a way of thinking that seeks to broaden the effects of the harms of ‘labeling’ on the offender, taking into account that, especially for petty crimes, the injuries of punishment are greater than those caused by the offender. Indeed, a criminal intervention tends to reinforce the behavior that led to the crime, rather than preventing the person from committing further crimes or finding a solution to the problem behind the offense and seeking help.<sup>15</sup> There are several arguments in favor of the need for diversions; on the one hand, certain human behaviors that are relevant from a criminal law point of view, and the perpetrators of these behaviors, do not reach a degree of danger to society that would justify the application of a criminal law detriment or consequence. Therefore, it is sufficient to impose other, less severe, or alternative legal implications on the perpetrators of the offenses. On the other hand, these solutions can also shorten and simplify the process of establishing liability, thus saving time and energy and freeing up capacity on the part of the authorities. Last but not least, criminal proceedings can be freed from trivial cases, and at the same time, the work of prosecuting officers can be simplified and facilitated. Basically, the Hungarian Penal Code (Btk.)<sup>16</sup> divides the law into two parts, on the one hand for more serious convictions and furthermore for minor offenses. However, on that basis, procedural divergence exists only in military proceedings and not in the main proceedings (Be. 710.§.).

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<sup>13</sup> Kerecsi, Klára, *Kontroll vagy támogatás: az alternatív szankciók dilemmája*. 2006, Budapest. CompLex Kiadó Jogi és Üzleti Tartalomszolgáltató Kft.

<sup>14</sup> Kerner Hans-Jürgen (Hrsg.), *Diversion statt Strafe? Probleme und Gefahren einer neuen Strategie strafrechtlicher Sozialkontrolle*. Heidelberg, C.F.Müller Juristischer, 1983, pp. 639

<sup>15</sup> Kury Hans – Lerchenmüller, Hedvig (Hrsg.), *Diversion. Alternativen zu klassischen Sanktionsformen*. 2 Bde. Bochum, 1982, pp. 173.

<sup>16</sup> Act C of 2012 on Criminal Code, ‘Hungarian Gazette’, No. 92/2012.

The drive to improve the efficiency of criminal proceedings has been the driving force behind the development of Hungarian criminal policy since the 1960s and 1970s. Point 11 of NET Decision No. 14/1973 on the legal policy guidelines<sup>17</sup> for applying the law gave priority to the differentiation of criminal liability. The requirement of which embraced:

- the choice of the procedural form,
- the determination of the degree of criminal liability, i.e. the imposition of the legal penalty applied, and finally
- determining the method of execution of the penalty imposed.
- The requirements for differentiation are based on the following:
  - the nature of the offense committed (criminal category),
  - the quality of the offense,
  - the offender's personal danger to society (recidivism, lifestyle, etc.),

Unfortunately, the possibility of differentiating the investigation was abolished by Act XIX of 1998 (hereinafter: former Be.),<sup>18</sup> amending Act I of 1973 on Criminal Procedure.<sup>19</sup> The Act did not include the legal provisions on diversion, which would have improved the efficiency of investigations and simplified the procedure, even though the key to the efficiency of criminal proceedings lies in the police diversion, which is fundamentally lacking in Hungarian criminal proceedings. In the following, the author analyzes the role and importance of diversions.

## 2. DIVERSION SOLUTIONS IN THE FORMER ACT XIX OF CRIMINAL PROCEDURE

Under the former Be. There were two types of diversionary or diversionary tools available:

Abbreviated procedures such as trial by indictment (former Be. Chapter XXVII), no prosecution (The Criminal Warrant) (former Be. Chapter XXIV), and waiver of trial.

There are also the diversionary legal instruments of the principle of opportunity: reprimand (Article 71 of the former Be.), partial non-prosecution (Article 220 of the former Be.), postponement of prosecution (Article 222 of the former Be.) and mediation (former Article 221 / A of the Be.). Their common feature is that they can be used before the judicial stage, thus relieving the judiciary from the task of deciding cases. However, the aim of the cases concluded by this method

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<sup>17</sup> Decision 14/1973 of the Presidential Council of the Hungarian People's Republic on the legal policy guidelines for the application of law.'Hungarian Gazette', No. 39/1973. (14/1973. NET Decision)

<sup>18</sup> Act XIX of 1998 on Criminal Procedure, Hungarian Gazette, No. 37/2002.

