

Reshaping Plea Bargaining in European Criminal Justice

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Keywords: plea bargaining, procedural safeguards, European Union.

The doctoral research, “Reshaping Plea Bargaining in European Criminal Justice”, has been carried out in the field of plea bargaining in Europe and its compatibility with European criminal procedural values. One part of the research focuses on the European Union’s (hereinafter EU) attempts to approach the matter of plea bargaining.

EU projects contributing to the mechanism of plea bargaining

Despite the rapid spread of plea bargaining in European continental criminal procedures, it may seem that no specific efforts have been put in to address the threats that plea bargaining causes to European procedural values. Kagan (2007) notes that the fragmented and complex decision-making structure of the EU has often resulted in deadlock or delays in responding to political demands for policy initiatives (Kagan, 2007).

It is worth noting that it is possible to observe partial EU attempts to approach the issue of European plea bargaining in several different projects related to this legal mechanism.

The first project that is worth mentioning is the EU project to support Kazakhstan’s criminal justice system (Council of Europe Portal, 2018). The objective of this project was to bring Kazakhstan’s criminal justice framework and institutional practices in line with European and international standards and practices in the area of criminal justice. More precisely, part of the project

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devoted efforts to ensuring that guilty plea proceedings are conducted in line with European standards. Hence, the outcome of this project may contribute significantly to the process of adopting plea bargaining, and to more transparent usage of it in Europe.

The second project that has been conducted focuses on legal aid in plea bargaining. The report of this project describes the standards of the European Convention on Human Rights (hereinafter ECHR) and the experience of selected countries from Western Europe relating to legal aid for defendants involved in plea bargaining negotiations. The assignment of this project falls within the joint United Nations Development Programme (“UNDP”) and the United Nations Children’s Fund (“UNICEF”) project, “Enhancing Access to Justice and Development of a Child-friendly Justice System in Georgia”, principally funded by the EU under the financing instrument “Support to the Justice Sector Reform in Georgia” signed in May 2015 (European Union & the United Nations Development Programme, 2017). As the researchers of this project note, a common theme seems to be concern as to pressure put upon accused persons (arising from detention, heavy potential sentences etc.) calling into doubt the voluntary nature of the plea bargains. This project raises questions such as whether the state is obliged to make a lawyer available in the context of plea bargaining, and whether the accused can be allowed to waive that entitlement without violation of Article 6 § of the ECHR arising as a result. Defined guidelines in the field of safeguards should be kept in mind when studying the standards on mandatory defence, funding, waivers etc.

One more report, prepared and issued by The European Commission for the Efficiency of Justice, titled “Study on the situation of the contractualisation and judicial process in Europe of 2010” drew a distinction between “Anglo-Saxon” plea-bargaining, characterised by a lack of legal provisions regulating the practice and the possibility of charge bargaining, and continental European systems characterised by much greater legal regulation and sentence-only bargaining (The European Commission for the Efficiency of Justice, 2010, p. 39-40). Plea bargaining in the light of the Court of Justice of the European Union

EU legislation should be perceived as an important factor that shapes the values of continental legal tradition and at least indirectly, should play a role in the process of shaping plea bargaining models in Europe. The Court of Justice of the European Union (hereinafter Court of Justice) interprets EU law to

make sure it is applied in the same way in all EU countries, and settles legal disputes between national governments and EU institutions (Fletcher, Lööf & Gilmore, 2008).

The Court of Justice provided some important insights regarding the mechanism of plea bargaining in joined cases C-187/01 and C-385/01 (2003). Analysis of the ruling in this case proved that there are no doubts that plea bargaining is perceived as a very complicated mechanism in the criminal justice system. Regardless, both the European Court of Human Rights (hereinafter ECtHR) and the Court of Justice have considered it unnecessary to give a thorough ruling on the matter. Although this may be true, it is obvious that both courts acknowledge the European derivatives of plea bargaining. Judges comprehend the issues that arise from this mechanism and try to provide at least basic insights on the operation of plea bargaining in Europe. Despite academic scholars often disparaging plea bargaining *per se*, the same grounds cannot be found in the EU criminal law field. Hence, the spread of adversarialism and adoption of plea bargaining in European national criminal procedures seems to be viewed quite supportively.

