Plea Bargaining in Austria?

Ladies and gentlemen, Colleagues,

When I was invited to speak at this conference, on the subject of plea bargaining in my own country, my initial thought was “Fantastic, this will be a short speech”, because plea bargaining does not, legally, exist in Austria. However, the mere fact that its existence is officially denied does not mean that it does not – in one way or another - appear in practice in various forms.

Even though the concept of plea bargaining, as understood by common law systems, is completely alien to Austrian law, approaching the court and the prosecution, discussing certain matters with the judge and attempting to reach a consensus, for example about procedural issues before trial is, arguably, often tantamount to a good quality defence.

The concept of discussing sentence, possible parole or therapy instead of a prison sentence, albeit not provided for by statute, is not completely alien to Austrian defence lawyers, despite the efforts of some within the judiciary and literature to eliminate such discussions and contact completely. It is in some cases desirable that discussions take place.

That said, plea bargaining as seen in Common Law systems, where parties come to an agreement as to which offences are to be indicted or, indeed, an agreement as to the length of the prison sentence, does not form part of our legal system.

There remains, however, a form of such plea-bargaining because very often it is necessary to talk to the judge in an attempt to discern his approach to, and the conclusions he has drawn from the evidence which, in Austria, he has had a chance to review before the trial commences. Considering that the sentence for a given offence can vary between 6 months and 10 years and, further, that there is no consistent or standardized reference as to the sentence for a certain offence, it would arguably be remiss of the defence lawyer not to attempt to find out the judge’s view on the matter.

The duty of the Defence lawyer to protect their clients’ interests may, from time to time, best be served by initiating discussions with the Prosecution and the judge as to procedural issues, prerequisites for the granting of therapy instead of punishment and many more.

Still, even agreements or “bargains” between the judge and the defence lawyer do take place and are not welcomed at all, as can be seen in the only decision of the Austrian Supreme Court (11 Os77/04) that deals with plea-bargaining, and has achieved a certain notoriety amongst the legal profession.

The facts, in brief, are as follows: a defence lawyer discusses his client’s case with the judge who is due to preside at the hearing. It is agreed that, if there is a plea of guilty, and, as a result, only limited evidence need therefore be led, the sentence to be imposed is one of three years.

The “bargain” has thus been struck.

The defence lawyer duly advises his client as to the terms of the deal, and the client agrees that accepting it is the most “economical” way to proceed. And then the inevitable happens: a higher sentence is imposed by the Senate than that which was agreed upon.

The problem of course is that an undertaking given by a judge in the course of what are, legally-speaking, informal discussions is in no way binding upon the court, and so the Senate who was hearing the case were free to impose a higher sentence, which they, on basis of the evidence presented, did.

The client appealed, following an understandable change of lawyer, on the basis that he had only elected not to exercise his full defence rights on the basis of the judge’s undertaking as to sentence, and had thus been denied the right to file motions and call witnesses on his own behalf.

The Supreme Court dismissed the appeal and, furthermore, deemed it necessary to take this opportunity to comment on the unwanted subject of plea bargains in general. The Supreme Court found that an “agreement” of this sort is to be opposed to in principle, for it is in breach of the Code of Criminal Procedure and undermines the basic principles of our legal system, namely the obligation of the court to establish the substantial truth. This of course excludes any “*contracting with a presumptive delinquent*” as the Supreme Court harshly put it. The court also warned that the involved parties could be held responsible for a breach of criminal law and also disciplinary statutes.

This decision, of course, sparked fierce debate, because the judiciary is officially opposed to any kind of contact with the judge outside and before the hearing, and yet, informal and unofficial conversations leading to “agreements” between defence counsel and the judge persist.

Discussions about “legalization” or the creation of a legal basis for “negotiations” and agreements between the parties and the court have been ongoing since the late 1980’s, but have produced nothing save the aforementioned decision of the Supreme Court, which effectively quashed our hopes for a more liberal approach being taken by the judiciary and legislature.

It now falls to me to explain a little about the reasons voiced by the legislature and judiciary for their continued, fervent refusal to entertain the idea of legalisation of – even a moderate form of plea-bargaining. What is their justification for ignoring a cost-effective, time-efficient, compassionate means of reducing cost, delay and trauma to victims whilst providing a degree of certainty of outcome that all parties desire? Their rationale is based upon the foundations of Austrian law as a Continental legal system, in the halcyon days of the inquisitorial system.

Already the Codex Theresianus of 1768 stated that the judge “*must under no circumstances dismiss statutory punishment by way of settlement*” and that “*where there is genuine crime, the judge must not let the offender get away without punishment or come to a benevolent agreement with the delinquent“*. This is basically, as strange as it sounds, even though

written more than 200 years ago at the height of inquisitorial times, still the position the Supreme Court takes until now.

Even modern legal texts such as the Code of Criminal Procedure and the Code of Conduct for Courts hold fast to the ancient rules, although in a more evolved form: § 52 of the rules of Conduct for Courts, for example, states that the judge is banned from commenting on the outcome of ongoing proceedings. § 164 StPO does bar the police, prosecution and the court from offering promises (or voicing threats) in order to persuade the defendant to confess.

The critics of plea-bargaining, who consider any form of agreement or discussion between the defence and the court “wheeling and dealing”, often, use these arguments to consolidate their position.

