

THE ENFORCEMENT SIGNIFICANCE OF THE ADMISSION OF GUILT AGREEMENT. ELEMENTS OF COMPARED LAW

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Abstract: *The enforcement value of this institution resides in the fact that Romanian criminal justice needs to relieve congestion in regard to the large number of criminal cases tried before the courts of law, thus granting the defendant the right to admit the deed he is accused of and benefit from a reduced sanction as a result of a simplified procedure. The article discusses the most important advantages of the regulation of this institution on a national level.*

Key words: *admission of guilt agreement, Criminal procedure code, advantages.*

1. Introduction

The special procedure of the admission of guilt agreement is completely new and entails a radical change of the Romanian criminal trial, as it is regulated with the purpose of reducing the duration of trials and simplifying the criminal prosecution phase, thus reducing the costs for both the parties and the Romanian state.

In the theses drafted on the occasion of the coming into force of the Criminal Procedure Code, passed by Government's Decision no 829/2007, it is showed that, starting from the obvious realities of the current legal life, which shows that both the extensive duration of the criminal trials in general, as well as the people's lack of trust in the act of justice and the human and material costs which are quite significant, translated into the high consumption of time and financial resources, led to a high degree of mistrust and uncertainty, thus the need to rethink the whole modern criminal system which responds to the imperative need to create a modern justice adequate to the new social expectations, as well as the increase of quality of this public service.

According to article 479 of the Criminal Procedure Code, as modified by the Government's Emergency Ordinance no 18/2016, the admission of guilt agreement represents the admission of the deed and the acceptance of the legal qualification of the deed in regard to the means and duration of the criminal sanction, its form of execution,

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the educational measures or the solution to forgo criminal sanction or postpone its enforcement.

First of all, it is necessary to observe that this special procedure was regulated in national law after the abbreviated procedure, as the latter existed before the coming into force of the new Criminal Procedure Code; however, the purpose of both these institutions was similar, namely the desire to speed up the criminal trial and reduce the human and financial resources which were needed in order for the defendant to stand trial.

As stated by its name, this institution entails the concept of “negotiated justice” as the central element is represented by an “agreement” between the prosecutor and the defendant by which the accused, by its own manifestation of will, renounces the guarantees provided by the presumption of innocence and his right to not self-incriminate, as by the admission of guilt (in the criminal procedure sense of the word it means the acceptance of the legal qualification of the deed) a potential dismissal of trial is removed.

We must also point out that the defendant decided if he wished to conclude such an agreement, as it does not operate *ope legis*, especially since the unification of the wills of the holder of this agreement and the prosecutor represents one of the necessary conditions to be met when the agreement is finalized.

The initiative of concluding an admission of guilt agreement can belong to the prosecutor or to the defendant. The holder of the admission of guilt agreement is the prosecutor who performs or oversees the criminal prosecution, he can initiate the procedure or he can accept the initiative of the defendant. In case of the defendant, he may initiate this special procedure, he can accept or refuse such an initiative from the prosecutor.

Once the deeds is admitted and the legal qualification is accepted, the negotiation procedure begins, in regard to the means, extent and form of execution of the sanction, educational measures or in regard to the solution to dismiss trial or postpone the enforcement of the sanction. In regard to the means of sanction, we must consider the main sanction, the accessory sanction and the complementary sanction. In regard to the extent or duration of the sanction, in agreement with the changes brought upon by Government’s Emergency Ordinance no 18/2016, it will be established within the limits stated by law for that particular crime, reduced by a third.

The prosecutor and the defendant will negotiate a solution of renouncing the sanction, the postpone of the execution of sanction or a conviction.

In case the desired solution is that of renouncing the criminal sanction, the conditions of article 80 of the Criminal Code must be respected; for the solution of postponing the criminal sanction the conditions of article 83 of the Criminal Code must be considered and, if the punishment is not execution inside a correctional facility and is suspended under supervision, the conditions of article 91 of the Criminal Code must be respected. In regard to minor defendants, the means of execution of the educational measures can be negotiated with consent from the legal representative of the minor, so minors can also be subjected to this special simplified procedure.

