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Trial Waiver Systems in Croatia
Towards a rights-based approach to trial waiver systems
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Author:
Elizabeta Ivičević Karas

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Introduction

Croatian criminal procedure has traditionally been a mix of adversarial and inquisitorial characteristics,¹ and one of fundamental principles of the criminal procedure is the principle of mandatory prosecution, determining that the state attorney is obliged to institute criminal proceedings when there is reasonable suspicion that a certain person committed a criminal offence which is subject to public prosecution and when there are no statutory impediments to the prosecution of that person (Article 2(3) of the Criminal Procedure Act² – CPT). The main purpose of this principle is to provide that the state prosecutor will initiate criminal proceedings against each suspect under the same conditions, without discrimination on any ground.³ Ultimately, this principle ensures the fair application of the provisions of material criminal law.⁴

Yet, the principle of mandatory prosecution does not exclude different forms of consensual procedures. They have all been introduced into the Croatian criminal justice system relatively recently and they are mostly justified by the principles of economics and efficiency of criminal proceedings, but also the humanization of the criminal justice system,⁵ especially in relation to the perpetrators of less grave offenses. Some of consensual procedures are regulated in compliance with the principle of mandatory prosecution, and they result in a (condemnatory) judgment, while in some forms of consensual procedures the state attorney exceptionally proceeds according to the principle of discretionary prosecution. All cases of discretionary prosecution are regulated by law, and justified by the fact that, despite reasonable suspicion and absence of statutory impediments to the prosecution, the state prosecutor must not institute criminal proceedings against a suspect if it would not be in the public interest, and that is the matter of the state attorney’s assessment. The application of the principle of discretionary prosecution is justified by the economy of criminal proceedings, as well as by utilitarian reasons.⁶ In addition, some forms of consensual procedures include negotiations, e.g. bargaining between parties, while others are in a form of tacit agreement, where the defendant may simply accept or not “the offer” presented by the state attorney.

This report will provide an overview of the legislative framework of different forms of consensual procedures, with special emphasis on the Croatian model of plea bargaining – judgment based on agreement of the parties. Analysis will cover selected theoretical and practical issues raised by practice and domestic literature. This analysis will also include the results of eleven half-structured interviews conducted with eleven practitioners (judges, state attorneys, attorneys and state officials of the Ministry of Justice of the Republic of Croatia). The number of conducted interviews does not provide any possibility of quantitative analysis, but still it contributed to the research with individual standpoints and perspectives on the raised issues.

Types of consensual procedures based on the principle of mandatory prosecution

There are three types of consensual procedures based on the dominant principle of mandatory prosecution, of which one actually implies negotiations and reaching an agreement, while the other two are tacit agreements. Consensual agreements based on the principle of mandatory prosecution include a judgment based on agreement of the parties, applicable to all criminal offences, notwithstanding the gravity or the type. Consensual procedures that do not include negotiations, but are actually forms of tacit agreement, are a penal order and a judgment in case of confession at the trial, both possible only for criminal offences punishable with a fine or imprisonment of up to five years.

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² Criminal Procedure Act (Zakon o kaznenom postupku), Official Gazette 152/08, 76/09, 80/11, 91/12, 143/12, 56/13, 145/13, 152/14, 70/17.
⁴ Krapac, op. cit. note 3, p. 103.
⁵ See Ivičević Karas, Elizabeta; Puljić, Dorotea, Presuda na temelju sporazuma stranaka u hrvatskom kaznenom procesnom pravu i praksi Županijskog suda u Zagrebu, Hrvatski ljetopis za kazneno pravo i praksu (2) 2013, p. 825.
⁶ Krapac, op. cit. note 3, p. 103.
Judgment based on agreement of the parties

Judgment based on agreement of the parties is a Croatian model of “plea bargaining”, originally constructed on the Italian model of “patteggiamento”. This model of consensual procedure was first introduced into Croatian criminal procedure in 2002, in the amendment of the Criminal Procedure Act then in force (CPA of 1997), known as “a judgment at the request of the parties in the investigation” (Article 190.a CPA of 1997).

This kind of judgment was possible only for criminal offenses punishable by imprisonment for up to ten years, and for more than five years, since for criminal offences punishable with imprisonment for no more no more than five years the legislator envisaged other forms of agreements (see infra). There was no possibility to bargain the criminal law qualification of the offence, since the state attorney was not allowed to act beyond the requirements of the principle of mandatory prosecution. Therefore, the parties negotiated only the type and the measure of the punishment.

