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SPECIFIC CRIMINAL PROCEDURE RULES AGAINST CORRUPTION IN HUNGARY

NORMAS PROCESALES PENALES ESPECÍFICAS CONTRA LA CORRUPCIÓN EN HUNGRÍA

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ABSTRACT

In the context of corruption, one of the areas of political controversy related to criminal procedural law in Hungary in recent years has been the question of joining or not joining the European Public Prosecutor's Office, and this issue has primarily arisen in connection with the detection of corruption offenses. As a compromise, an intermediate solution was reached: from November 24 of 2022, Hungary introduced the "Procedure for major crimes related to the exercise of public authority or management of public property" as a new Chapter CV/A of Act XC of 2017 on Hungarian criminal proceedings (CPC) ("conditionality procedure"). The paper reviews the main provisions of the conditionality procedure and examines the problems associated with them. Finally, the author raises the fear that conditionality proceedings will become the scene of daily

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political battles rather than a real alternative to establishing criminal liability.

Keywords: criminal procedure, corruption, special criminal procedure, special forms of prosecution, monopoly of prosecution, substitute private prosecution.

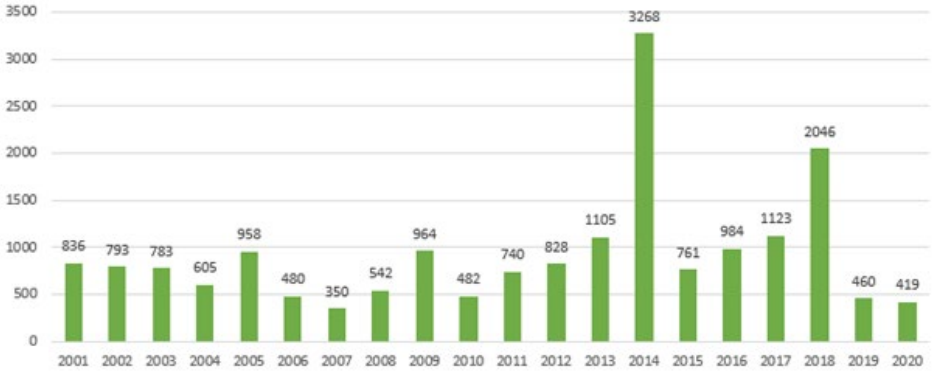
RESUMEN

En el contexto de la corrupción, uno de los ámbitos de controversia política relacionados con el Derecho procesal penal en Hungría en los últimos años ha sido la cuestión de adherirse o no a la Fiscalía Europea, y esta cuestión ha surgido principalmente en relación con la detección de delitos de corrupción. Como solución de compromiso, se llegó a una solución intermedia: a partir del 24 de noviembre de 2022, Hungría introdujo el "Procedimiento para delitos graves relacionados con el ejercicio de la autoridad pública o la gestión de bienes públicos" como un nuevo capítulo CV/A de la Ley XC de 2017 sobre el proceso penal húngaro (CPC) ("procedimiento de condicionalidad"). El artículo repasa las principales disposiciones del procedimiento de condicionalidad y examina los problemas asociados a ellas. Por último, el autor plantea el temor de que el procedimiento de condicionalidad se convierta en el escenario de batallas políticas cotidianas en lugar de una alternativa real para establecer la responsabilidad penal.

Palabras clave: procedimiento penal, corrupción, procedimiento penal especial, formas especiales de enjuiciamiento, monopolio de la acusación, acusación particular sustitutoria.

1. INTRODUCTION

Data on the number of corruption crimes show an interesting trend in Hungary over the past 20 years[2]:



It is visible that the number of corruption offenses was exceptional in the two election years (2014 and 2018) compared to the average of 679.3 in the 2000s. However, the data from the last two (available) years make up about 65% of the 2000 average. Therefore, the statistical data not only do not support the opposition's "intuition", "people's opinions", and similar, unsupported assumptions about a significant increase in corruption in Hungary, but they actually show the opposite (at least in terms of criminal proceedings initiated due to corruption). However, since leading officials of the European Union (which has also been partly involved in corruption scandals since then) saw serious corruption risks in Hungary; the legislator had to do something to curb it.