Roadmap for strengthening the procedural rights of suspects and accused persons. A missed opportunity?

In 2009 the EU took an approach towards the issue of strengthening the rights of suspects and defendants in criminal procedure (Peers, 2011). For its part, the European Council adopted a Resolution just before The Treaty of Lisbon came into force, setting up a 'Roadmap' for strengthening the procedural rights of suspects and accused persons. The outcome of the project has been the adoption of several Directives, which guarantee a broad scope of procedural rights to defendants.

Despite the fact, that none of the Directives on procedural rights address plea bargaining directly, this research demonstrated how Directives might be usefully employed across different EU countries whilst applying the mechanism of plea bargaining. Research provided examples regarding Directives as follows: Directive (EU) 2016/343 (2016) on the presumption of innocence, Directive 2013/48/EU (2013) on the right to access a lawyer, Directive 2012/13/EU on the right to information in criminal proceedings, Directive 2012/29/

EU, establishing minimum standards on the rights, support and protection of victims of crime.

For instance, Article 7 (4) § of the Directive (EU) 2016/343 (2016) on the presumption of innocence states that Member states might take into account, when sentencing, the cooperative behaviour of suspects and accused persons. Arguably, European legislation has expressed favour to cooperative defendants and the plea bargaining mechanism, as was previously discussed, is based on this kind of “exchange” mechanism. This rule could be taken into consideration whilst shaping sentence discounts in plea bargaining across Europe.

Whilst shaping the defence lawyer’s participation in plea bargaining, the Directive 2013/48/EU (2013) on the right to access a lawyer could be employed as well. As was previously discussed, it is common to regard the right to a lawyer as a primary safeguard of fairness in plea bargaining. The lawyer must be perceived as the “equaliser” in the bargaining process (Alschuler, 1974; Bibas, 2016). Notably, the effective assistance of counsel in plea bargaining is also inextricably linked with the right to information, as it requires that defence lawyers have basic information about the case, both to fully advise their clients and to effectively negotiate on behalf of their clients (Alkon, 2014). Considering that plea bargaining is a relatively new derivative in European criminal procedures, the defence lawyer’s presence should particularly contribute not only to negotiating the most favourable conditions, but also explaining the nature of plea bargaining and its consequences to the accused in the first place (Alkon, 2010).

Furthermore, fairness of the criminal procedural system requires that defendants have the knowledge and freedom required to make intelligent choices amongst the alternatives (Bibas, 2016). The right to information about procedural rights and about the accusation must be part of every negotiated settlement between the defendant and the prosecution. According to the Directive 2012/13/EU on the right to information in criminal proceedings, Article 3 §, national authorities must at least inform the suspect or the accused about their right of access to a lawyer, any entitlements to free legal advice and the conditions for obtaining such advice, the right to be informed of the accusation, the right to interpretation and translation, and the right to remain silent. With the application of the plea bargaining mechanism, the defendant is presented with new options in the criminal procedure, so they should be entitled to a different package of rights, which is broader than that which they are entitled to receive

in a regular criminal procedure. Most importantly, the defendant is entitled to express their defence freely and with the right not to be forced to accept any settlement (Buzarovska & Misoški, 2011). Simultaneously, the defendant has the right to accept or decline the prosecutor's offer. This places criminal justice officials under the obligation to provide defendants not only with general information about procedural rights, but particularly about the nature of the plea bargaining arrangement, the likely outcome in advance of a plea, or possible waivers, i. e. rights that the accused is giving up. The defendant could also be entitled to an explanation of the sentences for the crime they are charged with. The accused needs to understand what bargaining tools the prosecution possesses and what is the scope of the negotiation. In short, defendants need to have an understanding of the substantive merits of the deal in order to be able to evaluate the risks and benefits of holding out or walking away (Bibas, 2016), and the Directive 2012/13/EU could be a great starting point. Furthermore, as part of this Directive, access to the case file must be guaranteed to every defendant before they make a decision whether to enter negotiation in European continental criminal procedure. The proper use of this right guarantees the possibility for the defendant to be fully familiar with the facts of the case and the strength of the evidence against them. Respectively, it contributes significantly to the fairness of European plea bargaining procedure.