The parties (the defendant and the state attorney) could demand a minor sentence from the investigating judge - there was a possibility of imposing a prison sentence of up to one third of the upper limit prescribed by law, while the lower limit was not prescribed. Parties were supposed to clearly indicate the type and the measure of the punishment, and in case the request of the parties was accepted, the investigating judge could have pronounced no other type or measure of the punishment. In case of disagreement with the proposed sanction, the request would have been referred to the judicial panel of the county court, which could either bring a judgment based on the request of the parties, or reject the proposal, in which case the decision was susceptible of appeal.

Even though the court had clear authority to reject the settlement, the research conducted at Zagreb County Court, covering the period from 1 January 2003 to 1 October 2007, showed that the investigating judge did not express any disagreement with the request of the parties, i.e. with the proposed type and measure of the punishment.

Research conducted in the early period of application of this consensual form (from 2002 – 2005) showed that there were only 13 cases in the whole Croatia, where the investigating judge brought a judgment at the request of the parties in the investigation. Yet, after the amendment of the Criminal Code of 2006 increased the criminal law repression, the application of the judgment significantly increased.

In 2008 Croatian Parliament enacted the new Criminal Procedure Act which replaced the traditional model of judicial investigation with the new model of prosecutorial investigation. “Judgment at the request of the parties in the investigation” was replaced with a “judgment based on agreement of the parties”. The principle distinction between two models is that the current one allows bargaining for all criminal offences, though the Instructions from the State Attorney General, which are mandatory for all state attorneys, actually exclude this possibility for the gravest criminal offences.

Yet, in practice there have been judgments based on agreement of the parties in cases of murder, attempt murder or rape. Initially, victims had no role in this consensual procedure, but since the legislative amendment of 2013, in cases of criminal offences against life and limb and criminal offences against sexual liberty, punishable

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8 Criminal Procedure Act, Official Gazette 110/97, 27/98, 58/99, 112/99, 58/02, 143/02, 115/06.
13 See Krapac, op. cit. note 11, p. 146.
14 Instructions of the State Attorney General, on the proceedings during bargaining with the suspect/defendant on terms of pleading guilty and the punishment, O-2/09, of 17 February 2010, http://www.dorh.hr/PresudaPoSporazumu (accessed on 9 March 2019)
with more than five years imprisonment, the state attorney must obtain the consent of the victim (Article 360(6) CPA).

In addition, the judgment may not be brought in at the stage of investigation, but at later stages of proceedings – either before the indictment panel, or at the preparatory hearing for the trial stage. The state attorney and the defendant may only bargain on the conditions of pleading guilty and the punishment or other criminal law measure (Article 360(1) CPA), but not under any terms on the criminal law qualification of the offence, since when bargaining, the state attorney is bound with the principle of mandatory prosecution which leaves him no such discretion.

The bargaining procedure is regulated by the Instructions of the State Attorney General, and the CPA only regulates the procedure before the court, once the parties reach the agreement. Before deciding on the written agreement submitted by the parties, the court must first decide on the soundness of the indictment (Article 361(1) CPA). This obligation was not prescribed in the original provisions on bringing a judgment based on agreement of parties, but it was introduced with legislative amendments in 2013. The agreement may be refused only if the agreed punishment does not comply with the rules on measuring the punishment, or if it is otherwise unlawful, and in the case the statement (the agreement) is accepted, the court may only pronounce the punishment or measure determined in the written agreement (Article 361(2) CPA).

If the parties withdraw from the agreement, the statement on the agreement as well as all the other data relating to it, they must be excluded from the case file and stored with the judge of the investigation (Article 362 CPA).

The judgment based on agreement of the parties does not contain standard reasoning, but the reasoning must only indicate the statement on the agreement of the parties, which was the basis of the verdict (Article 363(2) CPA). The judgment based on agreement of the parties may not be challenged on the ground of violation of the criminal law, or for the erroneous or incomplete determination of the factual situation, unless the defendant learned about the evidence on the exclusion of unlawfulness or culpability only after the verdict (Article 346 CPA).

Even though it is considered as a useful tool for quick and efficient adjudication, judgment based on agreement of the parties is relatively rarely applied in practice. According to the 2017 Annual Report of the State Attorney’s Office, statistics show that the number of judgments based on agreement of the parties amounted to 3,96% of all convictions. It should be noted that 1,34% of all convictions in 2017 were judgments based on agreement of the parties in cases under jurisdiction of the Anti-Corruption and Organized Crime Prevention Office.

