BARGAINING CHIPS

Schellenberg Wittmer's Paul Gully-Hart and Joel Pahud outline the rules of a new simplified form of plea bargain introduced with the unification of Swiss criminal procedure rules

On 1 January 2011, the unified Swiss Code of Criminal Procedure (CCP) entered into force, putting an end to the fragmentation of the rules on criminal procedure in Switzerland, which were split between 26 cantonal codes of criminal procedure and a federal law. With the entry into force of the CCP, the rules on criminal procedure are now the same in each Swiss canton.

Among other innovations, the CCP introduces a form of plea bargain which was practically unknown in Switzerland until then. The so-called simplified proceeding (*procedure simplifiee; abgekurztes Verfahren*), governed by Articles 358-362 CCP, provides the parties with the possibility to enter into an agreement on the sanction(s) to be imposed on the accused and on the civil claim(s). Once reviewed and ratified by the court, this agreement has the same effect as a judgment.

The simplified proceeding is an exception to the ordinary proceedings, which can take place at the initiative of the parties in the course of the ordinary proceedings anytime until the indictment. In other words, once the indictment has been filed with the court, there is no more room for a simplified proceeding.

It is openly inspired by US law, yet the CCP sets limits to the simplified proceedings that are unfamiliar in other systems. For instance, the simplified proceeding is not applicable if the public prosecutor intends to seek a term of imprisonment of more than five years. It is also not applicable if the accused is a minor.

The idea of introducing a form of plea bargain in Switzerland has been a subject of some controversy in the process of adoption of the CCP. Critics pointed out that such a proceeding is contrary to the general principles of Swiss criminal procedure which impose a duty on prosecuting authorities to fully investigate the relevant facts and to prosecute *ex officio*. They also stressed that experience abroad has shown that the presumption of innocence and the protection against self-incrimination can be undermined by a plea bargain.

The core issue is that the simplified proceeding requires prior admissions by the accused; it can only take place if the accused has previously acknowledged the relevant facts and the civil claim, at least in its principle.

However, lawmakers noted that negotiations in the course of criminal proceedings were not uncommon in Switzerland and that, except in three cantons, these negotiations were not governed by any rules of procedure. They considered it best to provide a legislative framework for such negotiations.

Conditions

The CCP sets two conditions to the simplified proceeding. The accused should have recognised: (i) the criminally relevant facts and (ii) any civil claim, at least in its principle.

As these conditions must be fulfilled when the accused submits his request for simplified proceeding, there is an obvious need for prior informal negotiations with the public prosecutor. The accused may wish to ensure that a request to open a simplified proceeding will not fail. Furthermore and although disputed by some Swiss scholars, we submit that the accused may informally negotiate with the public prosecutor regarding the relevant facts (fact bargain) in order to convince the public prosecutor, for instance, to set aside some facts.

Obviously, the requirement of prior admissions raises some concerns. What will be the impact of these admissions in case the public prosecutor rejects a request to open a simplified proceeding, in case of a subsequent veto from the civil claimant or of a refusal by the court?

Article 362 (4) CCP states that the declarations made by the parties in view of the simplified proceeding shall not be used in the ordinary proceedings that could take place afterwards. This prohibition applies in any situations where the simplified proceeding is aborted and not only in case of refusal by the court to ratify the negotiated indictment (albeit the wording of the German and Italian versions of Article 362 (4) CCP

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suggests otherwise).

However, in our view, the declarations made prior to the opening of the simplified proceeding are not covered by Article 362 (4) CCP. Thus, the accused should ensure that the prior negotiations remain purely informal and that these admissions are only contained in his request to the public prosecutor to open a simplified proceeding and not in prior acts which would not benefit from the prohibition of Article 362 (4) CCP.

More generally, it remains to be seen whether the prosecuting authorities are effectively able to 'forget' about the past declarations and admissions made during a simplified proceeding once they have to conduct ordinary proceedings after the failure of the simplified proceeding.

