

REFLECTIONS ON THE LIMITS OF THE HUNGARIAN PLEA AGREEMENT

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Introduction

The new Hungarian Criminal Procedure Act (Act No XC of 2017 on Criminal Procedure, hereinafter: “CPA”) was designed to speed up criminal proceedings, as investigations and court proceedings had become very lengthy in previous years. The CPA introduced several legal measures to meet these objectives, which were expected to speed up the completion of criminal cases. Some of these are related to cooperation on caseloads. A codification aim was to broaden the possibility for the accused to cooperate with the authorities in the design of the legislation in order to make criminal proceedings more efficient and to redress the victim’s grievances effectively. (Vida, 2023)

The accused cooperates with the authorities to make a confession; consequently, some legal institutions allow for a quicker conclusion of the criminal proceedings. In return, the accused can expect to receive discounts and lighter sentences. According to the general justification of the CPA, “by the principles of timeliness and economy of litigation, most European States have come to recognise that pragmatic considerations make it worthwhile to treat cases in which the accused confesses differently from those in which the accused must be proved guilty.” (Bill T/13972 on Criminal Procedure. General Explanatory Memorandum) The confession of the accused creates an opportunity for the prosecuting authority to cooperate with the accused. All parties to criminal proceedings have an interest in this. Cooperation saves time and money for the authorities, reduces the penalty for the accused and ensures reparation for the victim. It also sends out the message that the perpetrator of the crime will indeed be brought to justice.

In the CPA, admission and cooperation by the accused can lead to two types of agreement. One form of agreement is a written agreement made before the indictment at the investigation stage. Under a plea agreement, the accused admits guilt of the offence committed in exchange for the prosecution applying the sentencing concessions for plea agreement in Act C of 2012 on the Criminal Code (hereinafter: CC). After the indictment, there may also be room for cooperation in the preparatory procedure (type 2 cooperation) if the accused admits guilt. It is an “implicit” agreement which, integrated into the criminal procedure, enforces the principle of simplicity, the agreement with the prosecutor and the admission of guilt. (Budaházi & Fantoly, 2023)

This paper presents the plea agreement reached during the investigation, highlighting its potential and limitations.

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Purpose

The paper aims to show Hungary's legal institution of the plea agreement and its limitations. Another aim is to show the characteristics of plea agreements in other European countries and how they differ from the American plea bargain.

Design/Methods/Approach

The paper reviews domestic and foreign literature and analyses domestic legal norms. It also illustrates the application of plea agreement through practical experience.

Findings

In Hungary, the plea agreement will be applied with the entry into force of the new Criminal Procedure Act in 2018. The plea agreement has been introduced into the practice on the Slovenian model. The legislator would expect this legal instrument to speed up criminal proceedings on a broader scale. In contrast, the number of criminal cases in which the legal tool is used is below 1%. The many limitations of plea agreement mean that it is rarely used at the investigation stage. This paper describes these constraints on the side of the prosecution, the accused, the defence and the judge. The legal instrument of plea agreement itself is good in criminal proceedings, but its current practice in Hungary needs to be changed to make it more common. The paper also presents practical solutions that the prosecution uses instead of a plea agreement but which fulfil its purpose.

Originality/Value

The paper could contribute to changing the application of plea agreement. The monitoring of changes could be the subject of further papers.

Cancellation of the Hearing

Before the new CPA came into force, the Hungarian criminal procedure used the predecessor of plea agreement, the trial waiver. The waiver of the trial was regulated by the Hungarian CPA 1998 (Act No XIX of 1998 on Criminal Procedure, hereinafter: 1998 CPA). The purpose of its introduction was the same as that of plea agreement: to speed up proceedings and reduce the burden on the courts. The legislator aimed to conclude cases as quickly as possible (Nagy, 2007). Nevertheless, the prevailing prosecutorial view was that waiver of trial should not be widely used. (Juhász, 2017) The narrow application resulted in a low take-up: between 2013 and 2017, the number of defendants who waived trial before indictment was between 0.09 and 0.20%. (Attorney General's Office, 2018) If the accused had made a confession of guilt and waived his right to a trial before the indictment, the court could, on the motion of the prosecutor, by a judgment handed down in open court, find the accused guilty of the same offence and the same charge as the indictment, and impose a sentence or measure. When imposing a custodial sentence, the more favourable sentence determined under CC section 82 (2), (3) was applicable, as it is now in the case of a plea agreement. A lighter penalty was also available for a co-



