PLEA AGREEMENT DURING THE CRIMINAL PROSECUTION OF A CRIMINAL TRIAL

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Abstract

The Plea Agreement is one of the latest institutions and one of the special procedures introduced by the New Romanian Criminal Procedure Code.

The Romanian procedure law adopted it because the State wanted a reduced cost of the justice action; thus, the courts would have fewer trials and the procedures would be accelerated. This work wants to analyse the congruity of this procedure with the right to a fair trial.

Keywords: *agreement, recognition, guilt, prosecutor, trial.*

1. Introduction

The Romanian quick social and economic development has been constantly claiming the need for adjusting the judicial system to the contemporary reality, for a good, prompt and efficient justice action.

One of the important institutions introduced among the special procedures, regulated by Title 4, Chapter 1 of the Special Part of the New Criminal Procedure Code, is represented by the plea agreement.

It is considered special because it is regulated mainly by some norms, derogatory from the normal procedure, applicable unitarily in solving criminal cases.

The special derogatory character draws from aspects concerning the limits of the law court assignment, the object of the trial, the rules set for the trial whenever the instance is informed about such agreement.

Some states have been using this special practice for a long time now. For instance, in the United Kingdom of Great Britain, the first pieces of evidence of this procedure date since 1743, whereas in the USA from 1804.

This work wants to study the circumstances of signing this type of agreement, used only during the criminal investigating stage.

We are going to analyse the duties of both the criminal prosecutor and his hierarchically superior, and at the same time, the obligations of the accused person when accessing this procedure during the criminal investigation stage of a criminal case.

2. Authors and procedure initiation

According to art 478 paragraph (1) Criminal Procedure Code, the defendant and the prosecutor are the authors of the plea agreement.

This document can be signed either by the prosecutor who investigates the criminal case, according to art. 56 paragraph (3) Criminal Procedure Code, or the prosecutor

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who supervises the criminal investigation carried out by criminal investigating bodies.

Pursuant to art 82, Criminal Procedure Code, the defendant is the person against whom a criminal action has been started. As the law doesn't make the difference, the plea agreement can be signed by both a natural and legal person[1] representing the defendant.

It is worth mentioning that when a defendant is confronted with a criminal prosecution for having committed several crimes, he has got the possibility, provided the legal requirements are complied with, to reach an agreement regarding only some of these offences. The rest of criminal deeds, not included in the plea deal, are to be subjected to the regular legal procedure.

At the beginning, the underage defendant was not allowed to access this procedure, neither personally nor through a legal representative. Nowadays, such restriction is no longer in force but its validity depends on the clearly expressed agreement of the underage legal representative[2].

When there are several defendants in the case, it is possible that only some of them to express their acceptance for a plea bargain; in such case, each of them will have a separate agreement, without affecting the presumption of innocence of those who haven't consented to the deal.

The capacity to initiate the procedure is valid for both of its authors.

Article 108 paragraph (4) thesis I of the Criminal Procedure Code states that "the judicial body must inform the defendant about the possibility to reach a plea agreement during the criminal prosecution". The defendant is informed about it and his other rights and obligations in writing, under signature, before his first hearing; in case of incapacity or refusal to sign, a minutes shall be drawn up pursuant to art 199 Criminal Procedure Code.

If the procedure is initiated by the defendant, though the law doesn't mention the form, the jurisprudence accepts it either as a written demand addressed to the prosecutor or an oral request put down in a minutes by the criminal prosecuting bodies.

Nevertheless, it is necessary to underline the fact that appealing to such procedure is recognized and guaranteed as a right rather than an obligation for its authors. So, any of them have the right to choose whether to initiate it or to refuse its initiating action done by the other author, if there are reasons to believe it is not favourable, or legal provisions are not observed. When the procedure is announced by one author or is already begun, the judicial body doesn't have to notify it to the victim, the civil party or to the responsible plaintiff party.

3. The object of the plea agreement

According to article 479 Criminal Procedure Code[3] "the plea agreement represents the recognition of the offence and the charge, object of the criminal action, and also the way and the length of the punishment, together with the manner of application of the educative measure or, if it is the case, the solution to give up or postpone the punishment order."

It is important to stress the fact that compared to the procedure of guilt

[1] See N. Volonciu, A.S. Uzlău (coord.), *The New Criminal Procedure Code- commented*, 2nd edition, Hamangiu Publishing House, Bucharest, 2015, p. 1266.

[2] Paragraph (6) art. 478 Criminal Procedure Code has been amended by art II p. 118 of the Government Decision no 18/2016 on amending and completing Law no 286/2009 on Criminal Code, Law no 135/2010 on Criminal Procedure Code, also for completing art 31 paragraph (1) of Law no 304/2004 on judicial structure, Official Gazette No 38 /23.05. 2016.