Proceedings before the public prosecutor

The CCP requires the accused to submit a request to the public prosecutor to open a simplified proceeding. In practice, the incentive to open informal negotiations on a potential simplified proceeding might come from the public prosecutor. The law, however, requires that the accused submits a request. This can be achieved, for instance, through a written request of the accused or a note in the minutes of a hearing.

The public prosecutor decides at his own discretion whether he accepts or rejects the request. The CCP confers no right to the accused to obtain a favourable decision. The decision of the public prosecutor is not subject to any appeal. Neither does it need to set forth its rationale.

Should it admit the request, the public prosecutor has to notify the opening of the simplified proceeding to the parties and to grant to the civil claimant a 10-day deadline to submit his civil claim and the compensation sought for the cost of the proceeding.

Should the public prosecutor reject the request, his decision is not binding – the accused still has the opportunity to renew his request in the course of the ordinary proceedings.

Negotiations and indictment

Once the simplified proceeding is opened, negotiations will take place between the parties. These negotiations are not described by the CCP. Their subject is the indictment, which will then be submitted for approval to the court.

Depending on the extent of the prior informal negotiations, the accused and the public prosecutor may have already agreed on the gist of the indictment. By contrast, talks will take place between the accused and the civil claimant because the latter has in most cases not participated to the prior informal negotiations (he has no right to be informed of such prior negotiations).

Once the parties have come to an agreement, the public prosecutor will draft the indictment. The content of the indictment is defined by Article 360 CCP. It contains, in particular, a simple but precise description of the relevant facts, the offence(s) committed by the accused, the sanction(s) to be imposed, the agreement on the civil claim, the agreement on the costs and indemnities and the acknowledgement by the parties that they waive ordinary proceedings and the ordinary means of appeal by agreeing with the indictment.

How should the indictment reflect the agreement of the parties to set aside certain facts? In other words, how can the accused ensure that the principle *ne bis in idem* will be observed with regard to the facts that the public prosecutor agreed to leave aside?

While some Swiss scholars opine that the indictment should contain a form of implicit renunciation that would then be endorsed by the court, we submit that the parties should instead agree that the public prosecutor would notify a decision of no action further to Articles 319 *et seq* CCP (*ordonnance de classement; Einstellungsverfügung*). This decision should not be notified until the court has ratified the indictment.

The public prosecutor has to notify the indictment to the accused and the civil claimant. The latter have to declare within 10 days whether they accept the indictment. Should the accused fail to reply within the deadline or should he reject the indictment, the simplified proceeding ends and the ordinary proceedings will resume.

On the contrary, further to Article 360 (3) CCP, the civil claimant is deemed to have accepted the indictment unless he has expressly rejected it within the deadline in a written statement to the public prosecutor.

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Proceedings before court

Once accepted, the indictment is forwarded by the public prosecutor to the court. The court holds a hearing, whose purpose is to control whether the conditions for the simplified proceeding are fulfilled, whether the accused recognises the relevant facts, whether the indictment matches with the investigation and whether the proposed sanctions are adequate.

Article 362 CCP holds that the court examines "freely" whether the above-mentioned conditions are fulfilled. In our view, the court should for instance dismiss an indictment if it considers that the facts described should have led to a term of imprisonment of more than five years, if the fraudulent conduct is barred by statute of limitations or if the authorities are not territorially competent. However, we submit that the court should refrain from exercising a tight control over the measure of the proposed sanctions; otherwise the simplified proceeding would be deprived of much of its substance.

If the court admits the indictment, it issues a decision which gives to the latter the same effect as a judgment. This decision can only be appealed on the grounds that the accused had in fact not accepted the indictment or that the judgment does not match the indictment.

Should the court reject the indictment, it remands the case to the public prosecutor for him to resume ordinary proceedings. This decision is not subject to any appeal.

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