operating defendant if the offence was committed by a criminal organisation and he or she cooperated significantly with the prosecutor or the investigating authority during the investigation, contributing to the proof of the case or other criminal cases. One of the reasons for this rare application was that it could only be initiated by the accused or the defence and only within 15 days of filing the charge sheet. The short time limit and difficulty in setting a starting date also contributed to the rarity of the application. A further problem with the instrument was that it was only used in cases that had been investigated and were already at the indictment stage, at which point the prosecution had no interest in adopting it. It was mainly used when the case was not sufficiently proven: the prosecution brought charges without doubt about the sentence the court would impose based on the evidence. For example, the prosecution had to consider the risk that if a witness were swayed during questioning at trial, the court might acquit the accused. The fact that there was a defence lawyer who was not interested in a speedy conclusion of the case because of the remuneration he received, and therefore, the defence did not exercise its right of initiative, also favoured the institution. (Szaktor, Turi & Budaházi, 2022)

The principle of waiver of trial was examined by the Constitutional Court, and in its decision 422/B/1999 AB, it ruled that waiver of trial (along with the rules ensuring a fair trial) is a suitable instrument to contribute to the reasonably prompt adjudication of the state's criminal claim and the efficient operation of the judiciary. On this basis, with appropriate guarantees, no constitutional concerns can be raised against either the speeding up or shortening of proceedings or against encouraging the accused to confess or waive trial. (Vida, 2023)

Plea Agreement and Other Countries

The term plea bargaining is an umbrella category in the United States of America, encompassing several different plea bargaining solutions per state and author. It is generally agreed that the process can be broken down into two major stages. On the one hand, there is the unregulated plea bargaining between the prosecutor and the defence, and on the other hand, the guilty plea is the admission of guilt before the court. Foreign authors categorise the content of plea bargaining, and some views distinguish three broad categories. According to these, "charge bargaining" is a type of plea bargain where the defendant pleads guilty to another, less serious crime and the prosecutor charges the defendant with a less serious crime than the original charge (e.g. pleading guilty to the misdemeanour of theft instead of the felony of theft). "Count bargaining" is the plea bargaining of specific charges. The defendant is charged with three counts of burglary and pleads guilty to one, while the prosecutor waives the other two. Sentence bargaining means a discount on a specific conviction or sentence. For example, probation or a lower sentence may be granted by the prosecutor. (Pápai-Tarr, 2011)

In the codification of the CPA, the waiver of trial was restructured, and a plea agreement was introduced as a new legal instrument, but different from the US plea bargain. The model used in the codification was the Slovenian plea agreement, which had several differences from the waiver of trial. It was hoped that the plea agreement, which had proved its worth in Slovenia, would also contribute to speeding up criminal proceedings in Hungary and the speedier conclusion of criminal cases.

A Slovenian plea agreement can be proposed by the accused, the defence and the prosecutor. The Hungarian CPA also takes it over. The prosecutor has to inform the suspect in writing of the facts of the offence, which is the subject of the plea agreement and of the legal classification. [Slovenian Criminal Procedure Act (Zakon o kazenskem postopku or ZKP, hereinafter: "ZKP") section 450a (1)]