[3] Amended by art II p 119 of Governmental Decision no 18/2016.

recognition, the plea agreement includes both recognition of the offence and the acceptance of the charge. Pursuant to art 482 letter g) Criminal Procedure Code, this recognition must be expressed as a clearly identified statement and not as a result of an interpretation of the defendant attitude as silent recognition (for instance, when the defendant understands to make use of his right to remain silent and not to cooperate with the judicial authorities).

Yet, nothing stops the defendant or his layer to ask for the change of the legal classification of the offence before the procedure begins.

The statement given by the defendant according to art 109 Criminal Procedure Code, and recorded according to art 110 Criminal Procedure Code, even when he admits his guilt and the legal classification at that particular time, but before the beginning of the plea bargain procedure, cannot be considered as guilt recognition in the spirit of art 479 Criminal Procedure Code, because it is not a proof of evidence that can be used against the defendant.

As for the punishment, in the absence of a clear distinction, both the main punishment (fine or prison) and the secondary one are to be taken into account.

About the kind of punishment, according to art 485 paragraph (1) letter a. Criminal Procedure Code, stating the solutions to be ruled by the Court, (related to the plea bargain), the parties, meaning the prosecutor and the defendant accompanied by his lawyer, can agree upon the prison punishment as liberty deprivation measure (with or without accessory punishment or complementary punishments) or upon the fine, by negotiating their length and sum, or upon the application manner for the suspension of probation.

The solution reached through agreement could be waiving the punishment or postponing its application.

Besides the observance of general terms for concluding the plea agreement, the prosecutor must verify the compliance with the provisions of art 80 Criminal Procedure Code in order to reach the solution of waving the punishment application.

When the negotiation focuses on the solution of postponing the punishment application, the prosecutor must also verify the observance of provisions of art 83 Criminal Code; after that, they will negotiate the number of days for unpaid labour for the community and the obligations stated by art 85 paragraph (2).

When negotiating the punishment suspension, it is necessary to register the fulfilment of provisions of art 91 Criminal Code, establishing a clear supervision term[4], the number of days of unpaid labour for community and which obligations, stated by art 93 paragraph(2), Criminal Code, are to be ruled.

The presence of these supplementary conditions has a direct influence on the maximum punishment length admitted in case of plea agreement[5].

We have to underline the fact that, besides the possible acceptance of the plea agreement for the underage defendants, its object can be made up by the form and manner of the applied educative measure, but it is clear that its length is not negotiated.

We can notice that safety measures are not negotiable. Yet, the Court has to rule also on them as based on art 487 letter a) Criminal Procedure Code, the sentence must contain also the mentions provided by art 404 Criminal Procedure Code, among them being the ones related the safety measures.

[4] Probation time is between 2-4 years, minimum the time of the ruled punishment.

[5] Waving the punishment can be ruled only for the crimes where the law provides maximum 5 year prison time and for punishment postponement, the law provided punishment must be less than 7 years.

4. Content provisions for the plea agreement

After analysing art 478 – 482 Criminal Procedure Code, we can see that there are some circumstances that must be collectively observed in order to reach a plea agreement.

Even from the start we have to say that such agreement is allowed only during the criminal prosecution stage. The solution seems to be justified by the reasons of its introduction and also by the fact that during the trial, the defendant can make use of the procedure of guilt recognition.

This circumstance is also fulfilled when the criminal prosecution is re-started pursuant to art 335 Criminal Procedure Code, art 341 paragraph (6) letter b. Criminal Procedure Code or art 341 paragraph (7) point 2 letter b) Criminal Procedure Code, but not when the criminal prosecution is restarted when the case is referred to the prosecuting body by the Judge of the Preliminary Chamber, according to art 334 Criminal Procedure Code.

The first condition, stated by art 480 paragraph (1)[6], envisages the maximum limit of the punishment provided by law, in the logic of art 187 Criminal Code: "the punishment provided by law which incriminates the committed offence, without considering the causes for its reduction or increase." This procedure can be started when the punishment provided by the law for the committed offence is maximum 15 years prison (as single punishment or alternatively with fine punishment) or a fine, without limitation of its quantity.

The law maker chose to refer to the degree of the deed abstract danger, with no consideration for committing an attempt, for the mitigating circumstances or the special cases of punishment reduction nor the aggravating circumstances (aggravating circumstances, continuous crime and recidivism after the enforcement).

We have to point out here the difference between the mitigated types of a crime and the special cases for punishment reduction. In the first case, the reference is made to the highest level mentioned by the text incriminating the deeds, related to the type form crime.

On the other hand, the special cases for punishment reduction don't have any influence over the possibility to reach a plea agreement related to their beneficiaries.