For comparison, in 2016, the number of judgments based on agreement of the parties amounted to 2,95% of all convictions, while in 2015 it amounted to 3,35%, in 2014 it amounted to 4,6%, and in 2013 it amounted to 2,8%. It is possible to conclude that judgment based on agreement of the parties is relatively rarely used in practice, taking into account these comparative trends.

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17 Ibid., p. 47.
Judgment in case of confession at the trial

Another form of tacit agreement between parties is prescribed for the stage of trial, but only for criminal offences punishable with a fine or imprisonment of up to five years. If the accused pleaded guilty to all counts of the charge and stated that he/she agrees with the type and measure of the punishment proposed in the indictment, the court may not impose any other type, or more severe punishment or measure (Article 417.a (6), (7) CPA). 22

Penal order

Penal order is also a form of tacit agreement between parties. It was introduced into Croatian criminal procedure in the Criminal Procedure Act enacted in 1997 with the aim of unburdening judicial bodies. 23 Further legislative reforms of the institute actually aimed to extend its scope of application. 24 Initially, the penal order could be issued only for criminal offences punishable with a fine or imprisonment of up to three years, but with the legislative amendment of 2002, the limit of the prescribed prison sentence was lifted to five years. 25

At present, the penal order may be issued for criminal offences punishable with a fine or imprisonment of up to five years, upon the request of the state attorney filed to the court with the indictment (Article 540(1) CPA). The request must be based on the “credible content of the crime report”, and in practice the crime report is in rule supplemented with collected evidence. 26

The CPA prescribes possible sanctions, which do not include an unconditional prison sentence, but only a suspended sentence up to one year, a fine up to certain amount, a confiscation of pecuniary gain acquired through a criminal offence, publication of the judgment in the media, a prohibition to drive a motor vehicle for up to two years and a seizure of objects (Article 540(2) CPA). 27 If the judge agrees with the proposed sanction, the judgment issuing the penal order is brought without the trial.

The penal order must be delivered to the defendant and his/her attorney, who have the right to submit a written objection and oppose to the state attorney’s proposal, which will result in continuing the procedure before the indictment panel, and then at the trial. If the defendant does not file the objection, he/she tacitly agreed with the proposed sentence, and then the penal order becomes final (Article 541(4) CPA).

Some researches show that penal order is very often used in state attorneys’ practice. For example, in 2014, 39% of all indictments against adult accused persons included the request to issue a penal order. 28 In the last few years the percentages are similar: 38,6% in 2015, 29 39,46% in 2016 30 and 37,05% in 2017. 31 It can be concluded that a penal order is important instrument of consensual ending of criminal proceedings for less grave criminal offences.

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22 Munivrana Vajda, Ivičević Karas, op. cit. note 1, p. 152.
23 Bonačić, Marin, Kritički osvrt na hrvatsko zakonodavno uređenje instituta kaznenog naloga, Hrvatski ljetopis za kazneno pravo i praksu, (1)2015, p. 185 and 187.
24 Ibid., p. 187.
25 Ivičević, Elizabeta, Novose, Dragan, Vrste i mjere kazne primjenjivane u instrumentu kaznenog naloga i njihov odnos prema izrečenim kaznama, Hrvatski ljetopis za kazneno pravo i praksu, (2)2004, p. 676.
27 See Munivrana Vajda, Ivičević Karas, op. cit. note 1, p. 155.
Forms of consensual procedures based on the principle of discretionary prosecution

There are three forms of consensual procedures based on the principle of discretionary prosecution. The conditional deferral or withdrawal of criminal prosecution, if the defendant assumed one or more of specific obligations, known as “informal sanctions”, is a procedure that is possible exclusively for criminal offences punishable with a fine or imprisonment of up to five years. The other two forms, crown witness and witness immunity are used to obtain evidence (witness testimony) needed for the prosecution of a restricted number of the gravest criminal offences.

The conditional deferral or withdrawal of criminal prosecution

The state attorney may conditionally dismiss a crime report or desist from prosecution, if there is a reasonable suspicion that a criminal offence, prosecuted ex officio, and punishable with a fine or imprisonment of up to five years was committed, and the suspect/defendant assumed one or more specific obligations: to repair or compensate the damage, to pay a certain contribution to a public institution, or for humanitarian or charitable purposes, to pay alimony due or due liabilities, to carry out community service work, to undergo treatment for drug addiction or other addiction, or a psychological treatment to treat violent behaviour (Article 206.d(1) CPA). The assumed obligations must be satisfied in a term that may not exceed one year.