If the parties agree to enter into a plea agreement and the accused does not have a defence counsel, the court shall appoint a defence counsel on the prosecutor's motion. If a plea agreement is concluded, the assigned defence counsel shall perform the defence functions until the conclusion of the criminal proceedings. The defender's appointment is withdrawn if the prosecutor informs the court that the plea agreement has not been successful. [ZKP 450a (2)] In Hungary, too, a lawyer is required to conclude a plea agreement, but if the accused does not have an authorised lawyer, the prosecution makes the appointment instead of the court. Like the Hungarian practice, the Slovenian practice allows the prosecutor to negotiate only with the defence counsel if the accused consents [ZKP section 450a (3)]. In such cases, the accused does not participate in the conciliation. As in Hungary, a plea agreement in Slovenia is concluded in writing and must be signed by the accused, the prosecutor and the defence. The document is attached to the indictment. [ZKP section 450a (4)] If they do not reach an agreement, i.e. they do not reach a plea bargain, the documents relating to the negotiations will be excluded from the case file. [ZKP section 450a § (5)] (Budaházi & Fantoly 2023) Thus, the unsuccessful plea agreement procedure is not brought before the court and does not influence the court in its judgment.

The state prosecutor and the defendant may agree on the following in Slovenia:

- punishment or an admonitory sanction and the manner of executing the punishment;
- the state prosecutor's withdrawal from criminal prosecution of the defendant's criminal offences, which are not included in the admission of guilt if the injured party agrees to this;
- the costs of criminal proceedings;
- Fulfilment of another task.

These also apply in Hungary, but in Hungary, the victim's consent is not required.

The subject of the plea agreement cannot be:

- legal definition of a criminal offence;
- precautionary measures when these are mandatory;
- confiscation of proceeds of crime, except the manner of confiscation. (<https://www.dt-rs.si/pre-trial-proceedings>) In Hungary, the facts and legal classification are non-negotiable.

The Slovenian law does not limit the conclusion of the agreement to certain criminal offences; however, the agreement is usually concluded in more challenging cases and especially when the agreement:

- significantly shortens criminal proceedings;
- encourages the defendant to submit evidence for another more serious criminal offence which was committed by another person;
- enables the victims and sensitive witnesses to be exempt from testifying at the main hearing. (<https://www.dt-rs.si/pre-trial-proceedings>)

The last point is not specific to Hungary.

The institution of plea agreement appears in the practice of several European countries. In England, the indictment is read out at the trial, and the judge then asks the defendant to make a statement that he or she will plead guilty before the jury is empanelled (plea of guilty). The judge will decide without a jury if he or she pleads guilty. Here, the agreement nature of the proceedings is that this confession may be preceded by a statement by the prosecutor waiving certain charges (in the end, therefore, he/she confesses in the hope of a lesser punishment). The defendant confesses in the hope of a lesser punishment. However, unlike in Hungary, in the English judgment agreement, the prosecutor has no role in determining the amount of the sentence. The plea agreement also exists in Scotland. There, the



defendant can make a written offer to the prosecutor on which charges he or she is willing to testify in case of a waiver. (Farkas & Róth, 2004) In Italy, it is not possible to make a plea agreement for any crime. The prosecutor and the accused can agree on an offence punishable by up to three years' imprisonment. Together, they ask the court to impose a specific sentence. The court in Italy has no discretion as to the severity of the sentence. The court can either impose the proposed sentence, which ends the criminal proceedings, or the case can continue without a plea agreement. (Herke, 2021)

In Spain, the prosecutor sends the accused and the indictment, the proposed sentence and its level, which since 1989 has been up to 12 years of imprisonment (Farkas, 1992). Suppose the accused accepts the sentence offered by the prosecutor or enters into a plea agreement and, as a result, agrees with the prosecution. The court will impose the sentence without further evidentiary proceedings in that case. The institution of simplified negotiation has been introduced in Denmark. If the accused has confessed, the trial is conducted by a single judge without a jury, and the prosecution is not represented by a prosecutor but by a police officer. (Herke, 2021) In France, there is a correctional institution: if the accused confessed, the prosecutor could classify the crime as a misdemeanour so that the district court, rather than the jury, will have the power to adjudicate it. (Vókó, 2003)

The Plea Agreement Process in Hungarian Practice

A plea agreement is a procedure in which the court has no role. It occurs between the prosecution, the suspect and the defence during the investigation phase. It is an indispensable part of a plea agreement, as it requires a full confession, considered the critical evidence in the case. (Szaktor, Turi & Budaházi, 2022) Under the CPA, a plea agreement can be used in any case and for any crime. The Hungarian plea agreement is not the classic American plea bargain, nor is the Slovenian one, which serves as a model.

