



Luxembourg newsflash

26 mars 2015

Introduction of “criminal settlement” in Luxembourg: judgment upon consent in criminal matters

Luxembourg has enacted a new law on a criminal settlement procedure known as a judgment upon consent. This procedure, which mainly aims at reducing the workload of the judicial authorities dealing with criminal matters, allows for an agreement between the public prosecutor and the person suspected of having committed an offence which on the one hand establishes an admission of guilt and on the other hand determines the criminal sanctions to be applied, subject however to the review and approval of the criminal courts.

Such an agreement, if approved, always leads to a conviction: out-of-court settlements are not possible and such conviction will be entered in such person’s criminal record. Whether or not this new regime will prove a success remains to be seen, and will most likely depend on how it will be applied in practice by the public prosecutor’s office and the criminal courts.

This newsflash will provide you with an overview of the key characteristics of the new procedure: “judgement upon consent” (*jugement sur accord*).

On 20 January 2015 the Luxembourg Parliament enacted a law introducing into the Code of Criminal Procedure the possibility of obtaining a so-called judgement upon consent (*jugement sur accord*) in criminal matters¹ based on a prosecution agreement between the public prosecutor and a person suspected of having committed a criminal offence (the prosecuted person, which can be either a natural person or a legal entity²).

The law is based on bill n° 6518 introducing a “settlement” in criminal matters, lodged with Parliament by the previous government on 3 January 2013³ which, as to its substance, received the backing of the current government although a number of amendments have been made to the initial text. It is in line with existing (and successfully applied) legislation in a number of other EU Member States, such as France, Belgium and Germany, but far from being a copy of foreign legislation it constitutes a specific Luxembourg regime.

¹ Articles 563 to 578 of the Code of Criminal Procedure. The law has been published in the Mémorial A, 2015, 33)

² Law of 3rd March 2010 of the criminal liability of legal entities (Mémorial A, 2010, 614)

³ For further information see our newsletter of March 2013

http://www.arendt.com/publications/documents/legalupdate/legal%20update_march_2013.pdf

In particular, the new procedure, initially called “criminal settlement” (*transaction pénale*), is now referred to as “judgment upon consent” (*jugement sur accord*), as this term was deemed to better reflect the effective functioning of the regime introduced by the new legal provisions.

The principal aim of this law is to allow for a simplified criminal procedure which, whilst reducing the workload of the prosecution authorities and of the criminal courts and the often significant delays in obtaining a final judgment in criminal proceedings, will at the same time result in a judgment rendered following a fair trial consistent with human rights requirements as well as the safeguarding of transparency and victims’ rights.

In complex cases, and in particular cases involving white collar crimes, requiring time consuming and complicated investigations which necessitate more often than not having recourse to international letters rogatory for the purpose of obtaining evidence from abroad, the period of time that lapses between the initiation of criminal investigations and the rendering of a final judgement has become such that the right of the defendant to have a judgement delivered within a reasonable time, as provided for by the European Convention on Human Rights, can in many cases not be respected.

In addition, for less complex cases, the sheer volume thereof referred to the public prosecutor’s office - a volume which is constantly increasing - renders it very difficult for the latter to evacuate all such cases in a timely manner, resulting in many of them being closed without further action.

The judgment upon consent procedure allows for a prosecution agreement to be negotiated between the public prosecutor and the prosecuted person. This agreement specifies the factual matters on which the relevant criminal action is based and determines the sanctions to be applied.

On the one hand it constitutes an admission, by the prosecuted person, of the charged offences as set out in the agreement. On the other hand, it limits the prosecution of the facts underlying the charged offences to those offences specified in the agreement.

Such a consensual approach as to the charged offences, together with an agreement as to the (reduced) sentence to be applied, resulting in a common position adopted by the public prosecutor and the defendant, largely eliminates the need for lengthy and complex investigations (often taking many months, if not years) as well as court hearings which can sometimes stretch over days, if not weeks.

These new provisions do not provide for any type of out-of-court settlement. In all instances, the prosecution agreement will be subject to the review and approval of the criminal courts through a judgment rendered following an adversarial hearing⁴. This hearing involves all the parties that can or must intervene in ordinary criminal proceedings and largely follows the line of such proceedings. The judgment approving (or disapproving) the prosecution agreement is thus rendered by an impartial tribunal that has in no way been involved in the negotiation of such agreement.

It is important to note that this new regime can only be applied to misdemeanours (*délits*) and crimes (*crimes*) which, due to mitigating factors, are procedurally treated as felonies and where the maximum prison term which can be applied does not exceed five years. Minor offences (*contraventions*) are excluded.

⁴ The main reason behind the exclusion of any out-of-court settlements seems to be the avoidance of possible misuse, such as “private deals” between the public prosecutor and the defendant.

The prosecuted person must, at all stages of the procedure, be assisted by legal counsel.

A proposal with a view to obtaining a judgment upon consent can be made at any stage of the criminal proceedings up to the very moment a judgment is rendered by the criminal court⁵.

The initiative can be taken either by the public prosecutor or the prosecuted person. Such a negotiation proposal can however be refused by the other party without giving any reason⁶. The refusal can be in total or in part, a partial refusal (probably the most frequent situation) normally leading to negotiations between the public prosecutor and the prosecuted person. Failure to respond within one month is considered to be an implicit refusal.

Negotiations must be concluded and an agreement found within a period of four months (which can be extended only once for another period of four months)⁷, failing which the negotiation process will be considered as having failed and the ordinary criminal proceedings will continue.

In matters having been referred to an investigating magistrate (*juge d'instruction*), the latter must be informed of the fact that a proposal for a prosecution agreement has been made and he must, within eight days, submit to the public prosecutor a report on the current state of the investigation and any future investigative measures he intends to perform.