In this context, one of the areas of political controversy related to criminal procedural law in Hungary in recent years has been the question of joining or not joining the European Public Prosecutor's Office, [3] and this issue has primarily arisen in connection with the detection of corruption offenses. Arguments and counterarguments were lined up as to whether we should join

[2] Nagy Tibor (2020): *Tájékoztató a bűnözés 2020. évi adatairól.* Legfőbb Ügyészség, Budapest, 23.
[3] Karsai Krisztina (2018): *A kívülmaradás lehetetlensége: az Európai Ügyészség működésének várható hatásai a kimaradó tagállamokban*, Magyar Jog (12) 670-678.

the organization like most EU member states, [4] accepting that this would significantly limit our independence in the criminal field, as the European Public Prosecutor's Office has the right to take cases into its own jurisdiction and in such cases, national authorities cannot continue to investigate the same case, or whether we should not allow interference in criminal proceedings like the absentees (Ireland, Poland, Sweden, Denmark)[5].

As a compromise, an intermediate solution was reached: from November 24 of 2022, Hungary introduced the so-called "conditionality procedure", which was given the concise title of "Procedure for major crimes related to the exercise of public authority or management of public property" as a new Chapter CV/A of Act XC of 2017 on criminal proceedings (CPC). The study attempts to provide an overview of this new separate procedure within narrow scope.

2. MAIN RULES OF THE CONDITIONALITY PROCEDURE

The new § 817/A. of the CPC specifies which crimes are eligible for the application of the specific rules of the conditional procedure. These primarily include corruption offenses (with the exception of certain less serious cases of bribery), most abuses of office, property crimes committed against national property or property managed by public interest foundation trustees that result in serious damage, certain offenses that harm the budget, anti-competitive agreements in procurement and concession procedures, as well as participation in a criminal organization and money laundering related to these offenses. The specific provisions must be applied in criminal proceedings initiated for major offenses related to exercising public authority or managing public property.

There are three (possible) stages of the conditionality procedure:

(a) Lodging a motion for review,

(b) The submission of a new motion for review,

(c) Designation as a person authorized to represent the indictment and filing of the indictment.

[4] Békés Ádám (2003): *Az Európai Ügyészség alapításának problémái és lehetőségei.* Európai Jog (6) 25-32.
[5] Polt Péter (2015): *Európai Ügyész: tendenciák és lehetőségek.* Európai Jog (6) 1-6.

In the conditionality procedure, the legal representation of the holder is mandatory.

ad a) The conditionality procedure may be initiated primarily by the submission of a motion for review, in certain cases of rejection of the complaint or termination of proceedings. If no motion for review is submitted in accordance with the ordinary procedure, or if the victim or complainant does not participate in the proceedings, or if they cannot file a motion for review[6] the Public Prosecutor's Office or the investigating authority publishes its decision or the case file within one month of the decision in accordance with Act CXII of 2011 on Informational Self-Determination and Freedom of Information. by using pseudonymisation as defined in § 3 Section 29 of the Act (anonymised decision or anonymised list of cases), on the website of the Public Prosecutor's Office or the investigating authority for central electronic information, and on the publication interface specified by decree of the Government. Publication shall include information on the conditions for filing a motion for review against the decision, the rights and obligations of the proposer, the time limit for filing the motion for overrule and the body to which the motion for review may be submitted.

Within one month of publication of the anonymised decision on the central electronic information website of the Public Prosecutor's Office or the investigating authority, any natural or non-natural person (with the exception of suspects, defence counsel, victims and whistleblowers) may submit a motion for review to the prosecutor's office or investigating authority that took the decision. The motion for review must be reasoned and the person submitting the motion for review may attach to it the data, documents and statements available to him which, in the applicant's view, are suitable for proving the fact to be proved in the case.