<sup>19</sup> Act I of 1973 on Criminal Procedure, Hungarian Gazette, No. 22/1973.

is not to enforce the principle of legality „above all,” but to allow the prosecutor to waive prosecution at his discretion, given the circumstances of the offense and the offender’s person. The assessment of these cases of slight guilt or the perpetrator’s criminal record, and possibly of the specific exculpatory and mitigating circumstances of the facts, at the initial stage of the criminal proceedings, lead the prosecutor to conclude that the court would assess them in the same way and would therefore take them into account in particular when imposing the sentence, thus rendering the use of the judicial route unnecessary. The varying degrees to which the greater prevalence of opportunism is hampered by dispositive regulation and subjective law enforcement bias. It does not tie its application to any rules of cogency in criminal law. A permanent push for stricter rules could lead to a strengthening of legality and consequently to a reduction in opportunism, which could be a factor in working against diversion from the courts.<sup>20</sup>

The assessment of whether diversionary instruments speed up proceedings or whether they are more of a burden on the prosecutor is somewhat mixed. This is mainly because the requirements for the application of the acceleration instruments only impact specific subsystems. What mostly culminates in increased workload (having to issue a decision, obtaining a probation officer’s opinion when postponing the indictment, interviewing the suspect and the victim where appropriate, reopening the case after unsuccessful diversion procedures, etc.) before this is primarily realized in Hungary at the intermediate, prosecutorial stage.

It follows from this that in the first cases that come under the spotlight of criminal justice, the police cannot effectively accelerate the proceedings by using diversionary means alone, based on the lack of „autonomy” under the Act CX of 2017 on Criminal Procedure (hereinafter: Be.),<sup>21</sup> only if they enhance joint case resolution in cooperation with the prosecution.<sup>22</sup> Furthermore, after the intermediate phase, judicial diversions are also ineffective because of the prosecution’s role as the balance-sheet language in the decision-making position, resulting in a deficient number of case closures with a case being abandoned. The failure to refer and try cases accounted for a significant proportion of cases terminated by diversion. Still, here too, the effectiveness of the fast-track procedure was weakened by the length of time taken to bring issues to court.

An analysis of the previous legislation shows that the decisive and exclusive stage in the use of diversion is the intermediate prosecution stage, which must, in all cases, be preceded by the investigation stage, which is fully formalized by the

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<sup>20</sup> Láng László, A büntetőeljárást gyorsító és egyszerűsítő jogintézmények és mechanizmusok. *Eurojustice konferencia*, Budapest, 2010. pp. 2

<sup>21</sup> Act CX of 2017 on Criminal Procedure, Hungarian Gazette, No. 99/2017.

<sup>22</sup> Vári Vince, Elterelés és az ügyész – nyomozó hatóság kapcsolata a nyomozásban. *III. Turizmus és Biztonság Nemzetközi Tudományos Konferencia: tanulmánykötet Nagykanizsa* (eds. Marton, Zs; Németh, K; Péter, E), Hungary: Pannon Egyetem Nagykanizsai Kampusz, 2019, pp. 54

taking of evidence. Indeed, diversionary methods have mainly relieved the courts, but they can also be a relief for the prosecution. In Hungary, the legal forms of diversion at the investigative stage were not provided for in the former Be. So the police could only use those above „hidden” diversion, ie, the official case selection, which in turn has a detrimental effect on the willingness to report, on detection and public confidence.<sup>23</sup> These diversionary options did not provide the investigative authority with any work relief or relief from the burden of investigation, and the police were not interested in using them. Nor to the extent that even in cases involving mediation or mandatory deferment of charges (failure to maintain, drug use), the full and exhaustive investigation and investigation activity was complete and compulsory. Only one form of diversion from the criminal procedure concerned the investigating authority, namely the prosecution. This, however, meant not more minor but even additional investigative tasks. Moreover, it is applied differentially because of its specificity due to the significantly different conditions of the investigative authority and the particularities of the organization of work. It should be added that this abbreviated procedure only imposed an obligation on the investigating officer and the prosecutor to expedite, but not on the court. Many cases were dealt with in the standard procedural order. It should be added that not all cases sent from the investigating authority to the prosecutor's office for prosecution are referred to this unique form of procedure. The most time- and energy-consuming activity of the investigation of the investigative authority is the examination phase of the inquiry. In all cases, part of the investigation is a suspect in the case. Although the result of the investigation, the document setting out the means of proof already triggers judicial evidence in the summary proceedings without a hearing. In this form of proceedings, the prosecutor considers the trial evidence unnecessary in his indictment, and the judge finds the decision on the file sufficient. Therefore, the investigating authority had no alternative to the investigation stage, as in other countries such as Austria, so it was not legally possible to relieve the investigating authority of the burden of the investigation stage using diversion in cases sent with an indictment. The law also did not allow for a system of direct summons to court following primary – public – measures in cases of simple legal and factual assessment, even in cases of arrests in the act, which would have eliminated the investigative activity of the investigating authority. Nor was there any possibility for the investigating officer to propose or intervene in the investigative phase of the procedure to use forms of diversion that would discharge the court, even though the conditions for such orders become clear at the discovery stage.

