Bulletin of the *Transilvania* University of Braşov
Series VII: Social Sciences • Law • Vol. 8 (57) No. 2 - 2015

THE HOLDERS OF THE ADMISSION OF GUILT AGREEMENT AND ITS LIMITS

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Abstract: *The admission of guilt agreement is a special procedure, a novelty for the Romanian criminal law, regulated in title IV of the Special Part of the Criminal Procedure Code, article 478-488. According to the motivation of the Criminal Procedure Code, by regulating this procedure, several aims were achieved: shortening the trial, simplifying the prosecution, saving human and financial resources. In order to regulate this institution, the Romanian lawmaker was inspired by the law of other European states, by assuming provisions from the French and the German system of law. The novelty of this institution created confusion and some inaccuracies, but, in our opinion, judicial practice will clarify certain aspects which are now considered confusing.*

Key words: *admission of guilt agreement, Criminal Procedure Code, the defendant, the prosecutor.*

1. Introduction

Human contemporary society is in a continuous evolution, which inevitably influences the law of a state, because it must be adapted by considering the factors which determine the appearance of a certain social phenomenon.

In this context, the lack of expedience of the criminal procedures in general became obvious, as well as the fact that the degree of confidence in the act of justice is falling, thus calling for the necessity of increasing the degree of transparency of the procedure. As a consequence, considering that national law must correspond to the standards imposed by the principle of the right to an equitable trial, as stated in the European Convention on Human Rights, Law no 135/2010 regarding the Criminal Procedure Code was published in the Official Bulletin of Romania on July 15th, 2010 [8]. It came into force February 1st, 2014. By this law, several changes were made in regard to the procedures which can occur within a criminal trial, changes which have restructured the current procedural logic, by attenuating the inquisitorial nature of the Romanian criminal procedure system and by introducing new elements of the adversarial system. This is the situation of the admission of guilt agreement, an element of negotiated justice, an institution which is a novelty for the procedural system, as it represents a typical element of the adversarial system, in which the prosecutor and the defendant can reach an agreement when the latter admits the crimes he is charged with. Given the

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novelty character of the admission of guilt agreement, the need for understanding this institution is that much greater, as specialty literature and judicial practice did not have enough time to offer all legal solutions needed for enforcing these provisions which are sometimes inaccurate or contradictory. Thorough the present endeavor, we aim to discuss the most important aspects regarding the preconditions which must be met before reaching an agreement regarding the admission of guilt; in the end, we will state some facts regarding the holder of the admission of guilt agreement and the limits of such an agreement. The new Criminal Procedure Code brought about a series of new institutions in Romanian law, as is the case of the admission of guilt agreement; it also brought a new vision over what the criminal trial really means. In elaborating the current regulation, several factors were considered, factors which required aligning the criminal procedural law with the continuously changing reality; given all these, we must notice that the Romanian lawmaker followed the legislative trend imposed by other European states which had, at first, an inquisitorial system of law; later on, more and more provisions coming from the adversarial system of law were regulated, thus reaching an attenuated inquisitorial system or mixed system.

However, we must state that change was determined, as mentioned in the motivation of Law 135/2010 regarding the Criminal Procedure Code, by the necessity of aligning the provisions of the Romanian criminal law with the jurisprudence of the European Court of Human Rights, as several situations were identified when „the Romanian Criminal Procedure regulations were in contradiction with the jurisprudence of the European Court of Human rights". Given this context, the appearance of the admission of guilt agreement is not surprising, as this tool is the answer to the request of creating a legal procedural code in which the criminal trial is faster and more efficient, thus less expensive, as mentioned in the motivation of the current Criminal Procedure code. We must also mention that the institution of admitting guilt is not an entirely new one. By law 202/2010 a simplified procedure was regulated, one by which in case guilt was admitted, the criminal trial would be simplified and shortened, thus benefiting both sides of the trial. The Romanian lawmaker regulated this procedure by considering the laws of other European states which have already passed certain similar procedures and assumed elements form the German and French criminal law.

First of all, this institution is a new and original legislative solution by which solving criminal cases in optimal time is ensured, a procedure which simplifies and shortens the criminal trial, thus benefiting both parties. The agreement can only be concluded in regard to those crimes for which the law regulates the punishment of a fine or imprisonment of up to 7 years and only when, by considering the evidence, it is clear that there is sufficient information regarding the existence of the deed and the guilt of the perpetrator.

