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ARTICLE

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ABSTRACT

The paper contains an analysis of judgments based on agreement of the parties, a Croatian model of plea bargaining, drawing on the experiences of three groups of practitioners: judges, state attorneys, and defence counsels. Previously conducted comparative legal analysis, as well as analysis of the Croatian normative framework and jurisprudence, was not able to provide answers to a number of questions about the motivation of the parties to negotiate, on the negotiation procedure which is not recorded in the protocol, about the real and the ideal role of the court, and about the real position of the parties and the victim. Hence, these issues were researched through semi-structured interviews with 60 practitioners and then further discussed in four focus groups. Some of the findings uncovered systemic inconsistencies in everyday legal practice in a number of areas. For instance, judgment based on agreement of the parties is more readily used in cases of serious offences, while other consensual forms of proceedings tend to be used for less serious offences. Informal negotiations at all stages of the criminal procedure have proven to be very popular with practitioners and sometimes even encouraged by judges. Yet, the issue of judicial control of the plea agreement divided the respondents, even though the right to judicial review of criminal prosecution is a fundamental principle of Croatian criminal procedure, which covers not only the fundamental issues of legality and voluntariness of the concluded agreement, but also the purposefulness of the proposed sanction. The victim's position in the plea-bargaining procedure is considered to be adequate, at least as long as the victim is involved, and there is a tendency to consult the victim even in cases when his or her consent is not required by law. Finally, although it is generally considered that defence rights are well protected, there are problematic issues, namely tariffs or the 'take it or leave it' offer, as well as the wide discretion of the state attorney when deciding to enter into negotiations and reach agreement. The qualitative analysis of the findings, which is presented in this paper, should contribute to drafting specific proposals for improvements in the legislation and practice of the judgment based on agreement of the parties in Croatian law. Many of these findings may also be relevant for other legal systems, especially those of the continental European legal tradition, since they may face the same problems and questions related to plea bargaining as a global phenomenon.

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1. INTRODUCTION

Following contemporary trends in criminal procedure, since the mid-1990s the Croatian legislature has been introducing and gradually widening the scope of application of various forms of consensual procedures, including judgment based on agreement of the parties, which was introduced in 2008 with the new Criminal Procedure Act. This is a consensual form closest to the traditional plea-bargaining procedure existing in legal systems of the Anglo-American legal tradition, as well as in many continental European legal orders, each of which has its own specific features. The main goal of this consensual form was to economise and increase the efficiency of the criminal procedure by concluding the proceedings before the trial stage.

This form of agreement between the parties may be concluded at the stage of the proceedings before the indictment panel and, exceptionally, at the preparatory hearing, i.e., it may not be concluded once the main hearing has started. Negotiations leading to the agreement are not regulated in detail by law, but mandatory defence is prescribed during the negotiations and court proceedings.[1] The agreement is allowed in relation to all criminal offences, regardless of their type and severity. In the case of criminal offences against life and limb, and against sexual liberties, for which a prison sentence of more than five years may be imposed, the consent of the victim to this form of agreement is mandatory.[2] This model of plea bargaining is based on the principle of legality, or mandatory prosecution, so it is not permitted to bargain on the legal qualification of the criminal offence, but only on the type and measure of punishment.[3] The parties enjoy a rather broad autonomy during the negotiations, but the law stipulates that the court may reject the agreement if it is not lawful, or if accepting a statement of agreement would not be in accordance with the rules on determining the punishment prescribed by law.[4]

Although this consensual form has a legitimate purpose – to improve the efficiency of criminal proceedings – it has nevertheless caused a number of problems in Croatian legal practice. One of them is the fact that it is often used for another specific procedural purpose – to obtain witness testimony in another criminal procedure, against another accused or co-accused.[5] This opened up a number of questions, such as whether the legal regulation of this consensual form complies with the stated specific purpose, especially bearing in mind that Croatian criminal procedural law regulates consensual forms, such as the crown witness and witness immunity, which are intended specifically for these cases. Another question was whether this consensual form was appropriate for serious criminal offences, and particularly for organised crime and corruption, as well as whether it implied sufficient judicial control. Doubts about the appropriateness of the current legal framework are also raised by the fact that the negotiation procedure is not required to be recorded in the protocol nor contained in the case files, as well as the fact that consent of the victim to the procedure is required only exceptionally. The search for answers to these questions initiated the first, theoretical and comparative, part of the research, which served as a ground for the second, empirical, part of the research presented in this paper.[6]

In order to further investigate these issues, we made a review of the most relevant case law of the European Court of Human Rights (ECtHR) (Section 2.1), after which we offered a brief comparative legal perspective on plea bargaining (Section 2.2). The central part of this paper (Sections 3 to 7) presents the methodology and the results of semi-structured, in-depth interviews with a number of Croatian practitioners on a range of issues dealing with the judgment based on agreement of the parties. The main aim of this research, both of its theoretical part and its empirical part, was to identify and analyse the legislative shortcomings and their implications in legal practice. First and foremost, the findings could serve as a basis for proposals for comprehensive legislative improvements of the Croatian legal framework in the area of consensual procedures, which are necessary as the Croatian legislature has never taken

1 Criminal Procedure Act 2008, Art 360(1).

2 ibid Art 360(6).

3 ibid Art 360(1).

4 ibid Art 361(3).

5 E Ivičević Karas, A Novokmet and I Martinović, 'Judgment Based on Agreement of the Parties in Croatian Law: A Critical Analysis from the Comparative Legal Perspective' (2021) 37 Pravni vjesnik 24–25.

6 ibid 11–34.

a consistent, systematic approach to the specific objectives of each existing form of consensual procedure, the gravity of criminal offences which may be the object of a particular form of agreement, the judicial control of the agreement, and defence rights and victims' rights in different consensual forms.[7] While these issues concern all forms of consensual procedures existing in Croatian criminal procedural law, this study focuses specifically on how the previously mentioned questions are regulated in judgments based on agreement of the parties.[8] We also believe that many of the questions addressed in this research may be relevant for a wider international audience, as they point to some typical problems with plea bargaining as a global phenomenon. Although the conclusions derived from the qualitative analysis are not 'absolute', the fact that a large number of practitioners who participated in the research point to the same specific issues or problems that they encounter in their practice of plea bargaining strongly indicates that these problems do exist and need to be addressed by the legislature.

2. EUROPEAN AND COMPARATIVE LEGAL PERSPECTIVE

2.1. PLEA BARGAINING FROM THE PERSPECTIVE OF ARTICLE 6 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

The practice of concluding plea agreements has been under the scrutiny of the ECtHR on several occasions. Thus, in the case of *Deweer v Belgium*, the Court pointed out that the defendant's consent to the imposition of a sanction without a trial would not be contrary to Article 6 European Convention on Human Rights (ECHR) if it is given in a free, explicit, and unambiguous manner.[9] In this way, in essence, the ECtHR hinted that different consensual forms aimed at speeding up criminal proceedings are not necessarily contrary to Article 6 ECHR.

This position of the ECtHR was additionally considered and confirmed in the case of *Natsvlishvili and Togonidze v Georgia*.[10] The Court emphasised that settlements have multiple advantages because, in addition to relieving the judicial system of a large number of cases and prisoners, they can, if applied correctly, also be a successful tool in the fight against corruption and organised crime (§ 90). Nevertheless, in this case, the ECtHR took an additional step forward because it determined two fundamental requirements by which it would assess in the future whether the concluded agreement complies with Article 6 ECHR. These criteria are as follows: (a) the defendant must accept the settlement on a completely voluntary basis, fully aware of all of the facts of the case and the legal consequences of the concluded settlement; (b) the content of the settlement, as well as the fairness of the procedure that preceded the conclusion of the settlement, must be subject to sufficient judicial control (§ 91–92).

A strong contribution to the further shaping of plea agreements in the criminal proceedings of European countries was also made within the framework of the Parliamentary Assembly of the Council of Europe which, in 2017, launched an initiative to study the application of consensual procedures in practice, including plea bargaining and the analysis of good practice, risks and problems, with the aim of making relevant recommendations for member states of the Council of Europe.[11] In its resolution 'Deal making in criminal proceedings: the need for minimum standards for trial waiver systems' of 12 October 2018, the Parliamentary Assembly stressed that appropriate safeguards are needed to ensure that member states enjoy the potential benefits that trial waiver systems may offer, while minimising the threat to human rights, in particular the right to a fair trial.[12] Therefore, it called upon all member states to implement the following safeguards, whose effectiveness will ultimately depend on the existence of a

7 E Ivičević Karas, 'Consensual Justice in Croatian Criminal Procedural Law: The Need for a Systematic Approach' (2020) 4 EU 2020 – Lessons from the Past and Solutions for the Future, EU and Comparative Law Issues and Challenges Series (ECLIC) 407–408.

8 The results of this study, as well as the studies of other consensual forms existing in the Croatian criminal justice system which were conducted within the same research project, should provide for a systematic approach to issues of negotiated justice and, finally, as pointed out, lead to proposals for concrete legislative improvements and better practical solutions.

9 *Deweer v Belgium*, no. 6903/75, Judgment 27. 2.1980.

10 *Natsvlishvili and Togonidze v. Georgia*, no. 9043/05, Judgment 29. 4. 2014., ECHR, 2014-II, p. 26.

11 Out-of-court Settlement Procedures in Criminal Justice: Advantages and Risks, Doc. 14371, 29 June 2017, https://pace.coe.int/en/files/25041, accessed 10 August 2022.