Prior to reaching this form of agreement, the state attorney must obtain consent of the victim or the injured party, which is necessary since a victim may resume a prosecution from the state attorney who dismissed a crime report or desisted from prosecution, and act as a subsidiary prosecutor.

This form of consensual procedure was introduced in Croatian criminal procedure in the Criminal Procedure Act of 1997, first for criminal offences punishable with a fine or with imprisonment of up to three years, under the influence of solutions in juvenile criminal procedural law which has known the principle of discretionary prosecution already since 1918. The regulation in force allows the state prosecutor rather large margin of discretion in applying so-called “informal sanctions,” imposing on the suspect/defendant different obligations. Even though in the case of conditional deferral or withdrawal of criminal prosecution there is no judgment, i.e. verdict, the state attorney does negotiate the application of the “informal sanctions” and their content and purpose do partially match with some “formal” punishments, safety measures and other criminal law measures prescribed in the Criminal code.

This form of consensual procedure is usually used in pre-trial proceedings, but it is also possible at the trial stage – before the beginning of the trial stricto sensu. Yet, according to some researchers, it is rarely used in practice, as Sirotić noticed, possibly because filing the indictment is actually much simpler than to engage into complicated and long lasting process of the conditional deferral or withdrawal of criminal prosecution. Other researchers stress the complexity of proceedings which hindered the application of this institute in practice.

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32 Munivrana Vajda; Ivičević Karas, op. cit. note 1, p. 152 – 153.
33 Puharić, Biljana; Radić, Ivana, Primjena načela svrhovitosti u postupanju prema maloljetnicima, Hrvatski ljetopis za kazneno pravo i praksu (2)2015, p. 648. See also Carić, Marina, Načelo svrhovitosti (oportuniteta) kaznenog progona iz članka 175. Zakona o kaznenom postupku, Hrvatski ljetopis za kazneno pravo i praksu (1)2001, p. 612 – 614.
34 Puharić; Radić, op. cit. note 33, p. 663 and 667-668.
36 Sirotić, Vlado, Uvjetna odgoda kaznenog progona punoljetnog počinitelja kaznenog djela, Hrvatski ljetopis za kazneno pravo i praksu (1)2012, p. 206.
37 Carić, Marina, op. cit. note 33, p. 638.
Crown witness

Crown witness is another form of consensual agreement based on the principle of discretionary prosecution. It was introduced into Croatian legal system in 2001 in the special legislation - Act on Anti-Corruption and Organized Crime Prevention Office. The previous CPA of 1997 allowed the State Attorney General to dismiss a crime report or desist from the prosecution of a person who was a member of criminal organization, it this was “of importance for the discovery of offenses and of the members of a criminal organization” and if this was “in proportion with the gravity of the offenses committed and with the importance of that person’s statement” (Article 176 CPA of 1997). This was actually the only legal provision on this form of agreement, which was considered insufficient, and as such, it hindered its application in practice.38

According to the regulation in force, the State Attorney General requires granting a suspect/defendant a status of a crown witness and the court assigns it. Basic substantive requirements are that the suspect/defendant must be a member of a criminal organization, that there are circumstances allowing a mitigation or remission of punishment, and that the statement is proportionate to the gravity of the offence and to its significance for revealing, proving and preventing other criminal offences committed within the criminal organization (Article 36(1) Act on Anti-Corruption and Organized Crime Prevention Office39).40 Therefore, a suspect/defendant may not be assigned the status of a crown witness if he/she committed any of the most grave criminal offence.

This form of agreement was meant to be applied in cases of organized crime and corruption. Due to the nature of the agreement, there are no publicly available statistics on its use, but it is actually rarely used in practice, probably due to relatively strict substantive and formal requirements, including rather complicated procedure of granting the status. At the same time, other two forms of consensual procedures, witness immunity (see infra) and judgment based on agreement of the parties may also be used in cases of corruption and organized crime, and they both, especially witness immunity, do provide witness testimony against other suspected/accused members of criminal organization, while implying much simpler proceedings. Yet, there are some significant difficulties met in practice, which will be discussed.

Witness immunity

Witness immunity is a relatively new form of consensual procedure, which was introduced in the new Criminal Procedure Act of 2008. Original provisions on this type of agreement gave large margin of discretion to the state attorney when granting the witness immunity, even for the gravest criminal offences, so the Constitutional Court of the Republic Croatia declared these provisions unconstitutional in July 2012.41 The legislative amendment of November 2013 implemented the principle of proportionality and provided narrower legislative framework for the state attorney’s decision. But still, it is the state attorney who decides on granting the witness immunity and there is no judicial control.