2. Defining „the admission of guilt agreement"

Although this institution is entirely new in Romanian law, from a theoretical point of view, but also in regard to the way a criminal trial takes place, the lawmaker chose not to define this institution, as the existing regulation, articles 478-488 of the Criminal Procedure Code only describe the general development of this procedure. As a result, defining the notion of „admission of guilt agreement" was left up to doctrine.

There are several ideas which must be considered when elaborating a definition; a

basic idea which must be considered in defining this notion is that the admission of guilt agreement, as regulated in different laws of the Roman-German system of law, is different, in concept, from the admission of guilt in the adversarial system.

The latter is „a traditional institution, whose purpose is to avoid expensive procedures with uncertain results; *de facto*, it represents a negotiation between the prosecution and the defense, on equal positions, in which the prosecutor accepts the guilt plea, thus the accused benefits from a reduced punishment" [6]. As a result, the court will no longer validate the agreement, it only verifies if the defendant's consent was expressed freely and by having all the necessary information. In the continental systems of law, one of the most important features of the admission of guilt agreement is that it provides „a series of benefits granted to the accused by way of negotiations, in exchange for his confession in which he admits to committing the crimes he is prosecuted for" [1].

Another opinion defines plea bargaining as an „understanding between the accused and his lawyer on one hand, and the prosecutor on the other hand" [2].

In regard to this definition, we must notice that the lawyer has an active role, much like the defendant and the prosecutor. However, the lawyer is not the holder of rights in regard to the admission of guilt agreement, as stated by the provision of article 480 second alignment, second thesis „when reaching an agreement regarding the admission of guilt, legal assistance is mandatory".

Starting from the categorization made by the Romanian lawmaker, by regulating this procedure in Title IV, „Special procedures", the admission of guilt agreement can be defined as that special procedure which regulates the agreement between the prosecutor and the defendant occurring after prosecution was set in motion, in the presence of the lawyer of the defendant, by which the defendant admits he is guilty of committing the crime he is charged with. Given all these, we must remember that the agreement must be ruled on by the court.

3. Preconditions of the admission of guilt agreement

The admission of guilt procedure occurs only during prosecution. Several conditions must be met for this procedure to occur in valid and legal conditions, conditions which must be met at the time the procedure is initiated.

According to the provisions of article 478 first alignment of the Criminal Procedure Code: „during prosecution, the defendant and the prosecutor can reach an agreement as a result of the defendant's admission of guilt". As a consequence, the agreement must be reached after the prosecution was set in motion. The action of prosecuting a person is set in motion „when there is evidence that a person committed a crime and none of the cases stated in article 16 first alignment apply", as stated by article 309 first alignment of the Criminal Procedure Code. This condition is accentuated by the fact that the holders of the agreement can only be the prosecutor and the defendant. During the criminal trial, the culprit becomes a defendant only after prosecution was set in motion.

Another precondition is that, for the crime committed, the punishment as stated by law is of no longer than 7 years of imprisonment. In case there are several crimes, all must meet the previously mentioned conditions. Also, doctrine points out that initiating and reaching an admission of guilt agreement in valid manner can only occur „when the evidence shows there is sufficient information

regarding the existence of the crime and the guilt of the culprit; as a result, sufficient evidence is still necessary in order for the court to validate the agreement". [7]

Whether the evidence is sufficient or not will be appreciated *in concreto*, as the admission of guilt can't replace the means by which he can be proven guilty. A condition which must be met by the defendant is that he must not be a minor. By applying the principle *ubi lex non distinguit nec nos distinguere debemus* [4], when entering such an agreement, the defendant must be of at least 18 years of age, regardless of whether his criminal liability is engaged according to article 113 alignments 2 and 3 of the Criminal Code.

It is interesting to note that the lawmaker makes no remark regarding the possibility of reaching an agreement in case there are previous convictions, as there are no limits set by law.

A final observation which must be made in regard to the preconditions of the agreement is that neither the prosecutor nor the defendant will be held to reach an agreement, when the opposing party has the initiative. The procedure of the agreement is abbreviated, simplified, and it derogates form the regular procedure during which the defendant is tried by a court of law; initiating the procedures for the admission of guilt agreement does not entail the obligation to reach it.

4. Holder of the admission of guilt agreement: the prosecutor

In regard to the prosecutor, as stated in the regulation of this procedure, an important distinction must be made, that between the case prosecutor, the holder of the right to enter agreements, and the superior prosecutor. As for the latter, we must point out that he is not „a party" in the agreement, because his prerogatives are likely to ensure the control of the lawfulness and validity of the agreement.