12 Resolution 2245 (2018), Out-of-court Settlement Procedures in Criminal Justice: Advantages and Risks, 12 October 2018, https://pace.coe.int/en/files/25041 accessed 10 August 2022.

truly independent judiciary: (a) making the involvement of a lawyer obligatory, as a condition for the validity of a plea bargain; (b) imposing a minimum level of investigation into the crime underlying the plea agreement and the disclosure of the results of the investigation to enable the defendant to make an informed choice; (c) requiring judicial scrutiny of key elements of the plea agreement, regarding in particular the credibility and voluntary nature of the confession and the appropriateness of the sanction resulting from the plea agreement, and envisaging adequate accountability for intimidation, duress and other abuse in the course of plea bargaining; (d) limiting the differential between the sanction resulting from a full trial and that offered as part of a plea bargain ('trial penalty'), thus avoiding unfair pressure on the accused while ensuring that sanctions remain within an appropriate range, and that justice is seen to be done; (e) prohibiting the waiver of appeal rights in order to ensure sufficient control, at the national level, of the actual practice of lower courts in the field of plea bargaining; (f) foreseeing the possibility of revoking a plea agreement in certain circumstances, in particular when new facts arise or become known which make the plea agreement inappropriate and require further prosecutorial action; in such a case, a confession made as part of the agreement must not be used against the defendant; (g) minimising the use of pretrial detention against persons suspected of less serious crimes by making use of alternative measures; (h) monitoring indicators of racial or wealth bias or discrimination in the reduction of sentences following guilty pleas, and taking appropriate awareness-raising, training, and, if need be, disciplinary measures to counteract any such bias or discrimination; (i) ensuring that the law-enforcement authorities and the criminal courts are properly resourced so as to avoid excessive recourse to trial waiver systems for purely budgetary reasons; and (j) ensuring proper monitoring and control by courts and law-enforcement bodies to avoid blackmail, pressure or any other manipulation aimed at compelling suspects to engage in a trial waiver system.[13]

These requirements, established at the level of the Parliamentary Assembly of the Council of Europe, certainly provide a substantial foundation for determining the minimum European standards that must be met to guarantee the conditions and prerequisites for the successful functioning of plea agreements in the European context. Taking into account that the plea bargaining procedure has its roots in the Anglo-American procedure, which significantly deviates from the minimum standards for the protection of defendants in certain European countries, it is justifiable to determine, by referring to positive European standards, the minimum guarantees intended to ensure the implementation of fair trial safeguards in the course of making a plea agreement.

2.2. COMPARATIVE LEGAL PERSPECTIVE

Although the American plea-bargaining model has served as an inspiration to legislatures in a number of European countries over the last few decades, comparative legal research has focused on Italian, French, Swiss, German and Austrian law, primarily due to the geographical proximity and/or the traditional influence of the law in these countries on Croatian criminal procedural law.[14] The detailed comparative legal analysis, which serves as a ground for designing the research contained in this article, has already been published[15] and we will refer to it in this Section of the paper as well as in appropriate places in the following Sections.

The comparative legal research has shown that consensual forms corresponding to judgment based on agreement of the parties, including *patteggiamento* in Italian law, *plaider coupable* in French law, and *abgekürztes Verfahren* in Swiss law, are not used for more serious criminal offences, or for criminal offences of organised crime and corruption.[16] Moreover, Austrian legislation, which has long served as a model for the Croatian legislature, does not provide at all for plea bargaining in criminal proceedings. One possible conclusion is that these consensual forms in comparative law serve primarily to ensure procedural efficiency and economy, and not to obtain the testimony of the defendant who will reach an agreement and then testify against his or her co-defendants in other criminal proceedings. That is to say, settlements aimed at obtaining the testimony of witnesses in other criminal proceedings are important precisely for

13 ibid.

14 E Ivičević Karas, A Novokmet, I Martinović (n 5) 12.

15 See ibid 11–34.

16 ibid 25.

the effective detection and proof of serious crimes, especially corruption, organised crime and terrorism.[17] For this purpose, national laws provide for special consensual forms, which include mechanisms to ensure that the defendant, as a *collaborator of justice*, will comply with the agreement.[18]

The next important aspect of the regulation of plea-bargaining procedures is appropriate judicial control. Since the judgment based on agreement of the parties is rendered by the court, the question is to what extent the court can control not only the legality of the agreement, but also the adequacy of the agreed penalty. Comparative legal research has shown that strong judicial control is ensured in Italian, French and Swiss law, since the court can reject the agreement of the parties not only when it is unlawful, but also when the proposed punishment, in the court's assessment, does not correspond to the purpose prescribed by the criminal code.[19] The German regulation of *Absprache* is specific insofar as the court is directly involved in the negotiation and in that sense has full control over the agreement, including the agreed penalty.[20] In this respect, Croatian law is an exception, since, according to the established practice of the Supreme Court, the court cannot review the adequacy of the agreed punishment, even when the agreement relates to serious crimes, including organised crime and corruption.

Finally, the issue of the position of the defence when initiating the agreement and during negotiations is particularly complex, and, more recently, the question of whether the victims have been provided with an adequate role has been raised. The question of defence rights and the legal position of the victim in plea bargaining are particularly relevant from the point of view of European criminal law and a series of recent directives that regulate these matters.

3. METHODOLOGY

As previously mentioned, the first part of the research included a theoretical analysis of the relevant foreign and domestic literature, an analysis of the domestic legislative framework of judgment based on agreement of the parties and the jurisprudence of the Supreme Court of the Republic of Croatia, as well as a comparative legal analysis. The research focused in particular on: (a) the purpose or specific objectives of traditional plea bargaining; (b) the scope and gravity of the criminal offences included; (c) the power of the court to review the agreement; (d) procedural and defence rights; and (e) the role of the victim.

The results of the first part of the research, i.e. the conclusions drawn and the questions that were raised for further discussion, enabled the preparation of the empirical part of the research, which was conducted in two phases.

The first phase of the empirical research included conducting semi-structured interviews with 60 experts, of whom 27 were from Zagreb, 15 from Split, nine from Osijek and nine from Rijeka.[21] Twenty interviews were conducted with professionals from each of three groups: judges (10 from county courts and 10 from municipal courts), state attorneys (10 from county state attorney offices and 10 from municipal state attorney offices) and defence counsels. In each group, nine interviews were held with professionals engaged in Zagreb, five in Split, three in Osijek and three in Rijeka. The questionnaire for each group of respondents was compiled based on the results of the first part of the research, which highlighted some controversial issues of normative regulation and the practice of plea bargaining in Croatia.

In the second phase of the empirical research, in order to deepen understanding and to clarify the remaining ambiguities, there were four focus group discussions, three of which were homogeneous (judges, state attorneys, and defence counsels), while the fourth focus group

17 ibid.

18 See E Ivičević Karas, Z Burić and M Pajčić, 'Collaborators of Justice: Comparative Legal Solutions and Croatian Criminal Procedural Law' (2021) 37 Pravni vjesnik 35–56.

19 E Ivičević Karas, A Novokmet, I Martinović (n 5) 27–28.

20 ibid 27.

21 Interviews were conducted in Osijek, Rijeka, Split and Zagreb from June to November 2021. Before each interview, the interviewees were informed of the project and the goals of the research, and that their responses would be anonymised. During each interview, the interviewer took notes and then typed the transcript. All 10 members of the project team, eight professors and two assistants from all four law faculties in Croatia, conducted the interviews.

was multi-professional.[22] Each focus group had four to six participants from Zagreb, Split, Osijek and Rijeka. For each of the focus groups, there was a special protocol, while the issues for discussion were based on the results of the analysis of research conducted by means of semi-structured interviews.[23]

4. NEGOTIATIONS BETWEEN THE PARTIES: INITIATIVE, MOTIVATION, SCOPE AND STAGE OF CRIMINAL PROCEEDINGS

4.1. PLEA BARGAINING INITIATIVE

Some of the forms of consensual proceedings recognised in Croatian law do not envisage prior agreement between the parties, but consist of a unilateral offer by the prosecutor (e.g. a penal order). However, judgment based on agreement of the parties may, understandably, follow only upon an agreement having been reached, which becomes formalised in the act of signing a joint statement which must include the guilty plea, the agreed sentence and some other legal consequences.[24] The negotiations preceding the signing of the statement are not regulated by law apart from the provision stating that the parties may negotiate the terms of a guilty plea and that the defendant must have a defence counsel in these negotiations.[25] One of the crucial questions which remains unresolved by those provisions is who may propose the negotiations: the prosecution, the defence, or either of the two parties, as well as what the potential role of the court is in triggering the negotiations, i.e. in encouraging the parties, directly or subtly, to start negotiating.

The first subject of research in this area was which of the two parties proposes the negotiations more often and what is the most common reaction of the other party to this initiative. This issue is considered to be important primarily for two reasons: to observe how state attorneys understand their legal and social purpose, as well as to determine how attractive the negotiations are for defence attorneys, whose willingness to propose and to engage in negotiations necessarily depends on the attitudes of the state attorney.

As for the initiative of the court towards the parties to reach a formally prescribed agreement, evidence that it is taken frequently would indicate that judges largely see themselves as mediators whose role is to resolve a dispute between the parties. At the same time, evidence to the contrary would suggest that the courts take a more traditional and cautious approach. Having in mind that Croatian law, in contrast, for example, to German law, does not envisage an active role of the court in negotiations and, as a consequence, does not oblige the court to establish the facts of the case if a formal agreement between the parties has been reached, the cautious approach seems more appropriate.[26]

In order to investigate these issues, defence counsels and state attorneys were asked whether they initiate negotiations, how often they do so, and whether the other party readily accepts their initiative. Both groups were also asked whether the other party initiates negotiations, how often it does so, and whether they readily accept the initiative. When it comes to judges, an attempt was made to explore not only whether they initiate negotiations between the parties, but also whether they do so only in the explicitly prescribed situation, i.e. as a prelude to judgment based on agreement of the parties, or whether they initiate informal negotiations as well.