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<sup>23</sup> Vári Vince, A nyomozás változó szerepe az új Be.-i törvényben, In, *II. Turizmus és Biztonság Nemzetközi Tudományos Konferencia: Tanulmánykötet Nagykanizsa* (ed. Kiglics, Norbert), Hungary: Pannon Egyetem Nagykanizsai Kampusz, 2017, pp. 132

### 3. DIVERSION SOLUTIONS UNDER THE ACT CX OF 2017 ON CRIMINAL PROCEDURE

The legislation does not intend to change the role of the prosecution service, so it does not continue to give it a „sanctioning” part. Although it can continue to adopt quasi-convictions and measures, it can no longer impose fines or other forms of punishment that involve deprivation of liberty. While maintaining its position under the existing rules, the rules broaden the prosecutor’s discretion and vary it expediently. The aim is to ensure that cases can be brought to a swift conclusion in the course of an investigation, without prejudice to the fundamental right to a judicial procedure, employing a diversionary approach because of the suspect’s cooperation. Recognizing the truth of what was said in the chapter on diversions, the legislator decided to bring forward the prosecutor’s decision-making powers after completing a preparatory or the exploration phase and integrating that into the next investigation phase.<sup>24</sup> To put it simply, the formula is that, instead of closing the investigation and proposing charges earlier, the prosecutor’s decisions, which are much more variable than in the past, can be taken after the investigation has been completed. In fact, as a matter of constitutional law, an attempt should be made to avoid the investigative phase, which could shorten and close a significant proportion of cases. As stated in the Ministerial Explanatory Memorandum,<sup>25</sup> the purpose of the investigation is to enable the prosecution to decide on the merits of the case. This can occur immediately after the suspension has been made or after further procedural steps have been taken, i.e., after the investigation has continued. (Ministerial Explanatory Memorandum to Article 390 of the Be.) It follows that the classic investigative activity, which until now followed the questioning of the suspect, is, under the legislation, no more an alternative to the continuation of criminal proceedings than the use of any of the diversionary methods. Returning to the chapter on suspicion, the Act of suspicion itself, as a critical procedural dividing line, and the ‘trial’ of the suspect, which, by opening up the right to full access to the suspect’s and his defense counsel’s file and by enhancing the right to complain against suspension, form an elementary part of the complex legal regime of diversion. Compared with the current provisions, the autonomy of the charge phase, the separate document disclosure separating the investigation from the charge phase, and the particular institution of ordering further investigation are thus abolished. The investigation is closed by a decision to close the

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<sup>24</sup> See more about the role of the police in the investigation in the Hungarian criminal proceedings: Dragana Čvorović, Vince Vary, ”Police in the Hungarian criminal proceedings”, *Crimen*, 1/2021, pp. 28

<sup>25</sup> Ministerial Explanatory Memorandum to the Hungarian government on criminal procedural (Be.) T / 13972. to law proposal (<https://www.parlament.hu/irom40/13972/13972.pdf>) (Download: 11.10.2021.)

investigation, rather than by a different conclusion of the investigating authority to complete the investigation.

When exploration is transformed into an investigation, control over the scope of the “real evidence” decision is transferred from the investigating authority to the prosecution, i.e., that the prosecution must determine the extent and manner of obtaining evidence in the course of the inquire. The prosecutor bears in mind the requirements of the evidentiary procedure to be followed in the post-indictment judicial proceedings. By this solution, the legislator has killed two birds with one stone: on the one hand, the prosecutor can no longer rely on investigative errors in cases brought before the court, and on the contrary, the prosecutor will only prosecute cases where he has no evidentiary objections. This practice will eliminate the possibility of additional investigations since the entire investigation phase is under the prosecution’s control. According to the Minister’s explanatory memorandum, the Act emphasizes the institutional system of diversion, as already analyzed, to speed up and simplify criminal proceedings. At the same time, this also entails an increase in the use of quasi-guilty decisions by the prosecution. The legislation pays particular attention to the reimbursement of criminal costs, for which a legal basis is provided. (Ministerial Explanatory Memorandum to Article 402 of the Be.)