Thus, according to the provision of article 478 fourth alignment of the Criminal Procedure Code „the limits of the admission of guilt agreement are set with the previous written notice from the superior prosecutor". Also, the second alignment of the same article mentions that „the effects of the admission of guilt agreement are to be approved by the superior prosecutor". As a result, given that the limits and effects of the agreements are set by the superior prosecutor, there is little room left for negotiation with the defendant.

As for exceeding the limits set by the superior prosecutor, it was appreciated that „nothing prevents the superior prosecutor from invalidating the agreement in case the provisions of article 304 second alignment of the Criminal Procedure Code apply, namely when he thinks the agreement does not abide by the conditions required by law or is not justified" [3].

The case prosecutor has more duties as he is in charge of performing the act of justice. He is the one who is the holder of this right, he initiates the procedure, requests notice from the superior prosecutor, negotiates with the defendant, asks for notice from the superior prosecutor regarding the effects of the agreement and „files the agreement before the competent court, by participating in the contradictory procedure, the adjudication of the criminal trial". In regard to the prosecutor's participation in the procedure before the court, we must mention that this procedure is strictly formal, given that, according to article 484 second alignment of the Criminal Procedure Code, the procedure is not contradictory, the case is not argued. The case prosecutor can appeal the sentence according to the conditions of article 488 of the Criminal Procedure Code. An important observation which

must be made is that the lawmaker does not point out the specific way in which the prosecutor must request the notice from the superior prosecutor regarding the initiation of an admission of guilt agreement. Since we lack express regulations, we believe that the provisions of article 286 fourth alignment are to be applied accordingly and the suggestion of an agreement must be addressed to the superior prosecutor by motivated report.

In case the defendant initiates the agreement, the case prosecutor has no obligation to reach such an agreement and begin procedures in order to conclude an agreement. In order to establish if reaching an agreement is advisable, he can consider „the defendant's will to collaborate in the prosecution stage or accusing other people; his attitude in regard to the crime he committed, his previous record, the nature and severity of the deed, the probability to obtain a conviction, the public interest to obtain a more efficient trial, with reduced expenses" [6].

Another observation regarding the role of the prosecutor is that he has no obligation to inform the victim regarding the agreement, as it has „a personal and consensual nature" [7].

In regard to the superior prosecutor's notice, the new Criminal Procedure Code contains two new provisions which could create confusion when applied in practice. Thus, by article 478 second alignment, it is stated that „the effects of the admission of guilt agreement are subject to the superior prosecutor's notice", whereas alignment 4 of the same article points out that „the limits of the admission of guilt agreement are established by the previously written notice from the superior prosecutor".

Specialty doctrine expressed two opinions on this matter. According to the first opinion, the superior prosecutor only elaborates one previous written notice in order for the agreement to be valid, based on the argument that „article 478 second alignment of the Criminal Procedure Code is a text of principle, which is later resumed in the fourth alignment of the same legal provision" [3].

As for the second opinion, the majority one and the one which we believe to be accurate, the followers of this opinion claim that „it is necessary that the superior prosecutor elaborates two notices, one before and one after the so-called „convention" between the two lead „actors" is concluded". The main argument which supports this opinion is that article 478 fourth alignment of the Criminal Procedure Code regulates a *previous notice*, while article 478 second alignment of the Criminal Procedure Code regulates the superior prosecutor's notice *in regard to the effects of the agreement,* thus occurring *after the agreement was negotiated and concluded.* Furthermore, given that the admission of guilt agreement undertakes no preliminary procedure, the control exercised by the superior prosecutor regarding the effects of the agreement has the same legal nature as a legal control. Starting from these ideas, we believe that both the previous and the subsequent notice, have the legal nature of a conformation notice, as a result, the case prosecutor is obliged to request and comply with these notices.

In regard to the form of the notice, the lawmaker only mentions the written form of the previous notice; there is no mention regarding the form of the subsequent notice. Given that the subsequent notice is already the subject of controversy, we feel that the lawmaker should regulate the form of this notice, namely whether a new document is needed or if the mention „verified from a legal and justified point of view" is sufficient. [5].

As for the content of the two notices, the Romanian lawmaker was more specific; thus, the previous notice contains the limits

of the agreement and the subsequent notice concerns the effects and the means by which the effects are produced.

By „limits of the admission of guilt agreement" we must understand those instructions of the superior prosecutor in regard to the means and duration of the punishment, as well as the form in which it will be executed; within these limits, the case prosecutor is free to negotiate with the defendant. In regard to these limits, doctrine appreciated that „the case prosecutor can't provide a situation which is easier for the defendant than the one stated in the superior prosecutor's previous notice" [6].