22 The focus group with state attorneys was held on 11 November 2021, as was the focus group with defence counsel. The focus group with judges was held on 12 November 2021, while the multi-professional focus group was conducted on 26 November 2021. All focus groups were held online, due to the COVID-19 pandemic.

23 We would like to thank all the practitioners who participated in the research as interviewees and as focus group participants. Their willingness to share with us their experience from the practice of various forms of consensual procedures has enabled this research to be conducted and for the results presented in this paper to be achieved.

24 Criminal Procedure Act 2008, Art. 360(4).

25 ibid Art 360(1).

26 According to the German Federal Constitutional Court, as long as the duty of the court to establish relevant facts is not jeopardised, the plea-bargaining initiative of the court is not systemically problematic. For an analysis and criticism of this decision, see A Mosbacher, 'The Decision of the Federal Constitutional Court of 19 March 2013 on Plea Agreements' (2019) 15 German Law Journal 7.

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With regard to the question of whether they propose negotiations to enable a judgment to be rendered based on agreement of the parties, state attorneys can be divided into two groups of equal size (10 in each). The first group are those who have never done so, while the second group comprises those who do have experience of initiating negotiations. In the second group, the majority of state attorneys (8) responded that they do so rarely or exceptionally. Those prosecutors who initiate negotiations with the defence sometimes do so even before an indictment is filed. To the next question, whether the defence initiates negotiations in order for a judgment to be rendered based on agreement of the parties, none of the state attorneys answered negatively; the majority of them either emphasised that this happens often, or did not give a direct answer, while a few (5) stated that defence counsels initiate negotiations infrequently. Most state attorneys do not reject this initiative a priori, but engage in negotiations. However, one of the respondents emphasised that state attorneys show reluctance to negotiate with the defence in a formal manner as this means they have 'a pile of paperwork to sign', which is 'complicated', as well as having trouble ensuring approval of the agreement by their superiors. Some of the state attorneys who are generally not opposed to negotiations embark on them only on certain conditions, e.g. that the defendant is not a repeat offender (4) or that the sentence proposed by the defence side is realistic (2). When a sentence is proposed by the defence, it is sometimes followed by a counter-proposal by the state attorney, i.e. 'raising the bar', as described by one of the respondents.

The next group examined were the defence counsels. Among them, a very small number (2) had never initiated negotiations to enable a judgment to be rendered based on agreement of the parties, while most of them have done so, with approximately the same number of those who do so often and those who do so infrequently. As for the question of whether the state attorney accepts their initiative, all of the attorneys answered affirmatively, with slightly more who stated that the state attorney does so rarely than those who say it is commonly done. One of the respondents noted that when the evidence against the defendant is strong and the defendant is considering pleading guilty, the state attorneys do not want to negotiate an agreement because 'it is complicated and time-consuming for them'. Some of the participants clarified their response regarding the willingness of the prosecutors to engage in negotiations by emphasising that it depends on the level of the competent state attorney's office; it seems that the Office for the Suppression of Corruption and Organised Crime (USKOK) is eager to negotiate, while the lowest level (i.e. the municipal state attorney's office) is much less willing to do so. When asked how often the state attorney was the initiator of the negotiations, the defence counsels gave different answers. About half of them (9) responded that the state attorney never or almost never does so, which one of the respondents attributed to apathy, lack of independence, lack of willingness to take responsibility and fear of being declared corrupt. The other respondents (10) had some experience with state attorneys initiating negotiations, with half of them (5) pointing out that state attorneys do this only on rare occasions. The prosecutors' proposals are generally well accepted by the defence counsels who took part in this research: some of them accept the proposals more often, and others only occasionally, but none of them indicated that they had never done so. One respondent usually explains to the client that 'these are not commercial negotiations and that one cannot bargain a lot' as 'you are negotiating with the state, which has its own "tariffs" and there is not much manoeuvring space'. Another noted that the problem was legal uncertainty, which made it difficult to assess what the court's decision might be if the defendant decided not to plead guilty.

One of the most interesting and thought-provoking groups of responses were those given by judges to the questions whether they had ever proposed negotiations to the parties in order to reach an agreement and, specifically, whether they had proposed negotiations to reach an agreement that would be the basis for a judgment based on agreement of the parties. Although somewhat similar, the second question was narrower, because it refers only to 'formal' negotiations (i.e. those that serve as a prelude to a judgment based on agreement of the parties), while the first question refers to all types of negotiations, including informal negotiations, that have, allegedly, not only survived the introduction of the formally prescribed negotiations in everyday legal practice, but thrived on them. Some of these informal negotiations take place at earlier stages of the criminal proceedings and, upon reaching an agreement, find their legal expression in the sentence proposed by the prosecutor, which is,

in some cases, partially binding for the court.[27] However, it is not uncommon for the parties to engage in trilateral negotiations with the trial judge, which sometimes result in a gentleman's agreement according to which the defendant will plead guilty at the trial, while the court will impose the sentence that was informally agreed on. Consequently, an even wider range of questions arises: not only is it uncertain who is allowed to initiate such informal negotiations, but it is also unclear whether this opaque practice is legally permitted in Croatian law, having in mind that it is the duty of the trial court to establish the facts of the case at a public trial.

Just under half of the judges (9) said that they never suggest any form of agreement, either 'formal' or 'informal', to the parties. Some of the noteworthy explanations for not embracing this practice were that it would be contrary to the structure of criminal proceedings or that the judge 'must not interfere' in consensual proceedings. In contrast, just over half of the judges (11) had – at least informally ('extrajudicially') – suggested to the parties that they engage in some form of negotiation, be it formal negotiations before the indictment panel or informal negotiations at various stages of the criminal procedure, including the main hearing. As for the second ('narrower') question, only a minority of judges (7) said that they suggested that the parties negotiate to enable a judgment to be rendered based on agreement of the parties.

To sum up, the results of our research point to the conclusion that the negotiations are most often instigated by the defence, although the prosecutor is generally willing to engage in them. However, this is only a rule of thumb as there are still a considerable number of state attorneys and even judges who are eager to propose or suggest negotiations. Moreover, the negotiations are, in practice, not restricted to those which take place before the indictment panel. Instead, they take place at various stages of the criminal procedure and sometimes involve the court itself, playing either an indirect and subtle role, or a more active one. In general, it seems that state attorneys and the court use plea bargaining rather flexibly and liberally and do not consider themselves to be particularly constrained by traditional procedural principles, such as the inquisitorial principle, which envisage the active and truth-seeking role of both the prosecutor and the court. This would mean that the Croatian system of criminal justice has been gradually turning into a model which does not rest upon a formally sanctioned main hearing as an essential keystone of criminal procedure, instead it seeks – formal or informal – 'solutions' to a 'dispute' between parties throughout the criminal proceedings. In a setting where participants actively bargain on the margins of the proceedings, with a rather vague understanding of their procedural duties and with a tendency of the court itself to initiate negotiations, the problem with plea bargaining is not only that it 'merges the tasks of administration, adjudication, and sentencing into a single conglomerate judgment',[28] but also that it involves a dispersion of responsibility between the prosecutor and the court. If such an approach in legal practice persists, additional regulatory safeguards should be put in place in order to protect both the rights of the defendant and public interest.

4.2. REASONS AND MOTIVES FOR INITIATING NEGOTIATIONS

The provisions regulating negotiations between the parties which can lead to a judgment being rendered on the basis of agreement do not prescribe the purposes of this form of plea bargaining. In comparative legal literature, this issue has been widely discussed.[29] The common justification is expediency, both in terms of time and resources. This part of the research sought to examine how the respondents perceive these purposes and what their own personal motives are to engage in negotiations. This will also enable the authors to determine whether the personal motives are in line with the more general social purposes of plea bargaining. The reasons why the prosecution and the defence enter into negotiations were examined,[30] where state attorneys were specifically asked how much their decisions were influenced by administrative criteria set by the government. The judge's position on informal agreements

27 See I Martinović and I Radić, 'Defendant's Confession at the Main Hearing in Croatian and Comparative Law: Just Another Piece of Evidence, Guilty Plea or a Tacit Agreement?' (2021) 37 Pravni vjesnik 105–122.

28 A Alschuler, 'The Prosecutor's Role in the Plea Bargaining' (1968) 36 University of Chicago Law Review 112.

29 For a brief overview of the use of plea bargaining in countries other than the United States, see e.g. H Jung, 'Plea Bargaining and Its Repercussions on the Theory of Criminal Procedures' (1997) 5 European Journal of Crime, Criminal Law and Criminal Justice 112–122.

30 In Croatian literature, this was examined from a theoretical standpoint in: Z Tomičić and A Novokmet, 'Nagodbe stranaka u kaznenom postupku–dostignuća i perspektive' (2012) 28 Pravni vjesnik 156–164.

between the parties which occur once the main hearing has already begun was surveyed as well.