Unlike in Hungarian practice, in English criminal procedure, the prosecutor does not influence the type or the sentence level and cannot submit any motion. Thus, the plea agreement process is limited. (Gácsi, 2018) In Hungary, the classification of the offences with which the accused is charged and the case facts cannot be negotiated. In the investigation, the plea agreement is made up of three parts. (Fantoly & Budaházi, 2018) Hungary's investigation is divided into an investigation phase and a discovery phase. The investigation ends with the suspect's identification and interrogation. The discovery phase follows this. In the investigation phase, the prosecution examines whether a plea agreement can be initiated. If, during the investigation, the person who is not yet suspected (the person reasonably suspected of having committed a criminal offence) or his or her defence counsel would like to initiate a plea agreement with the investigating authority, the investigating authority will inform the declarant that he or she can initiate the plea agreement after the police officer has communicated the suspicion, preferably after the police officer has questioned the suspect. In other words, no formal initiation of a plea agreement can occur during the suspect's questioning at the end of the discovery phase. If the prosecution does not agree with the suspect's or the defence counsel's initiative, it will inform them without a written decision.

If the prosecutor, the accused, or the defence initiates a plea agreement, this is followed by conciliation. All three shall participate in the conciliation. The conciliation may take place on several occasions. The CPA does not set a time limit for the meeting. (Novoszádek & Szegő, 2021) Under the CPA, the facts and legal classification of the offence cannot be the subject of the meeting, which is a matter for the prosecution to decide. The prosecutor, as the prosecution's representative, does not dispute whether the classification of the offence is correct from a substantive criminal law perspective, for example. (Szabó, 2018) Suppose the prosecution and the suspect have agreed on the content of the



plea agreement. In that case, the prosecution will warn the suspect of the consequences of the planned plea agreement during the suspect's interrogation. The prosecution shall record the plea agreement resulting from the agreement in the record of the suspect's interrogation, which shall be authenticated jointly by the prosecutor, the accused and the defence.

The plea agreement describes the offence and its classification under the CC. In the plea agreement, the suspect must admit and agree to plead guilty. It also includes a definition of the punishment or measure to be applied independently and its specific type, level and content. [CPA section 410] The plea agreement may (but is not required to) include provisions such as a collateral sanction, a measure that may be imposed in addition to the sentence or measure, or the payment of or exemption from criminal costs. In the plea agreement, the suspect may also undertake, for example, to cooperate substantially with the prosecution or the investigating authority in order to contribute to the proof of the case or other criminal case, to compensate the victim for the damage caused within a short time or to participate in mediation. [CPA section 411]

If the accused and the prosecution have reached an agreement during the investigation, the prosecution will prosecute on the same facts and charges as the agreement on the record. The prosecutor's office shall submit the record of the plea agreement to the court together with the indictment. In such cases, the prosecution makes three motions in the indictment: to have the court approve the plea agreement, to impose a sentence (or measure) that corresponds to the content of the plea agreement, and to take further measures corresponding to the content of the plea agreement. By charging the offender, the court will know all the evidence obtained to make an informed decision to approve or reject the plea agreement. This real choice guarantees that the judicial procedure in the case of a settlement is not just a formality (Fantoly & Budaházi, 2018).

If the conditions for approving the plea agreement are met, and there is no room for refusing to approve it, the court approves the plea agreement in the preparatory session. There is no right of appeal against the court's order approving the plea agreement. The court shall base the guilt of the accused on the admission of guilt, the approval of the plea agreement and the case file. [CPA sections 735, 736] There is no problem with the regulation of plea agreements in CPA. Everything would be in place for it to be used more often. The only regulatory problem is that if the court does not approve the plea agreement, the criminal proceedings cannot continue with an investigation but will continue with a trial. Therefore, even if the court does not support the plea agreement in the preparatory session, the evidence required for the trial would be sufficient.