The prosecuted person will, for the purpose of the negotiations (once accepted) be granted access to the criminal file held by the public prosecutor or, as the case may be, by the investigating judge (equality of arms principle).

In case the negotiations fail, all documents relating thereto will be destroyed.

If an agreement is reached between the public prosecutor and the prosecuted person, such agreement must be documented in writing and contain a number of details such as (i) the legal characterisation of the criminal offences to which the person involved has confessed, (ii) the mitigating factors taken into account (if any), (iii) the principal and accessory criminal sanctions to be applied (which must be sanctions applicable to misdemeanours (*délits*) and can under no circumstances comprise a prison term exceeding five years), (iv) the decisions to be taken as to restitutions and the costs of the criminal proceedings and (v) the terms of indemnification of persons having presented a claim in the context of the criminal proceedings.

The agreement must be signed by the public prosecutor, the prosecuted person and the latter's legal counsel.

In criminal proceedings where an investigating magistrate is involved, once a prosecution agreement has been reached, the public prosecutor must inform such investigating magistrate thereof and request the latter to close his investigation against the prosecuted person(s) party to the agreement in relation to all facts covered by such agreement, as the matter can only be referred to the criminal court for approval once such investigation has been formally closed.

In case the investigating magistrate decides not to close his investigation against the prosecuted person(s) party to the prosecution agreement the investigating magistrate must render a motivated

⁵ A judgment upon consent can no longer be obtained once a first instance judgment has been rendered, even if such judgment is subject to appeal.

⁶ Thus a decision by the public prosecutor not to enter into such negotiations, being entirely discretionary, is not subject to appeal.

⁷ The objective of this provision is to prevent delaying tactics employed by the defendant and intended solely to stall the criminal proceedings.

decision rejecting such request for closure, a decision which is subject to appeal before the council chamber of the criminal court. If the investigating magistrate's decision is confirmed, the prosecution agreement will be deemed void.

Obviously, where the criminal proceedings involve more than one person and where some of those persons do not benefit from a prosecution agreement, the existence of a prosecution agreement will not in any way affect the proceedings initiated against such other persons.

Once a prosecution agreement has been reached and the pending investigation (if any) is closed, the prosecuted person and any civil claimants will be summoned to appear before the criminal court. Any victims, as well as such persons that, in the public prosecutor's view, may have claims which have not yet been made against the prosecuted person will be informed of such hearing.

At the hearing, the prosecuted person is questioned by the court in relation to the facts being the subject matter of the prosecution agreement and all parties summoned will be heard by the court.

The court will then assess the prosecution agreement and in particular (i) rule on the guilt of the prosecuted person in respect of the facts the latter has admitted having committed, (ii) verify the lawfulness of the criminal sentence proposed, taking into account any mitigating factors which have been retained, (iii) verify the provisions of the prosecution agreement relating to restitutions and procedural costs and (iv) verify whether the indemnification proposed has been accepted by the parties having made a civil claim.

It should be noted that, on the one hand, the victims (if any) or any other persons having a civil claim resulting from the relevant criminal offences cannot challenge the prosecution agreement. On the other hand, such prosecution agreement has no impact on the rights of the civil claimants, who can always request that the matter be referred to a civil court for the purpose of determining such civil claims for damages in the event that the victims do not agree with the indemnification terms of the agreement. Such proceedings before the civil courts will be held in accordance with the rules on criminal procedure. Furthermore, the existence of a prosecution agreement does not in any way prevent persons having a civil claim against the prosecuted person in relation to the criminal offences committed and who have not intervened in the criminal proceedings, from filing such claims in the civil courts.

If the court deems that the guilt of the prosecuted person is established and that the proposed criminal sentence is lawful and appropriate, it will, by way of a substantiated judgment, convict the prosecuted person, apply the proposed sentence and rule on procedural costs, restitutions and indemnifications to the extent the latter have been accepted by the civil claimants.

It should be noted that the court cannot in any way deviate from the terms of the prosecution agreement, except for errors contained therein which can be remedied by mutual agreement between the public prosecutor and the prosecuted person.

If such a judgment upon consent is obtained, this judgment conclusively puts an absolute end to any criminal proceedings against the prosecuted person in respect of all facts referred to in the prosecution agreement.

If however the court deems that (i) the guilt of the prosecuted person is not established, (ii) that the proposed sentence is not appropriate, (iii) that the proposed provisions of the prosecution agreement relating to the legal characterisation of the alleged criminal offences, the criminal sentence and the decisions relating to procedural costs and restitutions are tainted by errors of such nature that they cannot be remedied, the prosecution agreement becomes void and the court

acknowledges in a judgment that the prosecution agreement has failed, referring the parties back to the stage of the criminal procedure preceding the conclusion of the prosecution agreement.

In such a case, any documents issued in the context of the negotiation of the prosecution agreement, as well as any information collected or declarations made cannot be used in any way in the ordinary criminal proceedings and all such documents will be destroyed.

The judgment rendered by the court in respect of the prosecution agreement is subject to the ordinary means of appeal as provided for in the Code of Criminal Procedure.

This provisions of this new law introduce a wholly new concept into Luxembourg criminal law which may prove to be interesting for the speedy settlement of relatively minor cases involving private persons, where the existence of a criminal offence as such is not contested, the sole question remaining being that of the sanction to be applied. As to more complex criminal cases, in particular cases involving white collar crimes, the success of these new provisions remains to be tested and will most likely largely depend upon the way they are applied in practice by the public prosecutor's office and by the courts. This is particularly true given the fact that an out-of-court settlement is excluded and a *jugement sur accord* will always and necessarily result in a criminal conviction with a corresponding entry in the criminal record (*casier judiciaire*).

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