This form of consensual procedure applies to witnesses who refused to answer particular question in order not to expose himself/herself, or a close relative, to criminal prosecution. Then the state attorney may grant him/her witness immunity, if the statement of the witness is important for proving a grave criminal offence listed in a catalogue (Article 286(2) CPA). In addition, the punishment prescribed for the criminal offence that would be covered with the witness immunity must be lower than the one the witness testimony would refer to,42 and must not amount to ten years or more. Again, due to the nature of the agreement, there are no publicly available official data on the number of such agreements.

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38 Novosel, Dragan, Posebnosti Zakona o Uredu za suzbijanje korupcije i organiziranog kriminaliteta, Hrvatski ljetopis za kaznen pravo i praksu, (2)2001, p. 66.
40 Munivrana Vajda; Ivičević Karas, op. cit. note 1, p. 153.
42 Munivrana Vajda; Ivičević Karas, op. cit. note 1, p. 154.
Croatian version of plea bargaining: judgment based on agreement of the parties

Advantages and disadvantages

Advantages of Croatian version of plea bargaining – judgment based on agreement of the parties - are those of consensual procedures in general, such as providing economics of criminal proceedings, ensuring the right to a trial within a reasonable time, efficiency of proceedings,\textsuperscript{43} humanization of criminal law\textsuperscript{44} and criminal justice in general. Namely, one interviewee stated that the defendant who pleads guilty may avoid pre-trial detention, or at least reduce its length. In addition, the defendant who pleaded guilty shall not be exposed to a public hearing and the possible stigmatization that it implies.\textsuperscript{45} There are also possible advantages for victims who may give their consent to plea bargaining (in cases when it is needed, see supra), which then spares them from going through potentially very long trial.\textsuperscript{46}

On the other hand, there are significant disadvantages, which include the lack of clear legislative framework, especially regarding the role of the court and relatively large discretion of the state attorney to decide whether to negotiate. Plea bargaining is weakening defence rights, particularly when we take into account how punishments for more grave criminal offences could threaten and put pressure on the defendant to give up his/her right to fair trial and to secure a milder punishment. This may even be qualified even as a form of “torture of a modern age”.\textsuperscript{47}

The fact that the defendant who pleaded guilty may avoid pre-trial detention, or reduce its length, may also be considered as a disadvantage of plea bargaining, since that also puts pressure to plea bargain and preserve his/her personal liberty. Some interviewees pointed that the state attorneys still have much discretion in deciding when to (or not to) bargain, which places defendants in unequal positions. According to some interviewees, in practice, the state attorney is quite often not ready to negotiate, even if the defence proposed and there are no legal obstacles. This also points to a problem of incomplete regulation of the role of the state attorney.

Scope of criminal offences

One of the questions that may be considered as a problematic is the scope of criminal offences subject to plea bargaining. As it was explained, the initial form of plea bargaining, regulated in the CPA of 1997, provided this form of consensual procedure only for criminal offenses punishable by imprisonment for up to ten years, and for more than five years, since for criminal offences punishable with imprisonment for no more than five years the legislator envisaged other forms of agreements (see supra). As Krapac stressed, maybe the reason why there were few serious debates and little opposition to introducing plea bargaining into Croatian criminal procedure, was exactly the fact that initially it was reserved for less grave criminal offences.\textsuperscript{48}

Then, in the new CPA of 2008, the legislator drastically extended the scope of application to all criminal offences, without any prior study on compliance with other forms of consensual procedures, and obviously without a prior

\textsuperscript{43} Tomićić, Zvonimir; Novokmet, Ante, Nagodbe stranaka u kaznenom postupku – dostignuća i perspektive, Pravni vjesnik (3-4)2012, p. 178.
\textsuperscript{44} Krapac, op. cit note 31, p. 138.
\textsuperscript{45} j.ečević Karan; Puljić, op. cit. note 5, p. 825.
\textsuperscript{46} ibid., p. 836.
\textsuperscript{47} Tomićić; Novokmet, op. cit. note 43, p. 179.
\textsuperscript{48} Krapac, op. cit. note 31, p. 148.
study on the potential impact on the criminal justice in general, and without reasoning such a legislative solution.\textsuperscript{49}

Even though the State Attorney’s General Instruction provided guidelines not to bargain in cases of the gravest criminal offences, this form of consensual procedure has been used in cases of murders, rapes, etc., as it has already been stressed.\textsuperscript{50} In addition, it is used in cases of corruption and organized crime,\textsuperscript{51} including the “high profile” corruption.