The institutional system introduced is based on the fact that the possibilities of termination of proceedings (mediation, conditional suspension of prosecution, decision on the specific method of prosecution), which are at the discretion of the trial, are essentially linked to the confession, prior or subsequent consent of the accused. By merging the indictment into the investigation phase, the Be. has taken a significant step towards speeding up the procedure by bringing the decisions subject to prosecutorial discretion. By going beyond the prospect of prosecutorial action, the Act also directly creates the possibility of prosecution and the defense to act as initiators to anticipate the decision on the conclusion of the proceedings. (Ministerial Explanatory Memorandum to Article 404 of the Be.)

Pursuant to Section 391 (1) of the Be, The prosecutor’s office may take the following decisions after questioning the suspect:

- a) the prospectus of a prosecution measure or judgment,
- b) to initiate a settlement,
- c) suspension of proceedings for mediation,
- d) conditional suspension by the prosecutor,
- e) termination of proceedings for other reasons,
- f) indictment,
- g) the performance of a procedural act within the framework of an investigation,
- h) separation, consolidation, or transfer of cases.

Compared to the previous legislation, there are several new elements in the current legislation. The prospect of prosecutorial action and decision in (a) is a mix,

a sort of amalgamation, of the various forms of prosecutorial discretion offered by the legislation in exchange for the suspect's confession and, optionally, the fulfillment of different conditions. Point (b) also bears a specific change since the provisions of former Chapter XXIV on the waiver of the trial (former Be. §§ 533-542 / D) were divided into two parts and placed in the investigative part in Chapter LXV on plea bargain (Be. §§ 407-412) is a one hand and in the amount of the particular procedure in Chapter XCIX is a procedural plea bargain. (Be. §§ 731-739.) The conditional suspension of prosecution was primarily included in the decisions as a legal instrument identical to the deferral of indictment in the current Be. Subsection (e) was added to § 398. (1) provides for the discontinuance of proceedings in cases where such discontinuance is ordered for other grounds for the termination of criminal liability as defined by law. Such grounds may be active remorse, cases against a cooperating person, or cases specified in the particular part of the Be., as well as grounds for termination on which a conditional prosecutor's suspension is based under section 417 of the Be. and discretionary cases of conditional prosecutor's suspension under section 416. Up to now, the measures taken after the disclosure of the file have been at the discretion of the prosecutor (former Be. Art. (1)) could not be the subject of a plea bargain with the suspect by introducing the system of diversion, the Be. changed all this significantly, hoping that in return for the opportunities offered, the criminal proceedings could be concluded by the confession and the measure or decision of the prosecutor without the investigation taking place.

We now go into more detail, with the prospect of a prosecution measure or decision as a new element, since the other factors were already part of the criminal procedure, except for the institution of the plea bargain, which has been renewed by being moved forward into the investigation, in the hope that the legislature will make more use of what was previously known as the 'waiver of trial,' but which is otherwise the classic plea bargain.

Paragraph 404 (2) (a) allows for the suspension of proceedings for mediation or the termination of proceedings for the outcome of mediation. Subsection (b) of the section offers the use of a conditional prosecutorial suspension equivalent to the deferral of a previous indictment and the termination of proceedings pending the latter's outcome for a confession. Point (c) offers the termination of the proceedings because of the cooperation of the suspect or dismissal of the charges, and point (d) provides the separate procedure for the prosecution and the criminal conviction in the case of an indictment, as provided for in Chapters XCVIII and C. In the legislation in force, neither the trial nor the use of a problem without difficulty, which is the equivalent of a separate procedure to obtain a conviction, was conditional on the conduct of the suspect in the proceedings, particularly his confession. However, the legislator does not consider an admission to be sufficient and imposes additional conditions on the suspect, in essence combining points (a)

to (d) of Article 404 (2). In the case of points (a) to (b) and (d) of subsection (2), it may still require the cooperation of the victim in point (c). In contrast, in the case of points (c) and (d), it may require the satisfaction of the civil claim of the quasi-victim in point (a). In the case of points (a) to (b) and (d), it may also require the fulfillment of other obligations that may be imposed under the conditional suspension of the prosecution in point (b).