The answers received do not deviate much from the expectations of the researchers, i.e. they are in accordance with the commonly recognised advantages of plea bargaining. The majority of state attorneys (11) emphasise expediency as one of the guiding principles which motivate them to engage in negotiations. Some of them elaborated on this more thoroughly, stressing the reduced costs and relieving the case burden on the prosecution and judiciary. Other reasons include evaluating the mitigating circumstances, avoiding further trauma for the victim, speeding up damage compensation and avoiding changes in the law or jurisprudence. One of the state attorneys mentioned discovering the accomplices as one of the motives. As a reason for avoiding negotiations, one of the respondents stated that agreements can be 'very different for the same crimes' which can lead to legal uncertainty. State attorneys almost unanimously state that their decision to initiate negotiations is not affected by the fact that the General Performance Criteria for Deputy State Attorneys, which are prescribed by the Justice Minister and serve as one of the criteria for the evaluation and eventual promotion of state attorneys, 'reward' reaching an agreement between parties.

Among the defence counsels, the most common reason for recommending the defendant to enter into negotiations is the fact that the evidence against him is 'clear', i.e. that it is obvious that the trial court would convict the defendant, while the second most common reason is securing a more lenient sentence. Interestingly, one of the defence counsels stressed that in cases with a large number of co-defendants a certain number of them almost always engages in plea bargaining 'which simply compels you to start negotiating because these are potential witnesses who can harm you in the trial. This forces us to reach a settlement'. As a factor that diminishes the defence's willingness to negotiate with the state attorney, one of the respondents emphasised that state attorneys do not provide sufficient concessions to the defendants who plead guilty, i.e. that their offer is not any better than that which the court itself would make in the case of a conviction.

As the next group of respondents, the judges were asked whether they prefer formal agreements[31] over other forms of reaching consensus and what the reason is for such a preference. Most judges did not give an unambiguous and definitive answer. However, one of the respondents pointed out that, on reaching a formal agreement, 'the defendant has a greater level of security' while, on reaching an informal agreement, it is not unusual that 'one of the parties, most often the state attorney, files an appeal despite the agreement'. Interestingly, the judges examined did not elaborate on their preferences from the perspective of fundamental legal principles of Croatian criminal procedure, but primarily from the viewpoint of the special interests of the parties and the court itself.

To conclude, it seems that the most common motive for entering negotiations is expediency. An additional reason, from the point of view of the defence, is the awareness that the probability of conviction upon trial is high in the particular case. The disadvantages of plea bargaining, which are frequently elaborated on in comparative literature,[32] were not mentioned by the respondents. However, it seems that the tendency to use agreement between the parties as a way of informally securing witness testimony can also be a motive of the state attorney for entering negotiations and offering concessions to the defendant. This is somewhat worrying, as this is certainly not the *ratio legis* of plea bargaining in Croatian criminal procedure.

4.3. STAGE AND SCOPE OF NEGOTIATIONS

Previous parts of the research have shown that negotiations between the parties take place not only during the proceedings before the indictment panel, i.e. in the case directly envisioned by the law, but also–to a certain extent–in various informal settings throughout the criminal process. This part of the research sought to determine the frequency of such informal agreements in relation to the formally sanctioned one. In addition, the authors attempted to determine whether the parties, either in 'formal' or 'informal' negotiations, commonly agree on some concessions which are not provided for by the law, e.g. about mitigating the legal

31 In accordance with the Criminal Procedure Act 2008, Art 360(1).

32 See e.g. S J Schulhofer, 'Plea Bargaining as Disaster' (1992) 101 Yale Law Journal 1979–2009.

qualification of the crime, or about granting a more lenient sentence in exchange for a witness statement against a co-defendant.

The defence counsels were asked what the subject of their negotiations with the state attorney was: was it only the guilty plea and the sentence, or was it something else as well, e.g. witness testimony in another trial or the legal qualification of the crime? About two-thirds of the defence counsels said that the subject of the negotiations was exclusively the guilty plea and the sentence, but a small number (2) had experience with negotiations in which the state attorney strove to acquire witness testimony in another criminal procedure, while a few more (4) admitted that the legal qualification of the crime was a matter of negotiations as well, which is not in accordance with the principle of mandatory prosecution[33] as one of the keystones of Croatian law. One of the respondents even stated that some of the concessions offered to defendants as prospective witnesses had been 'contrary to the principle of fairness and justice'. Some defence counsels (2) replied that the subject of the negotiations was simply 'everything'. On the other hand, one of the respondents shared the experience where the defendant who was charged with several crimes pleaded guilty even to those that he had not committed as the prosecutor was not willing to modify the qualification of the offence.

As for the stage at which negotiations are usually conducted, defence counsels often stated that this is done both before and after the indictment, with more than two-thirds of them having had experience with negotiations prior to the indictment. This means that the provision authorising the parties to negotiate in a very specific setting (before the indictment panel or, exceptionally, at the preparatory hearing) is not regarded as a legal hindrance to holding negotiations even before the indictment is filed (i.e. while the investigation is still ongoing). Regarding the experiences of negotiating after the beginning of the main hearing, most of the judges (13) stated that they had encountered such cases, while about a third (7) had no such experience. Interestingly, all the judges who sometimes encounter this form of settlement between the parties stated that they had accepted it at least once. One of the judges stressed that informal agreements are much more common in everyday practice than formal ones concluded before the indictment panel. Some of the judges were not only informed of the informal settlement, but also took an active part in reaching it, for example by indicating, at the request of the parties, the sentence that could be imposed on the defendant if found guilty. Generally, the respondents do not deem such practices problematic, but one of the defence counsels rightly pointed out that in such cases 'the judgment does not formally show that it is based on an agreement'. It should be pointed out that the discussion in the multi-professional focus group resulted in the unanimous conclusion that the possibility of negotiating and reaching agreement should be extended to the trial stage. This would, in their opinion, reduce the shortcomings of informal 'gentlemen's agreements'.

This part of the research confirms common knowledge that, as for the procedural stages in which negotiations are held, plea bargaining is understood extensively by Croatian legal practitioners. The fact that the Criminal Procedure Act 2008 does not mention negotiations between the parties anywhere else but in Article 360 is not generally taken as a prohibition of such proceedings. When it comes to the subject of negotiations, the participants in the research usually adhere to the legal provisions, although some do expand the scope of negotiations to further concessions not provided for by the law. This heterogeneity of practice calls for legislative action which would, ideally, rethink and reconceptualise plea bargaining in Croatian law or, at least, prohibit certain 'dispositions' of the parties, e.g. on the legal qualification of the offence. This would bring Croatian law closer to well-established models of plea bargaining which have already inspired the Croatian legislature, e.g. the Italian *pattegiamento* in which it is the role of the judge to verify whether the legal qualification of the offence is accurate and whether the proposed punishment is adequate (Article 444(2) of the Italian Criminal Procedure Act of 1988).

33 E Ivičević Karas and D Puljić, 'Presuda na temelju sporazuma stranaka u hrvatskom kaznenom procesnom pravu i praksi Županijskog suda u Zagrebu' (2013) 20 Hrvatski ljetopis za kazneno pravo i praksu 823–849; V Ljubanović, A Novokmet and Z Tomičić, *Kazneno procesno pravo–izabrana poglavlja* (2nd rev edn, Pravni fakultet Osijek 2020) 271.

5. CONCLUDING AN AGREEMENT: THE POSITION AND ROLE OF THE COURT

5.1. ADEQUACY AND SUITABILITY OF CONCLUDING A PLEA AGREEMENT FOR MINOR OFFENCES

The Criminal Procedure Act 2008 (CPA) recognises several different instruments aimed at speeding up criminal proceedings for less serious criminal offences punishable by a fine or up to five years' imprisonment.[34] Such instruments include a penal order,[35] a conditional waiver of prosecution, and an unconditional waiver of prosecution.[36] Therefore, it can be seen that the domestic legal order provides a broader list of competing grounds through which the legislature expresses the intention to resolve a particular criminal case without a court hearing. Since a plea agreement is not limited to the fixed lower or upper limit of the gravity of the offence, the question arises as to what extent a judgment based on agreement of the parties is used as a competitive instrument to expedite criminal proceedings and whether it is a suitable tool taking into account other existing procedural instruments aimed at solving these types of criminal offences.

Observing the Croatian system of judgment based on agreement of the parties from a comparative perspective, it can be seen that different European countries principally restrict the field of application of the plea agreement to less serious criminal offences.[37] Therefore, it can be said that in these countries the plea agreements are primarily based on the idea of speeding up the criminal procedure in order to solve individual cases in a fast and easy way, while at the same time excluding the possibility of concluding agreements for more serious crimes. It is noticeable that the Croatian legislature deviated from European models in this respect because it enabled the conclusion of plea agreements regardless of the severity of the criminal offences, including criminal offences with elements of corruption and organised crime. This is precisely what led to the phenomenon that the prosecutor, in the process of concluding an agreement with the defendant, often tries to obtain his confession not only in order to solve the specific criminal offence, but also to use the same defendant later on as a witness in criminal proceedings against other co-defendants once he had been finally convicted before the court on the basis of the concluded plea agreement.

The research shows that a significant number of judges (9) consider a judgment based on agreement of the parties to be a good and appropriate instrument for resolving less serious criminal offences punishable by a fine or up to five years' imprisonment. Only three judges pointed out that the domestic legal order offers other concurrent instruments aimed at speeding up criminal proceedings, in particular the penal order which, given its specifics, should be the most frequent basis for resolving the least serious criminal cases. Four judges explicitly stated that a judgment based on agreement of the parties should not be used for less serious criminal offences but that other consensual forms should be applied. Another four judges noted that they had never had a case in which a judgment was handed down based on agreement between the parties for a criminal offence punishable by a fine or imprisonment for up to five years.