Finally, as it will be explained, several crucial problems concerning plea bargaining in Croatia are actually connected with the scope of criminal offences subject to plea bargaining. This scope may be considered too large,\textsuperscript{52} taking into account that the pressure on the defendant to plea bargain is higher the higher the prescribed punishment.\textsuperscript{53} It may lead to conclusion that the scope of criminal offences should in any case be regulated on the legislative level, and based on the prior scientific study on existing trial waivers mechanisms in a whole.\textsuperscript{54} This is necessary if we know that a legal order does function as a system, including the criminal justice system.

It is interesting to note that among the interviewees there was no unique standpoint on this issue. Judges were mostly in favour of limiting the scope of criminal offences subject to plea bargaining, or at least excluding criminal offences of corruption and organized crime, as well as the gravest criminal offences.

Stages of the process

As mentioned previously, judgment based on agreement of the parties may be brought either before the indictment panel, or at the preparatory hearing for the trial stage, but not after the trial \textit{stricto sensu} has started. Among interviewees, there is no unique standpoint on whether this possibility to reach an agreement should be extended to the trial stage. Yet, according to the interviewees, it seems that in practice, there are some cases when the court brings the judgment based on agreement of the parties even after the main hearing has started – through the “fabrication” of the preparatory hearing, or the parties reach the informal agreement – in that case, formally, there is no judgment based on agreement of the parties. Yet, this is only an indication which certainly requires further research.

Powers of the court to question the agreement

In Croatia, the court does not have any role in negotiations of the parties regarding the terms of confessing the guilt and agreeing on the type and the measure of punishment. Negotiation which actually leads to the agreement is informal, and only once the agreement is reached and composed in the written form of the statement, it is presented to the court and then the formal proceedings start. The court may reject the parties’ statement if “given the circumstances, its acceptance is not in accordance with measuring the sentence as prescribed by law or the agreement is otherwise not lawful” (Article 361(3) CPA). If the court accepts the statement, it may only pronounce the same type and measure of punishment or other measure, as specified in the statement (Article 361(2) CPA).

In practice, the role of the court, i.e. the authority or duty of the court to assess whether the bargained sanction is fair given all circumstances, is a disputable issue, even if there were only few such cases in practice. On one

\textsuperscript{49} See Explanation note to the CPA of 2008: p. 188, accessible at: file:///D:/Nacrt%20konačnog%20prijedloga%20ZKP%202008%20-stranica%20%20Vlade.pdf [at 14 March 2019]

\textsuperscript{50} Ivućević Karas; Puljić, op. cit. note 5, p. 843 – 844.

\textsuperscript{51} Turudić, Ivan; Pavelin Boržić, Tanja; Bujas, Ivana, Sporazum stranaka u kaznenom postupku – trgovina pravdom ili? Pravni vjesnik (1)2016, p. 123.

\textsuperscript{52} Tomišić, Novokmet, op. cit. note 43, p. 178.

\textsuperscript{53} Ibid., p. 182.

\textsuperscript{54} Ivućević Karas; Puljić, op. cit. note 5, p. 842 – 843. Also Turudić; Pavelin Boržić; Bujas, op. cit. note 51, p. 144.
side, Croatian law provides an active role of the court in criminal proceedings, according to the traditional inquisitorial principle, which is still applied even at the stage of trial. The above cited legislative provision may be a ground for such interpretation. Turudić, Pavelin Borzić and Bujas stress that the principal role of the court is to assure that the punishment pronounced to the perpetrator is lawful and just, referring to constitutional guarantees. 55 On the other side, the court does indeed have very limited possibilities to consider all the circumstances taken into account by the state attorney when deciding on the sanction that would be adequate for the defendant. In addition, the state attorney is not lawfully obligated to present them to the court. Furthermore, the presentation of evidence will only take place at the trial, so the court has not yet had the possibility to evaluate all relevant evidence, but has to rely on the evidence in the case file. Finally, the CPA does not provide, as it did initially in the CPA of 1997, the possibility for the court to bring evidence ex officio, when needed, in order to decide on the agreement. Yet again, before accepting the agreement, the court must confirm the indictment, and that implies evaluation of evidence contained in the case file, which is also serves the assessment of the punishment (i.e. of its adequacy).