Looking at the diversionary possibilities offered by the Be. in the investigation, it is questionable whether the legal instruments will play their role in accelerating the procedure in the investigation. Should we be concerned that they will not live up to expectations? This could, in principle, be refuted by reviewing the legal and regulatory framework for the conduct of diversion under the provisions of Government Decree 100/2018 (8.6.2018) on the Rules of Investigation and Preparatory Procedure (NYER).<sup>26</sup> The procedure for the handling of cases to be diverted at the investigation stage may appear to be entirely transparent and straightforward, i.e., more “convenient” in terms of administrative workload compared to complex investigative acts and a more optimal solution. The initiative to use opportunistic keys may come from the suspected person, defense, and the investigating authority. This will only mean a short information obligation for the investigating authority, and they will also have to notify the prosecution. If this happens during the interrogation, it can be interrupted and resumed later (same day or another deadline), depending on what the prosecutor decides. The latter cannot even be documented, so no additional administrative burden is created. Furthermore, if the investigating authority considers that these solutions are justified or appropriate, it only has to inform the prosecution. The information will thus be two-way, on the one hand, and will mainly consist of a printed text and a brief oral interpretation of the trial.

Meanwhile, to the prosecutor, it will be written or oral and will include the planned date of the suspect’s hearing, the measure considered justified or practical, and its reasons. If it is self-reported, there is no obligation to inform the suspect and the defense. Suppose the prosecution supports the initiative of the investigating authority or the prosecution side. In that case, it will prepare a written industry or communicate its decision orally to the investigating officer, even immediately. Thus, the investigating authority will assist in agreeing by handing over to the prosecution of the initiative prepared by the trial. If it has received it orally or by brief, it must be entered in the record of the procedural act and sent to the prosecutor. (NYER, § 156-158.)

From this point on, it is only a question of whether the prosecutor who has an optional approach to the charging cooperation system is more “comfortable” with investigative or rather with pre-trial diversionary solutions. Of course, this

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<sup>26</sup> Government Decree No 100/2018 (8.VI.) on the Rules of Investigation and Preparatory Procedure (NYER), Hungarian Gazette, No. 81/2018.

is wrapped up in the solid hierarchical relationship that characterizes the prosecutorial organization. Translated: the dual procedural role of the prosecutor means that his supervisory and managerial functions over the investigation are less labor-intensive than his quasi-evidentiary functions in the courtroom, which arises from his position as a public prosecutor. If only because the obligation to be present is present in the case of court trials, whereas the supervision and management of investigations do not require such control and management, and the Be. has already defined the public prosecutor's evidentiary responsibilities before the court much more clearly. Moreover, the principles of adversarial proceedings and equality of arms place the public prosecutor on an equal footing with the defense. It follows that if a procedural situation arises where there is competition between the pre-trial court hearing diversion option and the post-investigation diversion option, the pre-trial diversion option will enjoy more significant support. In particular, if the 'success' of the pre-trial procedure, i.e., the possibility of obtaining a confession, depends mainly on the investigative action's specific, much, and detailed activity.

Since its entry into force only a few months ago, the current Be. has been a resounding success in speeding up proceedings, mainly because of the increasing number and rate of confessions made by the accused at the pre-trial court hearing and the predominance of speedy closures without trial due to the acceptance of the sentence proposed by the prosecutor. "The center of gravity is in the preparatory session, which has been completely recodified by the legislature. In Be., the pre-trial court hearing has become the main rule, which plays an essential role in avoiding a full criminal trial by providing the possibility to pass a verdict right immediately in the case of an admission of guilt. At the same time, the framework of the evidentiary procedure and the direction of the defense tactics are fixed in the absence of admission."<sup>27</sup> This, however, shows a clear positive correlation with the over-preponderance of evidence in the investigative activity and the overshadowing of the use of the diversion instruments. Since the burden-sharing in the preparatory meeting seems to work well and has a high incidence, it is evident that this is a disadvantage of the earlier, i.e., optionally applicable opportunistic solutions in the investigative phase. What is more, if the preparatory meeting becomes the decisive procedural speeding-up and efficiency-enhancing tool, the condition for encouraging a confession will be nothing less than a detailed and thorough investigation by the investigating authority. The situation has therefore taken an exciting turn with the introduction of the current Be. Although the investigation was divided into separate phases of detection and inquiry, among