The vast majority of state attorneys (16) consider a penal order to be the most appropriate instrument for minor offences, emphasising that speed of action, simplicity, and the efficiency of resolving the case are the key reasons for a penal order to have priority over judgments based on agreement of the parties. Only two state attorneys pointed out that a more suitable instrument for the least serious criminal offences is a conditional and unconditional waiver of criminal prosecution, while another two state attorneys stated that they had no experience of these cases since it was a long time since they had held the position of deputy in a municipal state attorney's office.

34 V Ljubanović, A Novokmet, Z Tomičić (n 33) 42–43.

35 See M Bonačić, 'Kritički osvrt na hrvatsko zakonodavno uređenje instituta kaznenog naloga' (2015) 22 Hrvatski ljetopis za kaznene znanosti i praksu 185–216.

36 See M Carić, 'Uvjetni odustanak od kaznenog progona' (2009) 46 Zbornik radova Pravnog fakulteta u Splitu 601–611.

37 For Italy and France see W T. Pizzi, 'The Battle to Establish an Adversarial Trial System in Italy' (2004) 25 Michigan Journal of International Law 439 and see L Soubise, 'Guilty Pleas in an Inquisitorial Setting–an Empirical Study of France' (2018) 45 Journal of Law and Society 410–411.

A significant number of defence attorneys (11) indicated that they encourage their clients to enter into a plea agreement for criminal offences punishable by a fine or a sentence of up to five years' imprisonment, especially when the defendant's guilt can be clearly established from the case file. Four defence attorneys noted that they do not generally recommend that the defendant enter into a plea agreement for less serious offences as, in such cases, other consensual forms are more appropriate. Four defence attorneys pointed out that the application of plea agreements in minor offences is suggested to the defendant primarily depending on the quality of the evidence gathered by the state attorney. One defence counsel could not recall whether he had had a case of concluding a settlement for offences punishable by a fine or a sentence of up to five years' imprisonment. To the explicit question whether they prefer some other form of consensual procedure instead of concluding a plea agreement, some of the defence counsels (6) prefer the defendant to admit to the offence at the hearing in accordance with Article 417(6)(7) CPA. In this situation, the court cannot sentence the defendant to a harsher sentence than that proposed by the state attorney in the indictment if the defendant has admitted the crime and expressed his agreement with the type and measure of the proposed sentence. On the other hand, some defence counsels (4) claimed that the penal order is a simple and quick way of ending criminal proceedings, which state attorneys resort to most frequently, so defence attorneys often encounter this type of agreement in their daily practice. A good proportion of defence counsels (6) prefer to enter into a plea agreement, while a smaller proportion (4) said that in their practice they prefer other consensual forms of agreement such as the conditional and unconditional waiver of prosecution.

It can be concluded that the analysed data show a rather divergent understanding of the need to enter into a plea agreement for less serious offences punishable by a fine or a sentence of up to five years' imprisonment. The general position of state attorneys is that no plea agreement should be concluded for these minor criminal offences because there are other instruments which are easier to apply that enable the faster resolution of these least serious criminal offences, among which the most appropriate is the penal order. The state attorneys' standpoint is supported by the majority of judges, although a good proportion of them believe that a plea agreement is a suitable instrument for resolving even the least serious of crimes. Interestingly, the defence attorneys mostly support the application of plea agreements for such crimes. Considering, however, that a plea agreement can only be reached with the consent of the state attorney and the defendant, it is clear that the reluctance of the state attorney to enter into a plea agreement in a situation where he considers the penal order to be the most appropriate instrument to solve the least serious crimes, makes it impossible to negotiate and conclude a classic plea agreement.

5.2. CONCLUDING A PLEA AGREEMENT ON THE INITIATIVE OF THE COURT AND THE BENEFITS OF CONCLUDING A PLEA AGREEMENT FOR THE MOST SERIOUS CRIMINAL OFFENCES WITHIN THE JURISDICTION OF THE OFFICE FOR THE SUPPRESSION OF CORRUPTION AND ORGANISED CRIME (USKOK)

Judgment based on agreement of the parties, in accordance with the explicit provision of the CPA, may be rendered, at the earliest, before the indictment panel once the indictment has been filed and, at the latest, at the preparatory hearing before the trial judge (Articles 359 and 374 CPA).[38] Only the parties, that is the state attorney and the defendant, have the right to negotiate and conclude a plea agreement and afterwards submit to the court a signed statement for reaching a judgment based on the agreement of the parties (Article 360(3) CPA).[39] According to the explicit provision of the law, the court does not encourage the parties to negotiate or participate in the procedure of agreeing on the conditions of the admission of guilt and possible sanction. However, in practice, it is often heard that there are so-called 'informal agreements' by which the court indicates to the parties that they should try to reach an agreement and thus speed up the resolution of the criminal case, especially when it comes to a case with complicated facts and a larger number of defendants in criminal proceedings which lead, as a rule, to lengthy criminal proceedings before the court. Therefore, the interview sought to find out whether the courts in everyday practice encourage the conclusion of agreements and

38 M Carić, 'Court Settlement between Parties in Contemporary Criminal Procedural Law' (2018) 31 Legal Challenges of Modern World, Economic and Social Development (ESD) 273.

39 For a critical overview, see: Z Tomičić, A Novokmet (n 30) 181–183.

whether there are informal agreements, known as 'gentlemen's agreements', through which, outside the legal framework, the parties agree on the conditions of concluding the agreement and consequently speeding up the finalisation of the case. In addition, a specific analysis was made, from the perspective of judges, of the expediency of concluding agreements for the most serious criminal offences, including criminal offences within the jurisdiction of USKOK.

The research conducted showed that comparative legislation and Croatian law mostly accept the idea of clear, party-driven negotiations on plea and sanction and that the court does not formally participate in the process of concluding an agreement. Therefore, the role of the court is reflected only in the later stage of the procedure, in which it exercises judicial review of the previously concluded agreement on admission of guilt and sanction. However, in Germany, the authority of the court has been established in a clear and unambiguous manner, not only is the court under an obligation to participate in the process of concluding a plea agreement, but it is also authorised to encourage negotiations on the conclusion of an agreement. Such an arrangement essentially outlines the traditional procedural idea of German criminal procedure, in which emphasis is placed on determining the material truth in criminal proceedings, a determination which is solely the responsibility of the court itself.[40] Therefore, the intention of the German legislature to express the need for the court to be an equal participant in the negotiation process is understandable, taking into account the traditional role of the court in German criminal proceedings.

Regarding the purposefulness of concluding agreements for the most serious criminal offences, a large number of judges (14) point out that a judgment based on agreement of the parties is an acceptable way to end the most serious criminal cases. Most frequently they state that they do not see the point of conducting criminal proceedings before the court if the factual situation between the parties is not in dispute. Avoiding criminal proceedings before the court saves on the costs of criminal proceedings and avoids exposing of defendants to negative consequences of a public trial. There is nothing disputable from the perspective of the victim of a criminal offence either, because the victim's consent is a prerequisite for plea agreements when it comes to criminal offences against life and limb and sexual freedom. Other judges (6) believe that the plea agreement should be limited to criminal offences within the jurisdiction of municipal courts, because they consider that the most serious crimes often involve trafficking in justice and that the sanctions proposed by the prosecutor and defendant are too low and that prosecutors use the defendant's confession subsequently as evidence against other defendants in the same criminal proceedings.

The majority of state attorneys (9) say that they have not encountered a situation where the court proposes that the parties enter into a plea agreement. However, although they denied such a possibility because the law itself does not consider it, they emphasised that an informal proposal for the parties to try to reach an agreement often comes from the court. Some state attorneys (5) explicitly confirm that, in their experience, they regularly come across the court's proposal that the parties should try to agree on the terms of the plea and sanction. Thus, some judges suggest concluding an agreement when they have in mind a sanction (e.g. a suspended sentence) that would be more difficult to justify, and indirectly suggest that the parties enter into an agreement so that they do not have to write an explanation of the judgment that could be demanding. There are also situations when, after presenting part of the evidence at the hearing, the court warns the parties that a conviction is obvious, so the defence accepts an agreement. A significant number of state attorneys (6) point out that, in practice, informal agreements in a way take place when the court asks the parties 'will you agree?' One reason for such a court proposal is the aim of the judges to complete their judicial norm as soon as possible, which is counted in the number of judgments passed. Therefore, state attorneys believe that the possibility of concluding an agreement should be explicitly extended up to the trial.

Answering the question about whether the court encourages the conclusion of a plea agreement, the defence counsels are practically divided. One part of the defence counsels (11) explicitly point out that they have never come across the court's proposal for a plea agreement. The other part (9) emphasises that the court often proposes that the parties conclude a plea agreement in order to resolve a specific case as quickly as possible. Thus, some point out that

40 R Hannich, *Karlsruher Kommentar zur Strafprozessordnung* (CH Beck 2019) § 243, 35.

the court, as a rule, proposes this to the defendants to exert pressure on the defendant by warning that he could be punished more severely if he does not agree to a plea agreement. Others point out that the court often informally proposes concluding an agreement when a conviction is obvious, but where a large amount of evidence would still have to be presented before the judgment is passed, which, however, would not change the situation in favour of the defendant.