But there are also more fundamental principles within our legal system which would exclude the possibility of negotiations and an agreement between the defence counsel and the prosecuting authorities and the court:

As a continental law system, one of the fundaments is the judge’s prerogative to establish the fundamental truth, obliging the court (and of course the police and the prosecution) to initiate all possible investigations that could lead to a clarification of the events. Even a full and detailed confession by the defendant does not release the court from its obligation to uncover the substantial truth and, therefore, each and every confession and guilty plea has to be examined as to its validity.

And of course there is the “Legalitätsprinzip”, the duty to investigate and prosecute each and every offence that the police or the prosecution become aware of, with very few exceptions provided by law. Within strict limits the prosecution for example can close proceedings without further investigations if the offence is marginal, but there is no provision that allows the prosecutor to close proceedings if the expenditure of the investigation is disproportionate to the gravity of the offence. Since the introduction of the “Diversion” the prosecution or, at a later stage, the court, can close proceedings provisionally if the defendant is willing to pay a fine, do community service or find reconciliation with the victim of the crime. Of course, this possibility is limited to certain forms of offences.

It has to be conceded that the “Diversion” is no less than an example of the court or prosecution contracting with the defendant. In order to effect a “Diversion”, the acceptance of all parties involved, i.e. the prosecution and the defendant or the prosecution, the court and the defendant is necessary, so by agreeing to either the fine, the social hours or any other measure imposed, the parties come to an agreement or even a “bargain”, usually long before a trial date is set.

As I mentioned before, notwithstanding the restrictions imposed on us by law and jurisprudence, it is of great importance to stay in contact with the trial judge, and sometimes, especially now that our revised Code of Criminal Procedure gave the prosecutor a more active role in the proceedings, with the prosecutor working on the case, before the hearing in order to discuss procedural issues and options. It is sometimes important for both sides to know what they can expect from the hearing, either a confession or a long procedure with

additional witnesses or other motions. It is also important for the defence to know which witnesses the court is going to hear, whether experts will be present and of course whether the client would stand a chance of being granted a therapy, which of course would necessitate a lot of preparatory work by the defence in order to get the documents ready in time for the trial.

As a defence lawyer I am of the opinion, as are most of my colleagues, that these sorts of discussion, by legislature and jurisprudence sometimes still considered undesirable plea bargaining are in no way contra legem, but a very important tool in our everyday work.

The working group on Criminal Law of the Austrian Bar Association, in 2007, decided on certain structures and prerequisites in order to make “Understandings during Criminal Procedure” between defendants and the court more transparent and feasible. These recommendations, hopefully, will be the starting point for a fundamental review of this greyest of areas:

The working group established that the defence counsel’s ability to contact directly the court and other participants of the proceedings, even outside the main hearing, must be regarded as a fundamental defence right during each stage of the proceedings. These discussions with the court and/or prosecution, aiming at resolving procedural problems and sometimes even the outcome of the trial, the acquisition and exchange of information and, most importantly, a consensual determination of certain approaches, can of course only be of use if these discussions can lead to tangible agreements, otherwise these informal “meetings” would have to be considered as a mere waste of the judge and the lawyer’s time and the client’s money.

Apart from the exchange of information these conversations should possibly also deal with questions concerning conclusions drawn from evidence and possible outcomes of the trial. It is important though that these “prognoses” on evidence and the outcome of the trial are tied to the point in time of the conversation and are conditional upon further findings during the proceedings. Of course, the defence counsel is obliged to inform his client of the provisional nature of any offer made or given by the judge, especially if the court will be composed of several judges.

Also the Association of Austrian Defence Lawyers have issued a resolution that an understanding amongst the participants concerning procedural aspects and questions of sentencing is permissible and that, therefore, the opinion of the Supreme Court in the aforementioned decision is inadequate and should be overturned.

Besides these everyday conversations there exist several discussion models for the introduction of a form of “plea-bargaining” that has the aim of fast-tracking certain trials and ensuring cost-effective conduct of the case. Of course there is the problem of whether a form of a quick ending of the proceedings by way of an agreement should be admissible for all cases or only the very complicated ones, the “simpler” ones one the offence is not considered grave. Disadvantages and dangers inherent in such a system though must not be forgotten, such as the problem of a diminution of transparency of the proceedings.

As I am sure that many of my colleagues would agree, the introduction of a moderate version of plea-bargaining, adapted specifically to our legal system, could be a welcome addition to our system of Criminal Procedure, a view shared by our former minister of justice, who claimed that she would welcome any new input to make trials more cost efficient, but so far no changes have come. I personally believe that an option comparable to plea bargaining could be an excellent tool for making specific court proceedings more streamlined and cost effective, thus allowing for the re-allocation of resources which could be needed in more complicated Proceedings.

Bibliography:

- Arbeitsgruppe Strafrecht, Grundsätze der Strafverteidigung, AwBl 2007,04
- Bertl/Venier, Das neue Strafprozessrecht, Wien 2007
- Danek, WK-StPO Vor § 220
- Danek, WK-StPO Vor §228-279
- Norbert Gerstberger, Statement, Strafverteidigung – Realität und Vision 2003
- Reinhard Moos , Absprachen im Strafprozess, RZ 2004, 56
- Oliver Scheiber, Ausgemauschelt, Juridikum 2005,2
- Richard Soyer, Vorstellungen zur Hauptverhandlung neu, Strafverteidigung – Realität und Vision 2003
- VÖSt, Beschlüsse des 3. Österreichischen StrafverteidigerInnentages, März 2005