Art 480 paragraph (2) Criminal Procedure Code, introduces the condition that all evidence should result into sufficient data for the existence of a crime considered the cause of the beginning criminal prosecuting action and for the defendant guilt.

In case the procedure is initiated by the prosecutor, the evidence charging the defendant present at the file must observe the provisions of art 309 paragraph (1) Criminal Procedure Code[7], stating that "a criminal action is begun by the prosecutor, by order, during the criminal prosecution, when he finds that there are pieces of evidence proving that a person committed a crime and none of the special cases provided by art 16 paragraph (1) can be applied here". Therefore, the plea agreement is also blocked if one of the special cases of preventing the beginning or the exercise of the criminal action is enforced.

The reason of this term is the very special feature of this procedure and it represents a supplementary warranty for the observance of the presumption of innocence and of the right to an equitable trial, a real

[6] Punishment limit allowed in this matter was extended by art II p. 120 of the Gov Decision 18/2016.

[7] I. Neagu, M. Damaschin Treaty on Criminal Procedure. Special Part, *Universul Juridic* Publishing House, Bucharest, 2015, p. 472.

pertinence of the *in dubio pro reo* principle instituted by art 4 paragraph (2) Criminal Procedure Code.

During the trial stage, in the absence of the adversarial principle, there will be no further evidence produced nor shall be analyzed the ones employed during the criminal prosecution, considered sufficient to make up the Court opinion, beyond any reasonable doubt, regarding the existence of the crime and the defendant's guilt. It is therefore understood that for benefiting from such agreement, the defendant must accept that the judgment shall be made only based on the evidence employed during the criminal prosecution.

The prosecutor is the one that has to verify the observance of such condition. If the defendant express his will to have a plea bargain, and should the prosecutor finds that the provision of art 480 paragraph (2) Criminal Procedure Code is not complied with, he shall reject the demand by means of an order, according to art 286 Criminal Procedure Code. This order can be fought against pursuant tart 339 Criminal Procedure Code, but, in this case, the hierarchically superior prosecutor shall study only the lawfulness of the reasons of the rejection, with no appreciation on the opportunity to have a plea agreement. This shall be assessed only by the prosecutor, and therefore, the hierarchically superior prosecutor shall not begin or ask his subordinated prosecutor to begin the procedure.

Another controversial[8] condition, according to art 478 paragraph (2) and paragraph (4), Criminal Procedure Code, is represented by the necessity to get the previous approval of hierarchically superior prosecutor.

By means of a first approval, the hierarchically superior prosecutor decides the limits of the negotiations or even the solutions to avoid, whereas through the approval, subsequent to the negotiations, checks the observance of conditions imposed by law and by the previous approval for the plea agreement.

Here, the hierarchically superior prosecutor has a rather guiding role, whereas the final assessment is to be made by the prosecutor in charge with the criminal prosecution, as, enjoying the best position in analyzing the evidence, he is the only person responsible for the main ruling documents in the case.

By reconsidering the benefits given to the defendant who chooses to undergo this procedure by applying the provisions of paragraph (4) of art 480 Criminal Procedure Code, nowadays, the limits should not be between the maximum and the minimum line of the punishment provided by the special part of the Criminal Code or other special laws, but between the reduced limits by a third for the prison punishment or the corrective measures with deprivation of freedom, and a quarter for the fine punishment. Given the fact that, when negotiating, the prosecutor has to comply with the limits of the previous approval, he couldn't oversee this rule either.

After the negotiations, in order to preserve the balance with the procedure of informing the Court by means of indictment, when the hierarchically superior prosecutor verifies whether this action is complying with the law, during this special procedure, as an additional guaranty of lawfulness and of limits imposed by the previous approval, it is considered highly necessary to issue a new approval, as it is now that the agreement becomes good for producing effects, representing the act of informing the Court.

If the hierarchically superior prosecutor totally agrees with the

[8] See "Plea Agreement Procedure. Analysis." Public Ministry. Prosecutor's Office of the High Court of Justice and Cassation, April 7th 2014.

prosecutor's proposition, as responsible for the criminal prosecution (content, *de jure* and *de facto* motives), it is sufficient for him to express his approval directly on the plea agreement paper. Should the hierarchically superior prosecutor considers some amendments are necessary, due to different opinion on the agreement content, he shall draw up a reasoned order, offering *de jure* and *de facto* motives as merits of his decision. As the law doesn't provide such aspect, pursuant to provisions of art 304 paragraph (2) Criminal Procedure Code, the same way will be followed in case of rejected agreement.

If the plea agreement is rejected when being approved, either before or after the negotiations, the prosecutor shall go on with the criminal prosecution according to the usual procedure.