The prosecutor's office or investigating authority that took the decision examines the motion for review after the expiry of the deadline for submitting it and, if it considers it to be well-founded, annuls the decision and orders the investigation (if the complaint is rejected) or the continuation of the proceedings (after the termination of the proceedings). Otherwise, within three days of the expiry of the deadline for submitting a motion for review, the motion, the

[6] With the exception of the Integrity Authority, the State and the body exercising public authority shall not be entitled to file a motion for review, even if they participate in the proceedings as complainants or victims (§ 817/C Subsession 7).

documents attached thereto and the case file shall be submitted to the Public Prosecutor's Office in the case of a decision taken by the investigating authority or to the superior prosecutor's office in the case of a decision taken by the Public Prosecutor's Office. If the motion submitted is well-founded, the prosecutor's office in the case of a decision taken by the investigating authority, or the superior prosecutor's office in the case of a decision taken by the prosecutor's office, annuls the decision and orders an investigation or order the continuation of the proceedings. Otherwise, the motion, the documents annexed thereto and the case file, together with any observations on the motion, shall be sent to the court within eight days of receipt of the motion.

The Investigating Judge of the Investigative Judge Group of the Central District Court of Buda has jurisdiction over the territory of the country. The court decides on the motion for review within one month of its arrival at the court on the basis of the case file (§ 817/E. of CPC). The court shall review the contested decision irrespective of the reasons for the motion for review, and shall therefore fully examine the case file and the data, documents and statements attached by the petitioner, which, in the applicant's view, are suitable for proving the fact to be proved in the case. If there is no impediment to the examination of the motion, the court decides by means of a non-conclusive order rejecting the motion or setting aside the contested decision. The latter shall take place if:

— the contested decision is unfounded,

— the public prosecutor's office or the investigating authority incorrectly applied the law in the contested decision, or

— the grounds of the contested decision are contrary to the operative part, and this had a material impact on the dismissal of the complaint or the termination of proceedings.

The contested decision is unfounded where

— the prosecutor's office or the investigating authority has not established any facts in the decision or has established it incompletely,

— the facts contained in the decision are wholly or partly undiscovered,

— the facts established are contrary to the content of the file, or

— the Public Prosecutor's Office or the investigating authority incorrectly inferred further facts from the facts established in the decision.

Once the contested decision has been set aside, there are two options: if the court

— has annulled the decision rejecting the complaint, the investigation will be initiated without a separate decision upon the decision,

— has annulled the decision to terminate the proceedings, the proceedings shall continue without a separate decision having been taken.

If an investigation is initiated or proceedings continue, the applicant shall continue to be entitled to submit evidence or submit observations.

ad b) If the Public Prosecutor's Office or the investigating authority terminates the proceedings conducted on the basis of the above-described motion for review, a new motion for review may be filed in the case of the grounds for termination specified in the CPC. In such cases, the public prosecutor's office or investigating authority serves it together with the anonymised list of cases

— the decision of the victim and the complainant who submitted the motion for review,

— the anonymised decision of the natural person making the motion for review.

A motion for reconsideration may only be filed by the person who previously submitted the motion for review. The person who previously filed a motion for review may file a new motion for review against the decision within one month of service of the termination decision. The submission of a new motion for review shall have suspensory effect on the provisions of the decision (with the exception of those relating to coercive measures affecting personal liberty).

A new motion for review must be submitted to the prosecutor's office or investigating authority that made the decision. The repeated motion for review must state the reasons on which it is based, and the person submitting the motion for review may attach to it the data, documents and statements at his or her disposal which, in the applicant's view, are suitable for proving the fact to be proved in the case. Within three days of the expiry of the deadline for submitting it, the public prosecutor's office or investigating authority which made the decision sends the motion and the documents attached thereto to the court, which decides on it in the procedure described earlier.

ad c) If the court determines that a motion for prosecution may be filed and a new motion for review has been filed only by the Integrity Authority, the prosecutor's office that made the contested decision or, if the contested decision was made by the investigating authority, the prosecutor's office that sent the motion for review shall publish it within five working days of service of the court's decision on the re-review motion

— the anonymized file list,

— the anonymized decision challenged by a repeated motion for review,

— the anonymized decision of the court on the (repeated) motion for review (Cp. 817/I. §).

During publication, information must be provided on the possibility of filing an indictment against the decision, on the conditions for filing the indictment, on the rights and obligations of the person authorized to represent the indictment, on the deadline for filing the indictment and on the body to which the indictment may be filed, which only the person who previously (repeatedly) motion for review is entitled [7] , unless the proceedings were conducted on the basis of an appeal by the Integrity Authority, in which case any natural or non-natural person (except the State and bodies exercising public authority) may file a motion for indictment.