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<sup>27</sup> Pataki Bettina (2018): *Az új Be. előkészítő üléshez kötődő terhelti együttműködés. Jogászvilág.* <https://jogaszvilag.hu/a-jovo-jogasza/az-uj-be-elokeszito-ulesehez-kotodo-terhelti-egyuttmukodes/> (Download: 10-10-2021.)

other things, because of the legislative intention to integrate diversionary options. Despite this, the pre-trial court hearing solution has dealt a severe blow to the practice of applying the system of cooperation. In the case of a charge, which counterproductively has had the opposite effect of slowing down and prolonging the inquiry by making the investigative evidence more thorough and thus longer.

## CONCLUSION

It can be considered a profound reform of the current Criminal Procedural Law. The legislator rightly recognized that the development of diversionary instruments to speed up proceedings and improve efficiency is necessary. It has made the changes required to the legal institutions, including splitting the investigation into two parts, thus ensuring that the examinations are not unnecessarily protracted. In the event of a confession and the accused's intention to initiate proceedings, they are completed optionally, without the need for subsequent court proceedings. In addition, and with a similar aim of speeding up proceedings, the cooperation system with the prosecution has been extended. The role of the pre-trial court hearing has been enhanced. Since it entered into force, the case-law practice has shown that, while the frequency of cooperation in the preparatory hearing has skyrocketed, the use of investigative diversions has been almost negligible. With the rise of the pre-trial court hearing, there is a risk of an increase in the average time taken by cases in the inquiry, which undoubtedly indicates a trend towards a positive quantitative shift in the fact-finding activity of the investigation. Therefore, the delay and slowing down of the process will mainly affect investigations in the future. The procedurally counter-productive impact of the preparatory meeting on the investigation could be remedied by a legal instrument such as the one in the Austrian Code of Criminal Procedure (Austrian StPO),<sup>28</sup> ie, the motion to terminate a time-delayed inquiry based on an action by the accused.

Similar to the Austrian, this legal instrument would allow a suspect or defense to apply for a judicial review of the investigation if, because of the seriousness of the suspension, the duration, and the scope of the investigation, no further continuation of the investigation or clarification of the facts can be expected (Austrian StPO, § 108). This allows the duration of the investigation to be kept to a reasonable time. If the prosecutor agrees with the objection, he will terminate the proceedings; if not, he will submit a reasoned opinion to the court.<sup>29</sup> By assessing the evidence available until then, the court would take an initial position on whether

<sup>28</sup> Criminal Procedure Code 1975, as amended up to Federal Law published in the Federal Law Gazette I No. 70/2018 (BGBl I No. 70/2018)) (Austrian StPO)

<sup>29</sup> Farkas Krisztina, „A gyorsító megoldások rendszere az osztrák büntetőeljárásban.” *Kriminológiai tanulmányok* 55, OKRI. Budapest, 2018, pp. 211

further investigative measures are justified. The prosecutor would thus have an interest in exploiting the system of burden-sharing not only in the pre-trial court hearing but also in the investigation, since from there on, it would be justified to carry out fast and efficient investigative activities, given that delayed and protracted investigations could easily lead to judicial termination of an inquiry for this reason.

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## Диверзиони модел поступања у истрази у кривичном поступку Мађарске

**Сажетак:** Закон ХЦ из 2017. године о кривичном поступку, који је ступио на снагу 1. јула 2018. године, донео је значајне реформе у погледу истраге у кривичним поступцима у Мађарској. Доношење закона је храбар подухват у циљу побољшања ефикасности кривичног поступка реинтерпретацијом односа између шужилаштва и истражне органе, верификалним раздвајањем истрага и инспектирањем диверзионих могућности у анализи. Циљ му је да се превазиђу недостаци postoјећег система јасним дефинисањем процедура одговорности за истраге и бављењем једносавним „иријивјалним“ случајевима у фази откривања. У раду аутор даје предлог одредби Закона о кривичном поступку Мађарске које су уско повезане са истрагом, са посебним акцентом на могућности диверзионих модела поступања и остворена питања која се у овом контексту намећу и која су истраживана разрази у оквиру судске праксе.

**Кључне речи:** истрага, обука, диверзиони модел, принцип оштрих-нишета.

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