Also, by analyzing the provisions of article 479 and article 482 letter h) of the Criminal Procedure code, it is acknowledged that security measures are not subject to negotiation, as they are not mentioned in the admission of guilt agreement. The court, presented with the agreement, must rule on its content as - according to article 487 letter c) of the Criminal Procedure Code - the sanction must also contain the measures stated in article 404 of the Criminal Procedure Code, including the security measures.

What the new Criminal Procedure Code did was to simplify the procedure of admission of guilt and introduce a new institution specific to the adversarial system: the admission of guilt agreement. The introduction of this institution represented a radical change of the criminal trial of our legislation.

Since the Romanian courts of law need to relieve congestion, the enforcement of the admission of guilt agreement is not at all surprising, given that it responds to the demand of creating a legislative procedural background in which the criminal trial is fast and efficient, less expensive, as mentioned in the introductory part of the current Criminal Procedure Code.

A wide enforcement of the institution of the admission of guilt agreement would lead to the relieve of congestion of the courts, thus the judges will be able to focus on the cases in which the guilt of the defendant must be established.

Along with these obvious advantages of the legal system, the conclusion of the admission of guilt agreement provides the defendant with a series of benefits. In order for the admission of guilt agreement to be validly concluded and for the defendant to be guaranteed the respect of the legal provisions and the fact that he will be granted the benefits provided by this institution, according to article 480 second alignment of the Criminal Procedure Code, legal assistance is mandatory. The lawyer is obliged to investigate the situation of the defendant in order to negotiate an agreement which is suitable to the defendant's situation.

An obvious benefit stated in article 480 fourth alignment is the reduction of the punishment limits by a third, in case of imprisonment and the reduction by a fourth of the limits established by law in case of a fine, so the defendant will have the possibility to be granted a reduced punishment as opposed to that which would have resulted from a traditional criminal trial.

"At first sight, the law does not provide the certainty of the reduction of punishment, as the defendant will not know whether the punishment resulting from the agreement is substantially different from the one which he would have got within a traditional criminal trial (especially in case of the less serious crimes). However there are no studies regarding this matter and, based on our observations, we can state that the admission of guilt agreement does indeed provide a reduced sanction for the defendant".

In all appearance, the admission of guilt agreement is a procedure with a more extensive enforcement than the abbreviated procedure; however, the limits of punishment, as stated by the lawmaker in order to access such a mechanism, can quickly turn into a barrier in the will of the defendant, namely a refusal to admit the facts and accept the legal qualification.

Thus, the agreement can only be concluded in regard to the crimes which are sanctioned by a fine or imprisonment for up to 15 years, as opposed to the accelerated procedure, in which case the sole restriction is the punishment of life imprisonment.

In the situation of the admission of guilt agreement, the contradictory character of a normal trial is restricted, thus the phase of the judicial research and debate is missing, as well the entering of new evidence and the re entering of evidence which is not admissible in the phase of criminal prosecution.

The reasons which justify the limitation of the contradictory character is emphasized by the mutual will of the prosecutor and the defendant, who conclude an agreement, a situation which excludes the contradictory positions of the parties, but not in an absolute manner, but merely by considering the act which brings their admission before the court.

As this exclusion does not operate *de plano*, we can state that the existence of contradictory positions is justified in regard to the situation of the accused, who is puzzled by the solution of the agreement or even the civil party in case such an agreement fails, mediation or transaction is not possible, thus depriving the civil party of the possibility to be awarded damages.

Hearing the parties and the injured party as stated in article 484 second alignment provides a minimum of contradictory to this special procedure, by allowing the parties to debate the file conclusions in regard to the admission of guilt agreement. In case the prosecutor becomes aware of mitigating circumstances, he will provide efficiency to these circumstances by negotiating the limits of the punishment already reduced by a third. If the court proceeds to validate the circumstances, the agreement will be acknowledged; on the contrary case, it will be rejected, as the court is not able to debate the change of the legal qualification of the fact.

In regard to this matter, I believe that no *reservatio mentalis* can be attributed to the defendant, as not knowing facts when consent was validly expressed does not lead to an irregular procedure. In other words, the defendant must fully admit (the abbreviated procedure) or partially admit (admission of guilt agreement) the deeds which he is accused of, as the irrevocable character of the admission strengthens this optic.