Based on the conducted analysis, it is evident in practice that there are situations where the court informally encourages the parties to enter into a plea agreement. Although the judge does not participate in the plea negotiations, he is still involved in the plea agreement, which means that an 'informal' agreement on how to end criminal proceedings occurs in judicial practice. There is also an opinion and an interest in favour of allowing the plea agreement to exist in the later stages of criminal proceedings, so as to allow the parties to have more space to conclude an agreement, and it is clear that such a trend exists in practice. This issue was also discussed in the focus groups with judges, state attorneys, and defence attorneys. All participants express the common view that such a practice exists, but they are of the opinion that it does not need to be formally prescribed by law since, in some procedural situations, it is simply in the interest of all participants so to act because it speeds up the procedure. Ultimately, judicial practice already does so, as it allows an agreement to be concluded outside the current legal framework. Therefore, it would be advisable to prescribe at least a general norm allowing the court and parties to discuss and, in suitable cases, to reach an agreement on the further course and outcome of the criminal proceedings.

5.3. JUDICIAL REVIEW OF THE PLEA AGREEMENT

5.3.1. Right to judicial review as a fundamental principle of Croatian criminal procedural law

Croatian criminal procedure is a typical representative of the continental European legal tradition based on the idea that the criminal procedure must ultimately lead to the establishment of the (objective) truth. This centuries-old premise has been somewhat relativized in the last twenty years through the legal adoption of certain features of the Anglo-American procedure, among which consensual procedures in the form of plea agreements intended to speed up the criminal procedure stand out.[41] Despite the reception of Anglo-American procedural ideas, Croatian criminal procedure has remained firmly rooted in the continental European procedure. This primarily refers to the consistent application of the principle of the legality of criminal prosecution (principle of mandatory prosecution) as a fundamental principle governing the procedural position of the state attorney in criminal proceedings in Croatia. In its strict procedural form, it prescribes the conditions under which the state attorney is obliged to (must) undertake criminal prosecution and to continue to support it during the criminal proceedings. If, at some point, the state attorney decides to enter into an agreement with the defendant, then the principle of mandatory prosecution imposes certain restrictions on him or her because he or she cannot negotiate the severity, type and number of criminal offences with which to charge the defendant, and therefore he or she is obliged to enter into an agreement for all the criminal offences for which the legal prerequisites for criminal prosecution are met.

Since the principle of the legality of criminal prosecution in its essence assumes the obligation of the state attorney to intervene in the rights and freedoms of citizens whenever he or she considers that the legal conditions for criminal prosecution are met, then as a counterpart to the repressive activity of the state attorney there is the obligation to establish judicial protection of citizens against illegal and unfounded criminal prosecution.[42] The right of an individual to judicial protection against illegal criminal prosecution and investigation was established by the Constitutional Court of the Republic of Croatia in its decision in 2012, which constitutionalised the principle of judicial review of criminal prosecution as a fundamental basis of Croatian

41 See B Pavišić, 'Novi hrvatski Zakon o kaznenom postupku' (2008) 15 Hrvatski ljetopis za kazneno pravo i praksu 575.

42 Z Đurđević, 'Sudska kontrola državnoodvjetničkog kaznenog progona i istrage: poredbenopravni i ustavni aspekt' (2010) 17 Hrvatski ljetopis za kazneno pravo i praksu 7–24.

criminal proceedings.[43] On that occasion, the Court emphasised that the requirements of legality and the prohibition of arbitrariness in the actions of state bodies in criminal matters derive from the rule of law, which is one of the highest values of the constitutional order and the basis for interpreting the Constitution (Article 3 of the Constitution of the Republic of Croatia). Equally, these requirements derive from Article 29 of the Constitution of the Republic of Croatia and Article 6 ECHR. At the heart of these provisions is the court, and this 'spirit of the Constitution' must be respected.[44] Acknowledging these requirements, the Croatian legislature established the principle of judicial review of criminal prosecution with an amendment to the CPA in 2013,[45] which is clearly reflected in the prescribed review of both the investigative and prosecutorial functions of the state attorney.[46] This review is optional during the investigation, and mandatory in the process of judicial review of the indictment. Since the conclusion of the plea agreement occurs in the process of judicial review of the indictment before the court, then it is clear that the court will have ensured the possibilities for conducting effective judicial review, which includes not only the scrutiny of fundamental issues of legality and voluntariness of the concluded agreement but also effective review of the purposefulness of the proposed sanction. These steps will have been taken to ensure that the sanction imposed on the basis of the plea agreement reflects the public interest in the prosecution and punishment of perpetrators of criminal offences.

5.3.2. Judicial review of plea agreement in the practice of the Croatian judiciary

One of the most challenging aspects of the Croatian model of plea bargaining is the question of the scope of judicial review.[47] The law explicitly stipulates that the court will not confirm the agreement if, given the circumstances, its acceptance is not in accordance with the sentencing prescribed by law, or the agreement is not otherwise lawful (Article 361(3) CPA). However, this provision, which is obviously very broadly prescribed, raises a number of questions in judicial practice, among which the following are prominent: (a) what is the role of the court in concluding plea agreements; (b) what could be the subject of judicial review; and (c) can the court reject the statement for passing a judgment based on agreement of the parties if it considers that the type and measure of the punishment agreed upon by the parties does not correspond to the degree of guilt of the perpetrator, the purpose of the punishment and the mitigating and aggravating circumstances of the case? These issues are a major problem, on which there is still no unified or clear position in Croatian judicial practice.[48] The Supreme Court of the Republic of Croatia[49] has tried to resolve this issue on several occasions, stating that the court is not authorised to reject the agreement of the parties, even though it considers that the sanction proposed on the basis of the agreement does not correspond to the purpose of punishment. Despite this understanding, courts of first instance have continued to refuse to accept the agreement of the parties in certain cases when they consider that the proposed sentence is too lenient, unfair and does not achieve the purpose of punishment. Therefore, this study sought to determine whether the powers of judicial review of the judgment based on agreement of the parties are appropriate and whether the existing legislation provides a sufficient basis for the court to decide whether the sentence is appropriate or fair.

Comparative experiences show that judicial review in Italy, France and Switzerland is carried out in such a way that the court achieves effective judicial review of the concluded agreement, including control of the purposefulness of the proposed sanction.[50] This ensures not only

43 Odluka Ustavnog suda Republike Hrvatske od 19. srpnja 2012 (Decision of the Constitutional Court of the Republic of Croatia, 19 July 2012), U-I-448/2009, U-I602/2009, U-I-1710/2009, U-I 18153/2009, U-I-5813/2010, U-I-2871/2011.

44 Odluka Ustavnog suda Republike Hrvatske (n 43) 24.

45 A Novokmet, 'Sudska kontrola kaznenog progona prema Noveli Zakona o kaznenom postupku' (2013) 20 Hrvatski ljetopis za kazneno pravo i praksu 555–612.

46 Z Đurđević, 'Rekonstrukcija, judicijalizacija, konstitucionalizacija, europeizacija hrvatskog kaznenog postupka V. novelom ZKP/08: prvi dio?' (2013) 20 Hrvatski ljetopis za kazneno pravo i praksu 315–362.

47 E Ivičević Karas, Dorotea Puljić (n 33) 837–845.

48 A Novokmet, D Tripalo, 'Opseg sudske kontrole sporazuma stranaka' (2021) 2 Hrvatski ljetopis za kaznene znanosti i praksu 213.

49 See, in particular: E Ivičević Karas, A Novokmet, I Martinović (n 5) 26–28.

50 ibid 27.

complete judicial review in the context of protecting the defendant from any abuses that would lead to a forced and involuntary agreement, but at the same time it protects society and the legal order as a whole, so that the agreed sanction is in accordance with the legally prescribed purpose of punishment in order to ensure and maintain citizens' confidence in the daily work of the judicial system. In Germany, however, the court not only participates in the conclusion of the agreement from the very beginning of the negotiation process, but the dominant position of the court during this process is reflected in the fact that the court proposes the lower minimum and upper maximum sentence that could be imposed on the defendant based on the confession and unequivocal determination of his guilt, taking into account the circumstances of the specific case and following the general rules for sentencing (§ 257c(3) Strafprozessordnung of 1987 (StPO)).[51] Although the Croatian legislature prescribed mandatory ex officio judicial review of the concluded agreement, it was called into question in the practice of the Supreme Court of Croatia, which took the position that the court should not control the purposefulness of the proposed sanction, but only whether it was determined in accordance with the law.

The research conducted shows that judges do not have a single position on whether the powers of judicial review of a judgment based on agreement of the parties are appropriate. A good number of judges (8) believe that the powers of the court are adequate because it controls the legality of the concluded agreement to make sure that the defendant legally, unequivocally and voluntarily accepts the concluded agreement. Therefore, they believe that the court should not control the purpose of the proposed sanction because the court as a rule has no knowledge of how the parties reached the agreement and what sorts of 'concessions' they offered other than what was stated in their statement pursuant to the agreement. Other judges (7) consider that the powers of judicial review are inadequate. They believe that the court should be able to influence the decision on the sentence not only when it is too lenient but also when it is too harsh. They point out that a judgment based on agreement of the parties must be fair. Plea agreements often lack an element of fairness in the proposed sanction, and the court does not currently have a clear opportunity to influence it. For the sake of the equality of all before the law, the court should have the power to reject the plea agreement when it does not consider the decision on the sentence to be fair. A smaller number of judges (5) support the current position of the Supreme Court, according to which the court should not review the purposefulness of the proposed sanction. They point out that defendants often have a personal interest in protecting private and family life from a public trial at a hearing and are willing to make a plea agreement only if they do not experience additional stigmatisation and social condemnation. In addition, the conclusion of the plea agreement avoids significantly high criminal proceedings costs that would be borne by the defendant, and therefore his interest should be respected.