These doubts were confirmed in judicial practice, when the County court in Zagreb, on two occasions, rejected the statement on the agreement, submitted by the parties to the indictment panel, 56 but then the Supreme Court of the Republic of Croatia, acting upon the request for the protection of legality filed by the State Attorney General, denied the County court the authority to question the agreed punishment concerning the circumstances that are relevant for the choice of the type and the measure of the punishment, prescribed in Article 47 CC. 57 In brief, according to the Supreme Court, the court may only question whether the punishment fits the legislative framework.

As referring to the initial version of plea bargaining, judgment at the request of the parties in investigation, Krapac stressed the role of the investigating judge as a “guardian” of public interest while bringing the judgment based on plea bargaining. 58 In the new version of Croatian plea bargaining, the indictment panel actually assumed the former role of the investigating judge. Even from the comparative perspective, especially having in mind the concept of Italian patteggiamento which directly inspired the Croatian legislation while introducing this institute in 2002, there are strong arguments to support the attitude in favor of a stronger role of the court. 59 Yet, on the other side, the defendant will definitely be put in a non-favorable position if the court, once he/she reached the agreement with the state attorney and confessed the guilt, rejects the agreement for the reasons of the inadequate punishment.

Probably, the issue of “inadequate punishment” will be raised concerning more serious criminal offences, especially having in mind relatively large margins to decide on the punishment, set out in the Criminal Code, 60 prescribing that in the case of the agreement between the defendant and the state attorney, “the punishment may be reduced up to half of the minimum punishment obtained by reduction” pursuant to the provisions on the punishment litigation limits, “but cannot be any shorter than three months imprisonment” (Article 49(2) CC). Therefore this issue is closely connected to the problem of the scope of criminal offences subject to plea bargaining. The law does not expressly prescribe the obligation of the state attorney to take into account the purpose of punishment, as well as all mitigating and aggravating circumstances prescribed in Criminal Code (Article 41 and 47 CC), even if it is actually suggested by the Mandatory instruction of the State Attorney General. 61

On the other side, although it is a disputable issue, the research conducted at Zagreb County Court, which included all the judgments based on agreement of parties for the period from 2013 to 25 December 2015, showed that the Court did not refuse any agreement. 62 Therefore all plea bargainings were 100% successful.

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55 Turudić, Pavelin Borzić; Bujas, op. cit. note 51, p. 146.
57 Supreme Court of the Republic of Croatia, judgment in case Kz 38/16-3, of 21 September 2017. See also judgment in case Kz 17/2018-8, of 8 and 9 May 2018.
58 Krapac, op. cit. note 31, p. 150.
59 See Ivlišević Karas; Puljić, op. cit. note 5, p. 840 – 841.
60 Criminal Code, Official Gazette 125/11, 144/12, 56/15, 61/15, 101/17, 118/18.
61 Turudić, Pavelin Borzić, Bujas, op. cit. note 51, p. 144.
62 Ibid., p. 148.
which means that either the court actually did not assess whether the punishment was adequate, or the parties in all cases agreed on the punishment which completely complied with all legislative requirements.

It should be stressed that among the interviewees there was no unique standing point on the authority and real possibilities of the court to assess the adequacy of the punishment, but the judges were more than other interviewees in favor of the interpretation giving the courts greater powers. For example, when deciding on penal order, the court may assess that the proposed punishment is inadequate, so one interviewee said that it is only logical that the court should be able to do so when deciding on the agreement of parties as well, since it may concern much graver criminal offences.

If it is regarded from the perspective of the guilty defendant who managed to reach the agreement on the “unusually” lenient punishment, it may not be a problem from the standpoint of his/her defence rights. But looking through a broader perspective of the criminal justice system which rests on the principle of mandatory prosecution, such bargained punishment, in a procedure which was closed to public and where the court had no possibility to intervene in a way of rejecting such an agreement if the punishment is inadequate, does not contribute to transparency of the system, nor to the improvement of the procedural position of other defendants who have very uncertain chances to bargain and reach the agreement with the state attorney.

Finally, more or less all interviewees agreed that the court assures transparency of proceedings, even in absence of public, which actually speaks in favor of the power of the court to question the reached agreement.