The reason for this solution is the prevention of a procedural abuse exercised by the defendant, who, by his omission to admit to certain deeds, oversteps the procedural time at which he would have had access to the previously mentioned institutions, thus delaying the procedure with the purpose of obtaining a new legal procedure in regard to the subsequently admitted deeds.

I do not agree with this attitude of the defendant, as the admission of the deeds can be seen a "reward" of the loyal procedural attitude manifested by the reduction of the limits of punishment; a potential omission depends on the uncorrupted manifestation of will which would contribute to a speedy trial and lack of equity in regard to the defendants which respected the procedural timing of an admissible admission of guilt.

This particular line of reasoning within the accelerated procedure is related to the time which precedes the judicial research, as, at a later time, the defendant can't make use of the guilty plea mechanism. In regard to the solutions which can be applied in case the defendant opts for the conclusion of an agreement, unlike the simplified procedure in

which case the solving of the case allows for a broader spectrum of solutions which will be decided upon by the court.

The reason for diminishing the solutions which can be applied is of the essence of the notion of negotiated justice, as an acquittal or cease of criminal trial solution is not subject to negotiation; the exercise of criminal action is a mandatory condition of the agreement or, in case of any of the above mentioned solutions, an agreement is out of the question as the rightful solution is dismissal.

On the other hand, a guilty plea within trial will allow the court to rule on the acquittal or cease of criminal trial, as the defendant is not held to acknowledge the legal qualification of the deed which is debatable by both parties. Also, within the special procedure of the agreement, the civil action will not be solved as it is not subject to negotiation between the prosecutor and the defendant, because it represents a demand of the injured party, the civil party of a trial.

As a consequence, in case of an agreement of will, the court will either acknowledge the transaction or mediation agreement concluded by the parties or will not solve the civil action, as this represents a special case in which the complaint must be ruled upon by a civil court.

In conclusion, "the fingerprint" of the elements of negotiated justice is visible within this procedure whose benefits are the speedy trial, a fact which contributed to the respect of the right to an equitable trial within a reasonable term. The admission of guilt agreement is of a complex meaning in regard to its enforcement. It benefits both the legal system, which is given the chance to breathe as well as the person who faces a conviction, thus benefiting from a reduced sanction.

2. Elements of Compared Law

Finally, we will present elements of compared law in regard to this procedure, in states such as USA, France, Italy, Germany and Great Britain.

First of all, the American *plea bargaining* can be defined as „an agreement negotiated between the prosecutor and the accused, based on which the accused pleads guilty for a less serious crime or for one of the crimes he is accused of, in exchange for a concession from the prosecutor, namely a reduced conviction or the dropping of some of the charges”.

Thus, the accused in the American system of justice must assume a certain position in regard to his trial, namely whether to plead guilty, to plead not guilty or not argue the charges brought against him; by pleading guilty, along with an admission of the deed, he forgoes the right to be tried by a jury within a contradictory procedure, in exchange for a concession from the prosecutor, who either drops some of the charges (count bargaining), or qualifies them as less serious (charge bargaining), or suggests a reduced conviction.

This is applied in regard to crimes which are punished with imprisonment, but not serious crimes, as federal crimes (treason, espionage). A true negotiation occurs between the defences lawyer – sometimes even on his own initiative – and the prosecutor, in the lack of a judge. The agreement is concluded in writing and will be

presented before the judge in a public session. In regard to the qualification of the deed, the judge can only ratify the agreement, but he is at liberty to rule in regard to the punishment. Also, the judge can reject the agreement if he finds there was no consent from the accused or if the basis of the agreement are unfounded.

In *Italy*, the Italian Code regulates a procedure of enforcing the punishment by request of the parties (*applicazione della pena su richiesta delle parti*), known as *patteggiamento*, which refers to „bargaining”, a negotiation in regard to the punishment. Thus, Italy completely abandons the procedural system specific to the Napoleon Code, by opting for an adversarial procedure.

This system is widely applied to all crimes punishable by up to 5 years imprisonment (or a fine or a punishment which replaces detention) by considering the circumstances and the subsequent reduction of conviction by a third.

Patteggiamento allargato, stated by the law of June 12th, 2003 allows for its enforcement in case of crimes punishable by imprisonment for up to 7 years and a half.