A Plea Agreement in the Numbers

In 2018, there were 67195 prosecutions in Hungary. The possibility of plea agreement was introduced after 1 July 2018 with the entry into force of the Criminal Code, which is one of the reasons why the prosecution submitted only 34 cases (0.05%) to the court based on a plea agreement during that year. (In 2019, 91 cases (0.1%) out of 68127 indictments were submitted for indictment by plea agreement (Prosecutor General's Office, 2020). In 2020, 58 cases (0.1%) out of 54401 indictments were submitted for indictment by plea agreement (Prosecutor General's Office, 2021).

In 2020, the prosecution entered into plea agreements with 122 defendants; the court referred only seven defendants for trial. In the remaining cases, the plea agreement was approved (Prosecutor General's Office, 2021). The approval rate of the plea agreement was 94.37%.



The figures show that the number of cases in which a plea agreement is reached is relatively small, with rates similar to those of the waiver of trial legal instrument (between 2013 and 2017, the use rate was between 0.09 and 0.20% of the number of indictments). While the waiver of trial legal instrument has had 15 years to increase its use rate, the plea agreement legal instrument has been available in criminal proceedings for four years. As the years go by, the rate of use may increase. However, it will not reach the high rate of plea agreement in the Anglo-Saxon world: in US federal criminal cases, the plea bargaining rate is around 97%, and in state criminal cases, 94%. (Zottoli, Daftary-Kapur, Winters & Hogan, 2016)

Problems with the Plea Agreement

Initially, the legislator intended the plea agreement for cases that had previously been decided by a court of first instance and were of a less complicated nature. The legislator expected that many cases could thus avoid a trial, as plea agreement cases could be concluded during the preparatory hearing. The legislator's optimism has proved to be exaggerated, as no mass of plea agreement cases have been brought. In the meantime, the prosecution has also addressed the issue of plea agreement, pointing out in principle that a plea agreement should take into account that, although it can be used in any case, for any offence, it can be a means of speeding up and increasing efficiency in cases that are not easy to judge (Vida, 2023).

The problem is that the plea agreement process is time-consuming, requiring multiple meetings between the prosecutor and the defence. It is administratively burdensome for the authority, which is why there are times when the prosecutor verbally agrees with the defence and in the context of an informal plea agreement that if the suspect confesses, he will make a so-called 'moderate' proposal, i.e. he will propose a lesser sentence in his indictment. It is also common practice for the authorities to make an investigative deal rather than a plea agreement. In exchange for information (evidence) about the case or another case, you may become a cooperator and receive benefits in your criminal case.

The defence may also be the reason for the infrequent use of plea agreement. It is only sometimes worthwhile for the defence to enter a plea agreement. In the case of a plea agreement, the accused will receive some sanction, i.e. the proceedings will not be terminated, or an acquittal will not be granted. The practice that the prosecution does not usually deviate from the mean when determining the sentence for the accused is not favorable to the prosecution. The median is half of the sum of the upper and lower sentences. Thus, the median is five years for a sentence of two to eight years. Even without a plea agreement, Hungarian courts usually impose the sentence based on the median. For this reason, it is not very advantageous to enter into a plea agreement if the sentence is not lower than it would be without a plea agreement. (Szaktor, Turi & Budaházi, 2022)

One of the reasons for the infrequent use of plea agreement is that the practice of plea agreement prior to 2018, when it was a legal instrument for waiving trial, has not changed and is only used for more severe offences. Prosecutors' experience shows that more plea agreements could occur than at present if the investigating authority were more active in examining the willingness to enter a plea agreement during the discovery phase of the investigation and informing the prosecution if it is likely.

The rule of thumb is that a plea agreement can only be initiated in the case of an established case after the investigation phase has been fully completed (Szaktor, 2020). If the plea agreement fails or the court does not approve the plea agreement, there is a high chance of an acquittal at trial due to the unavailability of evidence. If the court does not approve the plea agreement, or the accused does not



plead guilty before the court following the plea agreement and / or waives his or her right to trial, the Hungarian CPA does not allow the case to be returned to the investigation stage so that the investigation can continue and evidence can be obtained.