Thus, the provisions of the Directive on the right to information in criminal proceedings could easily be employed whilst establishing safeguards for the defendant to know their rights in the plea bargaining procedure, and to make a voluntary and knowledgeable waiver of the right to a full trial.

Directive 2012/29/EU, establishing minimum standards on the rights, support and protection of victims of crime, also seems to produce effects on plea negotiations. Not only does it have a broad scope of applicability, but it also makes explicit reference to the subject of agreements in criminal procedure (Torre, 2019). The provisions of this Directive specify that the only right of the victims, as stated in this Directive, which may, under certain circumstances not be applied to out-of-court settlements, is the "right to a review of a decision not to prosecute" (Directive 2012/29/EU, Article 11(5)§). An important provision is enshrined in this Directive, which sets forth the right of victim to be heard (Directive 2012/29/EU, Article 10 §). This provision seems to have crystallised the victim's right to have the chance to be heard, in person or at least in writing, before a negotiated judgment is delivered (Torre, 2019).

Conclusive remarks

As can be concluded, in comparison to the Council of Europe (hereinafter, CoE), the EU has played a very minor role regarding the plea bargaining mechanism and its safe usage in Europe. It seems that whilst aiming at the issue of a defendant's procedural rights and fair criminal procedure in general, the EU not only accepts, but also encourages the operation of plea bargaining on European soil. It acknowledges the dangers of this form of negotiated justice and this is the reason why the greatest emphasis is placed on safeguards being in place. Despite stating a number of safeguards, none of the conducted research or presented projects have focused on the essence of plea bargaining in the European contemporary continental criminal framework and its compatibility with prevailing procedural values. Plea bargaining still lacks a detailed and systematic evaluation in the light of European procedural values.

Moreover, considering all the anxieties about the rapid and uncontrollable spread of plea bargaining in Europe, the fact that none of the Directives on procedural rights address plea bargaining directly may cause consternation. Arguably, it might be considered as a missed opportunity for EU legislation to actually outline the possible operation of the plea bargaining mechanism in Europe.² European legislation might be a great starting point for improving plea bargaining safeguards in national criminal justice systems.³ Rights that

² Same conclusion should be made regarding a suggested new roadmap for 2020 aiming at taking further action at EU level to strengthen procedural rights of suspected or accused persons. According to the "Agenda 2020: A new Roadmap on minimum standards of certain procedural safeguards" the ECBA suggests taking measures regarding pre-trial detention and the EAW, procedural rights in trial, exclusion of evidence, witnesses' rights and confiscatory bans, conflicts of jurisdiction and *ne bis in idem*, remedies and appeal, and compensation. Plea bargaining mechanism, on the other hand, is not a key focus of any of those measurements. See, for instance, Asselineau, V. (2018). Agenda 2020: A New Roadmap on minimum standards of certain procedural safeguards. *New Journal of European Criminal Law*, 9(2), pp. 184-190.

³ Together with the ECtHR case law, Directives could become an excellent starting point for fortifying safeguards in plea bargaining. For instance, when the Court has examined whether waivers of the right to silence are made willingly and knowingly, the ECtHR has considered factors such as whether a lawyer is present and whether the accused has had sufficient information on his rights presented to him in simple, non-legalistic language, with the assistance of interpretation and translation if necessary, which may have made

are enshrined in the EU Directives can result in positive influences on the development of plea bargaining. In order to *prepare the accused person to be an independent party who can voluntarily choose a plea bargaining option in European continental criminal procedure, support from the criminal justice system needs to be provided*. The EU is working towards achieving common minimum standards of procedural rights in criminal proceedings to ensure that the basic rights of suspects and accused persons are protected sufficiently. This is solid enough ground to argue that the EU should use this line of thinking regarding plea bargaining as well, which is currently seen as a huge threat to defendants' rights by academics, the CoE, and non-governmental organisations such as Fair Trials.

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it harder for the accused to understand and foresee the consequences of their waiver. See *Hermi v. Italy*, 2006, para. 41. An analogous arguments could and should be applicable in the case of plea bargaining where defendant is facing a decision of waiving the right to full trial. Hence, the defence lawyer's participation should be perceived as mandatory in those cases.

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