A significant number of state attorneys (16) consider that judicial review of the plea agreement is satisfactory and that the court should not review the expediency of the proposed sanction agreed between the prosecutor and the defendant. They believe that if the court were given greater powers in judicial review, the meaning of this consensual form itself would be called into question. This is so because if the court can change what the parties agree, then this significantly changes their position during the negotiations and ultimately does not reflect the will of the parties. A significantly smaller number of state attorneys (4) believe that judicial review is inadequate because the court in practice does not carry out substantive control but only checks the formalities prescribed by law. Judges are happy that an agreement has been reached and accept it uncritically to enable them to resolve cases in a simple way. However, given the importance of the agreement and the consequences of the final judgment for the whole of society, these state attorneys believe that the court should have greater powers in the process of judicial review of the agreement.

Most defence counsels (10) believe that the current model of judicial review of the plea agreements is satisfactory and should not be changed. They believe that state attorneys, as well as the court, properly take into account the existing practice when concluding the agreement, and thus the agreement reached on the criminal sanction. Their general opinion is that the court should not have greater powers. The court should focus on assessing the legality

51 M Frommann, 'Regulating Plea-Bargaining in Germany: Can the Italian Approach Serve as a Model to Guarantee the Independence of German Judges' (2009) 2 Hanse Law Review 203.

and not the fairness of the agreement. However, a slightly smaller number of defence counsels (8) believe that judicial review is unsatisfactory and that the court should have greater powers over the proposed sanction. In this way, the court would show its authority by determining whether a criminal offence has been committed and imposing an appropriate sentence. They point out that by accepting a plea agreement the court fulfils its statistical norm for passing a judgment, which is one of the reasons why judges do not look critically enough at the agreement between the parties. They emphasise that the court should be able to intervene in cases where the agreed sanction is highly disproportionate to the crime committed, which may indicate other motives, such as an agreement to use against other defendants in the same case the testimony of the defendant who enters into a plea agreement. Courts should therefore have greater powers, because even when there is a plea agreement, a court judgment is ultimately passed. Furthermore, only the court, and not the parties, guarantees the satisfaction of the public interest and fair punishment as the ultimate goal of criminal proceedings. Two defence counsels did not take a clear position on the adequacy of judicial review. They believe the court should have a clearer insight into why the plea agreement was reached. The basic question of what motivated the state attorney and defendant to agree and accept the proposed sanction always remains hidden from the public. It is very difficult to strike a balance between the public and the private sphere, but this should be done because the public is also interested in the outcome of criminal proceedings and should therefore know why the defendant was privileged to some extent.

It follows from all the above that the views of judges and defence attorneys on the issue of the adequacy of judicial review are divided and that this is obviously an area where the current legal solution suffers from certain shortcomings, leading to different conclusions. However, the majority of state attorneys believe that the powers of judicial review are sufficient because they are currently in such a position that it largely depends on the state attorney whether an agreement will be reached and what sanction will be imposed on the defendant. Practically the same position was taken by state attorneys, defence attorneys, and most judges during the focus groups. The defence counsels emphasised that if the defendant does not have a certain guarantee that the plea agreement and the agreed sanction will be confirmed, then it will remain only a dead letter since no one will even try to make an agreement. The opinions and views expressed show that there is no consensus on the current regulation of the judicial review of the plea agreement because it does not lead to a clear conclusion of what the court should review and to what extent.

Both the jurisprudence of the ECtHR and recommendations within the framework of the Council of Europe (CoE), emphasize the necessity of judicial review of the plea agreement and clearly express the position that the court must review not only the voluntariness but also the credibility of the confession.[52] 'The court must be convinced of the truth of the confession, a mere formal admission of the crime should not be considered sufficient.'[53] Related to this is the issue of the agreed sanction, which is followed by clear recommendations that the sanction imposed on the basis of the agreement must not deviate significantly from the sanction otherwise imposed after a full trial.[54] In other words, the sanction imposed by way of a plea agreement must not deviate from that to be expected after a full trial to the extent that the general rules of sentencing would be violated. Otherwise, in the long term, such an agreement can create a negative public perception that the judiciary fails to uphold the rule of law.[55] Hence, during plea negotiations, the prosecutor would have to take care of the public interest in punishing the perpetrator of the crime and ensure that the agreed sanction is not below the limit of what is still acceptable in view of the gravity of the crime and the degree of guilt of the defendant, even taking into account the generally accepted ground for reduction of the penalty for a defendant who has admitted to his or her crime.[56]

52 Council of Europe, 'Out-of-court Settlement Procedures in Criminal Justice: Advantages and Risks' (Report, Doc 14618, 29 June 2017) <https://pace.coe.int/en/files/25041> accessed 19 August 2022.

53 ibid.

54 ibid 13.

55 ibid.

56 ibid.

For this reason, future amendments to the Croatian criminal procedure code will have to determine, much more concretely and clearly, the scope of judicial review of the plea agreement in order to protect legal security and the equality of all before the law.

6. DEFENDANT AND VICTIM OF CRIME: POSITION, ROLE, AND PROCEDURAL RIGHTS

6.1. POSITION AND ROLE OF THE VICTIM

The traditional concept of plea bargaining implies an agreement between two parties in criminal proceedings–the prosecutor and the defendant–so the logical question is whether the victim's involvement in the process is needed and justified. However, in criminal law of the European Union, there is a clear tendency to strengthen the role of the victim and strengthen the possibility of his or her active participation in the criminal procedure,[57] which are crucial determinants of Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime.[58] Member states are expected to facilitate the referral to mediation and other restorative justice services,[59] which may include various consensual forms, and this implies adequate protection of the interests of victims in these procedures. The interests of victims can be protected only if the possibility of their effective participation in consensual procedures is prescribed by law. From this point of view, the victim should have the right to protect his or her interests in the plea-bargaining procedure. This can be done by involving the victim in court proceedings, as in French and Swiss law, and even by giving the victim a decisive role, as in Swiss law, where the victim can prevent an agreement between the parties.[60] As Rauxloh emphasises, 'it is widely accepted that active participation of victims in proceedings plays an important factor in the healing process as it empowers the victims and restores their dignity', and 'this healing and empowering effect is of course lost if the trial is avoided by a bargained guilty plea'.[61]

In Croatian criminal procedure, victims are not included in the negotiations procedure which may result in an agreement between the parties. The state attorney does not have to obtain their consent to negotiate with the defendant, except in cases of criminal offences against life and limb and against sexual liberties, for which a prison sentence of more than five years may be imposed.[62] This is a kind of compromise solution that sought to reconcile, on the one hand, the objections that the victim is not a party to criminal proceedings and should not be involved in the negotiations,[63] and, on the other hand, modern trends of strengthening the victim's position in criminal procedure and restorative effects.[64] One of the most important rights of a victim, acting as the injured party in criminal proceedings, is the right to file a claim for indemnification, which allows for faster compensation than waiting for litigation.[65] Therefore, the statement on the agreement, which serves as a basis for the judgment based on agreement of the parties, should contain a statement of the defendant on any submitted claim for indemnification.[66]

The conducted research shows that the majority of judges interviewed (11) believe that the victims have been given an appropriate role in the process of rendering a judgment based

57 See A Sanna, *Il "patteggiamento" tra prassi e novelle legislative* (Wolters Kluwer CEDAM 2018) 48–53.

58 Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA [2012] OJ L 315.

59 A Balsamo, 'Chapter 3. The Content of Fundamental Rights' in R E Kostoris (ed), *Handbook of European Criminal Procedure* (Springer 2018) 161.

60 E Ivičević Karas, A Novokmet, I Martinović (n 5) 29.

61 R Rauxloh, *Plea Bargaining in National and International Law* (Routledge 2012) 219.

62 Criminal Procedure Act 2008, Art 360(6).

63 See N Cambj, 'Sporazumijevanje prema noveli Zakona o kaznenom postupku' (2013) 20 Hrvatski ljetopis za kaznene znanosti i praksu 675–678.

64 A Maršavelski and K Ivanušić, 'Restorativna pravda u kaznenopravnoj teoriji i praksi' (2021) 28 Hrvatski ljetopis za kaznene znanosti i praksu 489–490.

65 D Krapac, *Kazneno procesno pravo, Prva knjiga: Institucije* (8th rev edn, Narodne novine 2020) 255.

66 Criminal Procedure Act 2008, Art 360(4)(4).

on agreement of the parties. Only four judges explicitly stated that this is not the case – three of them because the victim's consent is required only in relation to a narrow circle of criminal offences, and one of them because the parties' negotiations take place with the public prosecutor, so neither the court nor the victim has much knowledge of them. However, the majority of judges (14) believe that the interests of the victim are adequately protected in the process of reaching agreement. One respondent believes that the interests of the victim are not sufficiently protected in practice, because the victim is 'secondary' in the procedure, and another believes that the victims are 'never sufficiently' protected.

The majority of the interviewed state attorneys also believe that victims are accorded an appropriate role in the process of rendering a judgment based on agreement of the parties. Only two believe that this is not the case because the consent of the victim is not required in all cases, and one respondent stressed that the consent of the victim should always be required. A large number of respondents said that they often ask for the consent of the victim, even when the law does not require it, if the circumstances of the case so require, for example in the case of a particularly cruel robbery. In addition, the majority of state attorneys believe that the interests of the victim are adequately protected, and only one pointed out that this depends on each state attorney individually, i.e. how careful he or she will be in his or her actions. Only one state attorney stated that he did not consider it a good solution for the victim to block the negotiations by denying consent. In addition, concerning protection of the victim's interests, it should be pointed out that the majority of state attorney respondents believe that the defendant's willingness to accept the victim's claim for indemnification influences their decision to enter into agreement: seven believe that it influences it greatly, five that it does have an influence, one that it may have an influence, three that it has an influence in the case of certain crimes (primarily in economic crimes and property crimes), and only three consider it has no influence at all. This shows that state attorneys, in general, do take into account very specifically the victim's interest in the compensation of damages when they decide to enter into negotiations with the defendant.