**Defence issues**

**Mandatory defence**

The law prescribes a mandatory defence during the whole course of plea bargaining (Article 360(1) CPA). The defendant must have a defence counsel from the beginning of negotiations with the state attorney. All interviewees agreed that the presence of a defence counsel guarantees an adequate protection of defence rights. Even though the CPA expressly prescribes it, before deciding on the indictment and accepting the agreement, the court must establish that the parties really agreed with the contents of the given formal statement (Article 361(1) CPA). Many interviewees pointed out that judges thoroughly verify whether the defendant actually understood the meaning of the judgment based on agreement of the parties, its consequences and limited possibilities to appeal. Yet, it seems that judges regularly do not clearly check with the defendant whether the admission of guilt was given on the defendant’s free will and without any pressure, and some of interviewees said that such checks would be needed.

**Influence of the defence directives**

The general opinion of the interviewees is that there is no any direct impact of transposition of the EU directives on defence rights, on the defence rights of defendants during plea bargaining. Most of them reasoned that this was because the plea bargaining takes place at relatively late stages of proceedings. Yet, two interviewees, both attorneys at law, stated that, in their opinion, the procedural position of the defendant has generally improved. Since the implementation of the Directive on access to a lawyer, a suspect has a right to a defence counsel before

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63 Ibid.
64 Ibid.
and during any police questioning, and so, the right to remain silent is better guaranteed and the defendant is in a better starting position for possible negotiations with the state attorney.

**Plea bargaining with the aim to obtain witness testimony incriminating (former) co-defendant**

One of reasons for plea bargain that the state attorney should asses, is whether the agreement would enable detecting other criminal offenses or other perpetrators, as regulated in the State Attorney General’s Instructions. This was prescribed in the previous law on the State Attorney’s Office of 2008 (Article 74(1)6), as a legitimate aim or bargaining, yet the new law of 2018 does not contain such a provision. Therefore, at the moment, this issue is regulated in the Instructions, which are an internal legal act.

This may be questionable for several reasons, as our interviews confirmed. The first issue concerns the risk of possible manipulation with procedural roles of different participants in the procedure. In Croatian law, it is strictly forbidden to question, as a witness, one of co-defendants, in case the proceedings against him/her was separated from proceedings against other co-defendants (Article 284 point 3 CPA). That is so to provide unity of evidence, but also to protect fundamental defence rights. Namely, the defendant has the right to remain silent and is not obligated to tell the truth, while the witness is obligated to testify and to tell the truth, with the risk of criminal prosecution for false testimony.

In case of judgment based on agreement of the parties, once the co-defendant is convicted, he/she is no longer formally a defendant and he/she may testify in criminal proceedings against his/her former co-defendants. In addition, the defendant who is motivated to reach the agreement, and to give a certain statement, will not necessarily tell the (complete) truth, but might adjust his/her statement to the needs of prosecution of other co-defendants, so the evidentiary value of such statements may be disputable. In addition, as it was raised by one interviewee, there is a problem that the court cannot review the terms of the agreement of the co-defendant.

On the other hand, from the state attorney’s perspective, there is no guarantee that, after the bargained sentence became final, the witness will respect the agreement. Having that in mind, the procedure of granting the status of crown witness is more efficient, because whether the crown witness will actually be exempt of criminal prosecution, depends on his/her cooperation and testimony before a court.

**Conclusions**

Different forms of consensual procedures have been introduced into Croatian legal system over the last two decades. These forms are either based on the application of the principle of mandatory prosecution, or the principle of discretionary prosecution. They are based on negotiations of the parties and formal agreements, or they have a form of tacit agreements.

What is clear is that the Croatian legislator introduced various forms of consensual procedures in a short space of time, some of them having been amended on several occasions with a tendency to expand the scope of their
application. Yet, it seems that the legislator failed to take a systematic approach to the issue of consensual procedures, which would imply an assessment of their impact on the criminal justice system as a whole.

It also failed to clearly distinguish different forms of proceedings regarding their specific purposes and domains of application. There is, for example, no clear distinction between purposes of using the crown witness, witness immunity and judgment based on the agreement of the parties, which is used to obtain the witness statement of the convicted person in the criminal proceedings against his/her former co-defendant, which is disputable from many reasons. Therefore, there is a need for a holistic and harmonized regulation of different forms of consensual procedures, as well as a need for a complete and clear regulation of each form of consensual procedures.

Even though it is considered that consensual forms of proceedings do provide speedier, more economical and more efficient criminal proceedings, there are still concerns about the respect of fundamental defence rights, as well as doubts regarding the role of the court and the state attorney. Finally, it should be kept in mind that the regulation of consensual procedures should contribute to the transparency of the criminal justice in a whole.