At the same time, the plea agreement must be the result of the negotiations carried out between the prosecutor and the defendant, who, according to art 480 paragraph (2) Thesis I Criminal Procedure Code, shall be accompanied by a lawyer, observing the provisions of art 91 paragraph 2) and art 92 paragraph 8) Criminal Procedure Code. Non compliance with this obligation leads to absolute annulment of the agreement pursuant to art 281 paragraph (1) letter f) Criminal Procedure Code, and the defendant has the right to invoke any time during the trial.

Negotiation is the key of this procedure and implies that both the prosecutor and the defendant make concessions while observing the law provisions.

As the law doesn't clearly describe the procedure, we conclude that the negotiations shall be held directly between the prosecutor and the defendant assisted by his lawyer, either through dialogue or written documents. It is certain that the direct dialogue is the clear way to obtain promptness.

Taking into account the powerful personal character of the agreement, ant that the punishment shall be enforced after the probable admissibility, It must be able to assure the prevention and correction purpose of the criminal code. Consequently, the prosecutor has to envisage the general individualizing criteria[9] stated by art 74 Criminal Code. Several aspects will be taken into consideration collectively: circumstances and the modus operandi, the means[10], danger risk for the property, type and seriousness of the result or other consequences of the crime[11], the crime motive and purpose, the crime type and repetitiveness, representing the criminal record of the defendant[12], his conduct after committing the crime and during the criminal process[13], education level, age, heath status, family and social situation[14].

The powerful personal character of the agreement is also pointed out by analysis of the subjective criteria.

On the other hand, the defendant also enjoys the possibility to draw the

[9] The analysis of the individualizing general criteria is not a judicial individualization, being the exclusive attribute of the Court.

[10] The following are to be analyzed: place and time of the crime together with the modus operandi and the means used in order to establish the danger risk of the author.

[11] It is important for the result crimes, for the study of the crime direct and indirect results.

[12] For instance, the absence of criminal record is a favorable element for the defendant whereas his perfection in a criminal field will lead to more severe punishment. Maybe, the time between the previous sentences and the moment of committing the new crime would be taken into consideration.

[13] It is important to see if there was any attempt to prevent the crime result, to restore the stolen goods, to hide the crime traces, to escape from criminal prosecution, to intimidate the witnesses etc.

[14] There will be an analysis of poor health state, family environment, entourage influence, psychological troubles (that don't impair judgment) etc.

prosecutor's attention on the favourable criteria.

If the defendant committed several crimes, he can express his interest in reaching an agreement for all or part of them. In this case, the analysis of the above mentioned conditions shall be exercised for each crime. When agreement are made concerning several committed crimes, the resulted punishment, according to art 39 paragraph (1) Criminal Code, shall be set by reference to the negotiated punishments.

5. Legal provisions on the plea agreement form and content

When the content of the plea agreement is approved by its authors, they will write it down. It is a form condition provided by art 481 paragraph (1) Criminal Procedure Code. In case of defendants who chose to follow this procedure, the prosecutor will not make up the indictment and the Court will receive the plea agreement directly.

This agreement shall contain as provided by art. 482 Criminal Procedure Code:

1. the date and place of signature;
2. last name, first name and capacity of its authors;
3. information on the defendant person, according to art 107 paragraph (1);
4. description of the deed object of the agreement;
5. legal classification and punishment provided by law;
6. evidence and evidence means;
7. express statement of the defendant admitting his guilt and his agreement with the legal classification which started the criminal action;
8. the type and the time (clearly mentioned, not by reference to two limits), and also the punishment application manner or the solution of waving to the punishment or the postponement of punishment application object of the agreement between the prosecutor and the defendant;
9. signatures of the prosecutor, defendant and his lawyer.

If there are several defendants in the case and if many of them or even all of them expressed their desire to reach a plea agreement and the prosecutor finds that the legal terms are complied with, he shall sign a separate agreement with everyone of them. Practically the negotiation has to be held separately, given its powerful personal character.

The specialized literature showed the necessity to present the defendant a copy of the agreement immediately after it was signed.

6. Conclusions

As we can see from the analysis of these legal provisions, the prosecutor is the representative of the general interests of the society, in charge with defending the lawful order and the citizens' rights and freedoms. Therefore, during the procedure, his role is to watch over the balance between the general and the particular interests, in other words, the balance between the opportunity of the procedure and the compliance of the legal provisions in order to have a valid agreement.

We consider this theme important and extremely useful given the fact that the prosecutor takes into account the defendant's will to cooperate for the criminal prosecution and also his position regarding his own crime.

Nevertheless, as we have already mentioned it, we are talking about a general interest as by using this plea agreement we have a fairly and expeditiously trial with fewer costs.

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