There is a problem that the plea agreement risks convicting the innocent, or that it gives an unfair advantage to the accused who cooperates with the authorities over his non-deciding accomplices, as those who adhere to the due process of law under constitutional law receive a heavier sentence than their counterparts who enter into a plea agreement. However, the plea agreement is often not effective enough. As a result, a lower sentence has a lower deterrent effect. Substantive truth is rarely established: the plea agreementer often tries to avoid a heavier sentence by making false statements. In a plea agreement, too much depends on the person and professionalism of the defender, and there is a risk of judicial and prosecutorial bias and possible revenge. (Fantoly & Herke, 2023) There was an instance of this in one case where the first defendant challenged a plea agreement made by the second defendant. The first defendant referred to another criminal case to explain why the second defendant testified against him. (Debreceni Törvényszék, 17.B.37/2020/151/VI)

However, there are also many arguments in favour of a plea agreement. One such argument is that the sentence is handed down very quickly, which helps ensure the trial's economy. The accused receives a lighter sentence, thus eliminating the risk of a disproportionate sentence being imposed in a public trial. However, neither the prosecution nor the defence feels like a loser at the end of the proceedings. A cooperative defendant may also facilitate the early prosecution of other alleged perpetrators, thus rewarding the cooperation of the accused with real concessions. (Fantoly & Herke, 2023) In one of the cases, the defendant who made a plea agreement refused to testify in the court of first instance. According to the Metropolitan Court of Appeal, he could do so because, in the plea agreement, it is only an option and not an obligation that the suspect may agree to cooperate substantially with the prosecution or the investigating authority in proving the case or other criminal cases. (Fővárosi Ítéltábla, 6.Bf.175/2021/10.) If the trial is held for other defendants, the court can question as a witness the defendant who has made a plea agreement. He refused to testify as a witness in that case.

Although the victim's identity does not increase or decrease the number of settlements, it is worth considering what the settlement means for the victim. The victim may benefit from the fact that, if a plea agreement is reached, he or she will not be questioned again by the court at trial. This may be an important aspect in cases of sexual offences, so that the victim does not have to relive the unpleasant experience (Herke, 2008). In this way, the state is also spared the recovery of a civil claim. The parties may also decide to bear the costs of the criminal proceedings, which may be borne in whole or in part by the State.

For the victim, a disadvantage of a plea agreement is that the accused is likely to receive a lighter sentence or measure from the court than if no plea agreement had been reached.

Conclusion

A plea agreement is one way for the authorities to shorten the criminal proceedings. The plea agreement mainly exonerates the court because if the agreement is concluded at the investigation stage by the accused, the defence and the prosecutor, and approved by the court at the preparatory meeting, or if the accused waives trial, there is no trial and no second or third instance trial. The case will end at the court's preparatory session. In Hungary, the plea agreement has a history of 5 years, and its application rate is less than 1% of cases, which is low. Reasons for this may include the administrative



burden on the authorities, the multiple occasions of negotiations leading to the conclusion of a plea agreement, the lack of openness to the plea agreement on the part of the investigating authority, the prosecution, the accused and the defence. It could become more frequent if it were more worthwhile for both the defence and the authorities to conclude a plea agreement. The study has shown that, in addition to the United States, the plea agreement is used in many European countries, with some variations. A common feature of a plea agreement is that it is negotiated between the defence and the prosecution and typically requires a confession from the accused to obtain a benefit in return. In current Hungarian practice, a plea agreement is used in several criminal cases, which have attracted much media attention. It has brought both simple and more complex cases to a swift conclusion. In Hungary, it is mainly up to the prosecution to decide how the number of plea agreement cases will develop, and if there is a will to use it more often, its use will increase. It would be worthwhile to allow the Hungarian CPA to return the criminal proceedings to the investigative stage if the court does not approve a plea agreement. It would avoid the authorities needing to collect more evidence than required for a plea agreement. It would also help make plea agreements more common if they were used more frequently in more cases, including those for less severe offences. In Hungarian practice, it is more often used for more serious offences.

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