The person authorized to represent the indictment must have the opportunity to inspect the case files, with the exception of the case files kept in private (§ 817/L. of CPC). The indictment may be filed within two months by the person authorized to represent the indictment with the public prosecutor's office or investigating authority that made the decision, which forwards it to the competent court within 8 days.

The court dismisses the indictment by a non-conclusive order (§ 817/N. of CPC) if:

— the person authorized to represent the indictment submitted the indictment after the deadline specified by law,

— the person authorized to represent the prosecution has no legal representative,

[7] If there are multiple person, it depends on their agreement which one submits the indictment. If they cannot agree, the court designates the person entitled to file the indictment.

— the person submitting the indictment is not entitled to submit an indictment under the CPC,

— the act charged is not a priority offence related to the exercise of official authority or the management of public property,

— the indictment does not contain the mandatory paraphernalia (§ 817/M. Subsession 3 of CPC),

— the indictment was not filed through legal counsel.

If the indictment cannot be rejected, the court will examine within two months of the filing of the indictment whether the person designated as the accused in the indictment can be reasonably suspected of committing the offence indicted (§ 817/O. of CPC). By non-conclusive order of the court, the indictment:

— refuses if the person designated as the accused in the indictment cannot reasonably be suspected of having committed the offence charged,

— partially rejects if a person named as accused in the indictment cannot reasonably be suspected of committing an offence which is the subject of the indictment, or if the person designated as accused in the indictment cannot reasonably be suspected of committing an offence which is the subject of the indictment (§ 817/P. of CPC).

If the court partially rejects the indictment, the person authorized to represent the indictment must, within fifteen days of service of the decision, resubmit to the court the indictment containing the parts of the indictment that was rejected. If the person authorized to represent the prosecution fails to do so, the court terminates the proceedings by final order.

If the indictment cannot be dismissed, the court:

— send it immediately to the accused,

— ensure that the means of proof are available at the hearing, or

— order a coercive measure.

After service of the indictment on the accused, the participation of counsel in the proceedings is mandatory (§ 817/Q. of CPC).

The person authorized to represent the prosecution in court proceedings exercises the rights of the Public Prosecutor's Office and performs the functions

of the Public Prosecutor's Office, including requesting the imposition of a coercive measure affecting the personal liberty of the accused and the issuance of an arrest warrant. The person authorized to represent the indictment may not extend the charge but may drop it at any time without giving reasons (§ 817/R. of CPC).

The presence of the legal representative of the person authorized to represent the prosecution at the hearing is mandatory. If neither the person authorized to represent the prosecution nor his legal representative appear at the trial and he or she has not excused himself or herself immediately for good reason, in advance, or if both persons appear through no fault of their own in such a state that they are unable to fulfil their procedural obligations, and if both persons leave the procedural act without permission, the court shall terminate the proceedings by means of a final order.

The person authorized to represent the indictment cannot appeal against the court's judgment (nor does he have the right to extraordinary remedy). In the case of a defence appeal, the court submits the case file directly to the court competent to hear the appeal (§ 817/T. of CPC).

3. SUGGESTIONS ON THE CONDITIONALITY PROCEDURE

The provisions on the conditionality procedure entered into force a few months ago, so it is not yet possible to analyze their practice. However, questions of principle were already raised when the special procedure was enacted.

As a rule, the prosecution is represented in criminal proceedings (except in minor private prosecution cases) by the public prosecutor. In addition, as the Constitutional Court ruled in Decision Nr. 42/2005. (XII. 14.) AB határozat supplementary private prosecution is a form of correction of the prosecutorial prosecution monopoly. Its original purpose was to reduce the potential dangers arising from the monopoly to truthful criminal prosecution (perpetrators of serious crimes remain unpunished due to the lack of public prosecution for political reasons, professional mistakes or faulty deliberations), and to counteract the prosecutorial "overpower" over the prosecuting court resulting from the refusal to prosecute or the dismissal of charges.