The generally positive attitude of the respondents towards the position of the victim in the negotiation procedure is supported by the analysed responses to the question whether they have ever received any complaints from victims due to their non-involvement in the procedure. The analysis shows that such complaints are rare. The majority of judges (17) have never been in a situation where the victim objected because he or she was not involved in the agreement process. One judge concluded that the reason may be that victims, i.e. the injured parties, are not invited to the session of the indictment panel at which the judgment is rendered on the basis of an agreement. Two judges had each received a victim's complaint, and only one respondent stated that in several cases, primarily concerning property offences, a victim objected to the agreement in writing because the agreement often contained only partial acceptance of the claim for indemnification. No state attorney has ever received a complaint because the victim was not involved in the sentencing procedure based on agreement of the parties. The majority of defence counsels (17) were never in a situation where the victim objected because he or she was not involved in the procedure of rendering a judgment based on agreement of the parties. Only one respondent had experienced a victim objecting, in relation to a claim for indemnification, while two respondents heard that others had had such experiences.

Therefore, it can be concluded that, although the majority of respondents believe that the victim's position in the procedure of rendering a judgment based on agreement of the parties is properly regulated and that victims' interests are well protected, state attorneys tend to extend the victim's consent to agreement to other criminal offences as well, particularly when the circumstances of the case support it. The fact that victims' objections are rare shows that this is good practice. However, the few complaints made were mostly related to claims for indemnification, which should be considered an important part of the statement on the agreement of the parties. Even more attention should therefore be paid to this, particularly by state attorneys.

6.2. PROCEDURAL AND DEFENCE RIGHTS

The procedural position of the defendant in the procedure of rendering a judgment based on agreement of the parties is complex, on account of many issues related to consensual

justice in general, which imply a waiver of some important guarantees of a fair trial. However, when answering the general question on how efficiently defence rights are guaranteed in the plea-bargaining procedure, respondents pointed out several specific issues. In general, great importance is given to mandatory assistance by a defence counsel, which is explicitly prescribed in French and Swiss law,[67] as well as in Croatian law.[68]

The majority of Croatian judges (19) believe that all defence rights are effectively ensured in the agreement process, and five explicitly emphasised the importance of mandatory defence. The majority of the interviewed defence counsels (12) believe that all defence rights are effectively ensured in the process of rendering a judgment based on agreement of the parties. Three defence counsels believe that rights are guaranteed at the normative level, but that there are problems in practice, and several respondents consider that there are problems at the normative level as well, primarily due to the matter being underregulated. In general, defence counsels pointed out the following problems: (a) the existence of state attorney tariffs in relation to the proposed penalties, which reduces the possibility of negotiation; (b) the settlement is reduced to a 'take it or leave it' offer, in the sense that there are no real negotiations; (c) there are inequalities in the handling of similar cases, and the conduct of state attorneys can be arbitrary in rejecting the defence's initiative to negotiate; (d) the limited ability of the defence to inspect case files; and (e) the defendant's limited ability to be involved in negotiations if he or she is in pre-trial detention. The problems stated under (a), (b) and (c) confirm that the proclaimed right of the defendant to agree on the punishment and other criminal law measures,[69] which is a peculiarity of Croatian criminal procedural law,[70] is more of a possibility, depending on the readiness of the state attorney to negotiate, than an actual defence right.

The very specific difficulties that the defence encounters in relation to negotiations and reaching an agreement, which were pointed out by defence counsels, call into question the generally positive attitudes of all three groups of respondents on defence rights in the procedures of reaching an agreement of the parties.

7. CONCLUSION

The research produced a number of findings. Some were entirely consistent with the expectations of the researchers and in line with a large body of literature, both Croatian and international. For instance, it was confirmed that practitioners find expediency (in terms of time and resources) to be one of the greatest advantages of plea bargaining in all its forms. However, some of the findings uncovered systemic inconsistencies in everyday legal practice in a number of areas. Among other things, it was shown that plea bargaining, in its legally sanctioned form, is more readily used in cases of serious offences which are within the jurisdiction of USKOK and county state attorney offices. In contrast, municipal state attorneys prefer not to settle cases in such a way, choosing other consensual forms of proceedings instead. However, informal negotiations at all stages of the criminal procedure have proven to be very popular with practitioners who generally did not find them to be legally problematic. By using informal agreements, state attorneys tend to avoid the 'hassle' of a written agreement, which is a necessary part of formally regulated plea bargaining. In some cases, the decision of a state attorney to engage in formal negotiations might be guided by ulterior motives, such as to indirectly compel co-defendants to plead guilty, given that another co-defendant who has already reached an agreement could always be called on as a witness against them. It is not uncommon for judges to encourage informal negotiations and even to take an active role in them, which is a practice which is neither allowed nor expressly prohibited by Croatian law.

The issue of judicial control of the plea agreement, and especially whether the court can control the purposefulness of the proposed sanction, divided the respondents, which only confirms the difficulties faced by theory and practice when it comes to the judicial review of the plea agreement. Undoubtedly, the legislature will have to find a solution based on the fundamental principles of Croatian criminal procedure, and will ultimately clearly have to take a position

67 E Ivičević Karas, A Novokmet, I Martinović (n 5) 28.

68 Criminal Procedure Act 2008, Art 360.

69 Criminal Procedure Act 2008, Art 360(1)(11).

70 E Ivičević Karas (n 7) 426–427.

on whether Croatian criminal procedure is predominantly party-driven proceedings in which there is no room for strict judicial review of the proposed sanction, or whether, in respect of the continental European tradition, it will strengthen the role of the judge in the process of review of the plea agreement in order to satisfy public interest in the prosecution and punishment of perpetrators of criminal offences. In this latter sense, the legislature should bear in mind that, in 2012, the Constitutional Court of the Republic of Croatia constitutionalised the right to judicial review of criminal prosecution as a fundamental principle of Croatian criminal procedure, which presupposes its obligation to establish a veil of judicial protection over all phases of the criminal procedure, including the process of concluding a plea agreement. This review must cover not only the fundamental issues of legality and voluntariness of the concluded agreement, but also the judicial review of the purposefulness of the proposed sanction. Minimum European standards developed in the practice of the ECtHR confirm that the judiciary must maintain a certain degree of control over the proposed plea agreement and sanction, both in terms of the voluntariness and credibility of the confession, and in terms of the purpose of punishment. This practice of the ECtHR was additionally confirmed through the activity of the Parliamentary Assembly of the Council of Europe, which went a step further by warning that the imposition of excessively mild sanctions could harm the preservation of the rule of law in the long term. Therefore, both judiciary and public prosecutors share equal responsibility to protect the rule of law in a democratic society. Hence, these judicial bodies must bear equal responsibility for the protection of the public interest in the prosecution and punishment of the perpetrators of criminal offences even when, due to purely pragmatic reasons, they trade with justice in order to reach a final verdict in a more efficient manner.

The research further shows that, generally, the victim's position in the plea-bargaining procedure is considered adequate, as long as the victim is involved, in terms of giving consent to the agreement in cases of more grave criminal offences against life and limb and against sexual freedom. Yet, there is a tendency to consult the victim even in cases when his or her consent is not required by law. This is in line with the previously mentioned comparative legal trends (Section 6.1.), as well as with the efforts in the criminal law of the European Union to strengthen the legal position of the victim. These developments have had a significant impact on Croatian criminal procedure and have recently encouraged a redefinition of the traditionally passive role and legal position of the victim in different consensual procedures, including judgment based on agreement of the parties. In any case, in the negotiation procedure, more attention should be paid to the victim's claim for indemnification, which often motivates him or her to give consent to an agreement of the parties, when agreement is needed.

As concerns defence rights, although it is generally considered that they are well protected, especially thorough mandatory defence, there are several important issues that call into question such a conclusion. These issues are mostly related to tariffs or the 'take it or leave it' offer, which narrows the possibilities to negotiate, as well as the large discretion of the state attorney when deciding to enter into negotiations and reach agreement. These issues are conditioned by the very nature of plea-bargaining, which implies different motives of the parties when they propose a negotiation or agree to negotiate on the condition of a guilty plea and on the punishment. Moreover, the state attorney is naturally in a better procedural position than the defendant since he or she can never be the object of repressive actions and measures. Therefore, these problems cannot be wholly eliminated, but they can be alleviated by strengthening the controlling role of the court in the plea-bargaining procedure, and especially by involving the court in the negotiation procedure itself, as in German law.

Finally, all stated findings in this empirical research, based on practitioners' experiences, should contribute to drafting specific proposals for improvements in the legislation and practice of the judgment based on agreement of the parties in Croatian law. These findings provide answers to a number of questions which could not be answered by normative, theoretical or comparative legal research, nor by analysis of case law, since the negotiation procedure is not recorded in the protocol nor contained in the case files. Many of these findings may be relevant for other legal systems, especially those of the continental European legal tradition, since they may face the same problems and questions related to the plea-bargaining procedure as those analysed in this paper.

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