The initiative belongs to the prosecutor or the accused or his lawyer.

The agreement does not entail the guilt of the accused – even if it is implied – as the accused only forgoes his right to defend himself, especially in regard to entering evidence, a mechanism specific to an ordinary procedure.

If the suggestion regarding the punishment is not accepted by the defence, the ordinary procedure will be applied, unlike the reversed situation, in which case the prosecutor rejects the defence suggestion, the defence can present the suggestion before the judge who is at liberty to accept it.

The agreement is presented to the judge in the form of a request. During a public session, he immediately rules on the punishment – without being able to derogate from it – by motivated decision if he appreciates that the *patteggiamento* conditions are respected and applied to the specific circumstances of the case. However, according to the Constitutional Court, the legal control entails the negotiated punishment in regard to its conformity with the demands of rehabilitation.

The judge rules in the form of a conviction decision, but in order to favour the mechanism and accelerate the procedure, the lawmaker stated that the accused will not be held to pay legal expenses or any other accessory sanctions or security measures, except for forfeiture.

The judge will not rule in regard to the civil interests, by forcing the victim to file a civil lawsuit. The decision is not susceptible to appeal, as the exception is the case in which the prosecutor is not in agreement with the suggestion of the accused in regard to the enforcement of the punishment. If the judge rejects the agreement, the ordinary procedure will follow its course.

In Germany, the lawmaker regulated negotiated justice by the Law of May 28th, 2009 according to which negotiations pertain to the confession of guilt and renouncing the ordinary procedure. Negotiation can occur including within the ordinary trial, provided there are transcripts in the file. The initiative can belong to the prosecutor, the defense or the judge.

The agreement is reached when the judge notifies the prosecutor and the defense of their reached consensus.

Also, the judge mentions the minimal and maximal limits of punishment, by considering the rules which apply to the ordinary proceedings and with respect of proportion.

However, the agreement can regulate procedural measures which accompany the punishment or pertain to the behavior of the parties; however, it can't pertain to the declaration of guilt of the accused and any security measure. Like all systems which practice *plea bargaining*, we notice a dual characteristic of justice.

In France, the lawmaker regulated, by the law of March 9th, 2004, the guilty plea or the admission of guilt. After it is presented to the prosecutor, the accused, who acknowledges the deeds and accepts the procedure of pleading guilty in the presence of his lawyer, who is informed of the proceedings in the file, will express his consent in regard to the punishment.

Usually, the initiative belongs to the prosecutor, but it can also come from the author of the deeds. If the author accepts the suggestion of the prosecutor, he will ask for confirmation from the judge.

The judge will rule in a public session, in the presence to the accused, his lawyer – his presence is mandatory - and the prosecutor. The judge will hear from the accused and his lawyer, in order to verify the reality of the deeds and the legal qualification, as well as their intent to maintain the agreement in regard to punishment.

The judge is not forced to accept the suggestion of the prosecutor, but if he accepts it, he will not be able to subsequently change it.

The decision of the judge will be motivated and will provide all the effects of a conviction decision. The agreement can be applied in regard to any crime punishable by a fine or imprisonment for up to 5 years. The judge will also rule in regard to civil interests.

In the French system, there is no effective negotiation between the prosecutor and the author of the deeds, but merely a suggestion of punishment, which can be accepted or rejected. Also, the accused can benefit from a procedure of admission of guilt, even if the complaint is already filed before a judge.

This applies to all crimes punishable by a fine or imprisonment for up to 5 years; however, the law regulated the prosecutor's possibility to suggest one of the performances stated in article 41-2 of the Criminal Procedure Code, like turning in the vehicle or the driver's license or community work. The prosecutor can also suggest the payment of damages to the victim.

The characteristics of the admission of guilt in Great Britain: one of the fundamental traits which characterize the British criminal trial is the fact the phase of criminal prosecution is missing.

As this phase is not regulated by law, the criminal trial begins with the filing of a criminal complaint before the court of law.

The British criminal trial has the advantage of some procedural measures aimed to facilitate the defendant's intention to plead guilty in case there are charges brought against him. Thus, the defendants will receive a reduced punishment as opposed to the one they would receive if they would plead not guilty.

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