Already after the (re)introduction of supplementary private prosecution, fundamental practical problems arose. In general, the definition of victim has been problematic (e.g. in the case of completed homicide, there is no room for

supplementary private prosecution precisely because the relatives (parents in some cases) of the victim cannot be considered "victims" for the purposes of criminal proceedings and their representative cannot act as the victim's representative[8]). The real theoretical problem was caused when László Keller, "State Secretary for Criminal Complaints", initiated a large number of supplementary private prosecution proceedings. However, the legal interpretation of both the Constitutional Court[9] and the Curia[10] was uniform in this respect (and this is now reflected in the text of the Code of Criminal Procedure[11]): the Fundamental Law excludes any state body other than the Public Prosecutor's Office from acting as an accuser, regardless of the nature of the crime or the harm suffered by it. Therefore, we have the previous CPC[12]nor did it allow e.g. local governments to act as substitute private prosecutors in criminal cases. If, nevertheless, the court made a final final decision on the basis of such a charge, it proceeded on the basis of an accusation brought by an unentitled person, on the basis of which an extraordinary remedy was also possible.

The same applies to the conditionality procedure: the CPC states that no public body (with the exception of the Integrity Authority) may file a motion for review (§ 817/C. Subsession 7 of CPC) or the Integrity Authority (§ 817/J. Subsession 2 of CPC).

Precisely in order to dispel the doubts already raised, Parliament asked the Constitutional Court for a preliminary review of the normative text relating to the conditionality procedure, whether it does not violate Article 29 Subsession 1 of the Fundamental Law. This Article states: "The Prosecutor General and the Public Prosecutor's Office shall be independent and, as public prosecutors in the administration of justice, shall be the sole enforcers of the State's criminal claims. The Public Prosecutor's Office prosecutes crimes, takes action against other unlawful acts and omissions and helps prevent unlawful acts."

The Constitutional Court adopted a decree Nr. 28/2022. (XI. 8.) AB határozat. In its decision[13] the Constitutional Court stated that the law adopted

[8] EBH (Principled court decision) 2000. 293.
[9] 42/2005. (XI. 14.) AB határozat (decision of the Constitutional Court), confirmed by Decision 3030/2020. (II. 24.) AB határozat
[10] Curia decision Nr. Bfv.II.38/2021.
[11] CPC § 25. Subsession 1. "The Public Prosecutor's Office shall be the public prosecutor."
[12] Act XIX of 1998 on Criminal Procedure.
[13] With parallel reasoning by Judges Ágnes Czine, Egon Dienes-Oehm and Zoltán Márki.

but not yet published in connection with the conditionality procedure does not violate the principle of monopoly on prosecutions of the prosecution set out in Article 29 Subsession 1 of the Fundamental Law. The legislature is not bound by a constitutional requirement which provides for the exclusive application of supplementary private prosecution as a correction of charges, that is to say, the legislature may apply other corrections of charges to compensate for any anomalies arising from the prosecution monopoly. Therefore, according to the Constitutional Court, if the prosecutor's office takes the view that there is no room for the enforcement of state criminal claims, and if, in such a case, the legislator nevertheless grants another entity (not exercising public authority) the opportunity to take action before the court, the requirement of the prosecution monopoly set out in the Fundamental Law is not violated. The action of that entity serves the objective referred to above through the enforcement of Article 38 of the Fundamental Law in order to step up the fight against specific criminal offences and the unlawful treatment of public funds.

It is another matter that we have to broadly agree with the dissenting opinion of Constitutional Court judge Zoltán Márki that the relevant judgment of the CJEU of 16 February of 2022 in case C-156/21, EU:C:2022:97 of Hungary v European Parliament and the Council of the European Union expressed an expectation on several points regarding measures that can be taken under the General System of Conditionality for the Protection of the Union Budget, that it must relate exclusively to the implementation of the Union budget, i.e. there must be a genuine link between the financial interests of the Union and the serious risk thereof.

Personally (based on my experience with private criminal complaints), I am somewhat skeptical about how much the new legal institution will fulfill its intended purpose. If the prosecutor's office, which has a high level of professional training and experience (and investigative background), considers that the evidence in a given case is not sufficient to bring charges, it is difficult to imagine that a natural person who is not so lay but not so lay but does not know the prosecution and investigative structure behind him) can adequately prove the guilt of the accused before the court. And although convictions are sometimes handed down in supplementary private prosecutions, acquittals are much more common, and there is also a fear that conditionality proceedings will become the scene of daily political battles rather than a real alternative to establishing criminal liability.

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