Based on the above mentioned facts, we believe that the case prosecutor can't change the form of serving the punishment, as established by the superior prosecutor through his notice. The subsequent notice regards the specific effects which are produced, namely the *de facto* understanding between the case prosecutor and the defendant, within the previously set limits.

In case the admission of guilt agreement was concluded without respecting the preset limits as stated in the previous notice or without respecting the legal provisions, we appreciate that the superior prosecutor is entitled to refuse to issue the notice, based on article 304 of the Criminal Procedure Code. To support this statement, we quote the provisions of article 484 first alignment of the Criminal Procedure Code, stating that „if the admission of guilt agreement lacks any of the mandatory statements or if the conditions stated in article 482 and 483 were not respected, the court will rule on remedying these inaccuracies within 5 days and apprises the head prosecutor of the institution which granted the notice".

As a result, the court is not in charge of verifying the legality of the agreement, nor that of verifying whether the preset limits were respected, as this task belongs to the competent superior prosecutor, before the court is appraised of this.

5. The defendant

By definition, the defendant is the person who is prosecuted, thus becoming a party in the criminal trial. According to the provisions of article 309 first alignment of the Criminal Procedure Code, „prosecution begins by ordinance of the prosecutor, when he believes there is sufficient evidence that a person committed a crime and none of the cases stated in article 16 first alignment apply". The setting in motion of prosecution will be communicated to the defendant, by the prosecutor, according to the provisions of article 257 of the Criminal Procedure Code. During prosecution, before the first hearing, the defendant will be read his rights and obligations. According to article 108 fourth alignment of the Criminal Procedure Code, this is the moment when the defendant finds out about the possibility of concluding and admission of the guilt agreement.

We believe that if the admission of the guilt agreement can't be concluded due to conditions such as the fact that the defendant is a minor or the punishment for that crime is of more than 7 years of imprisonment, the prosecutor will have no reason to inform the defendant of the possibility to conclude an admission of guilt agreement, as it is sufficient that he is informed of the simplified procedure before the court if he admits his guilt.

During the admission of guilt agreement procedure, the defendant is the holder of the right, along with the prosecutor, as the agreement can't be concluded by representation. We must also notice that, according to the provisions of article 480 second alignment, second thesis, "legal assistance is mandatory when concluding

an admission of guilt agreement", as the lawyer can't conclude the agreement instead of the defendant.

The minor defendant does not have the possibility of concluding an admission of guilt agreement. Thus, during this procedure, the defendant can be the one who requested the agreement or the one who receives the suggestion of concluding an agreement as requested by the prosecutor. If the defendant requests the agreement, he does so based on the information provided by the prosecutor. This "does not entail the prosecutor's obligation to accept the agreement, as he is the only subject empowered by the state to decide on concluding an agreement" [7].

In this situation, given that the lawmaker did not clearly state certain detail elements of the procedure, the issue of the *way* in which the culprit will make this suggestion to the prosecutor is raised.

Furthermore, if his suggestion is dismissed, as the prosecutor does not wish to conclude an agreement, there is the problem of *the way the dismissal is performed.* Also, another question which might appear is that of the good faith of the suggestion of concluding an agreement, in case it was not concluded: will it remain on record and, if so, what effect will this suggestion have on the entire case? Given the novelty of this institution, but also of the procedure, we appreciate that these will be clarified based on practice, but we believe that the request of the defendant and the motivated dismissal of the prosecutor should be expressed in writing. In case the defendant receives the suggestion of the prosecutor to conclude an admission of guilt agreement, we must note that he is not held to conclude it, as he is on equal position with the case prosecutor.

Thus, in order to decide whether he wants to conclude the agreement or not, the defendant can request a continuance during which he will decide if he wished to reach an agreement or not.

An observation which should be stated is that the defendant's refusal to conclude the agreement can't be seen as a way to postpone the trial or avoid criminal liability, but merely as a simple exercise of the choice he has regarding the concluding of the agreement.

Regardless of his positions during trial, the defendant's legal assistance is mandatory; he may be assisted by chosen council or, in case he doesn't have the possibility to appoint a lawyer, a lawyer will be appointed by the bar. In any of the mentioned cases, the provisions of article 92 eighth alignment of the Criminal Procedure Code must be considered, according to which "the lawyer of the suspect or defendant benefits from the time needed and the necessary benefits in order to prepare an efficient defense" or, to be more specific, in order to prepare the negotiation. The personal character of the agreement is pointed out by the provisions of article 478 fifth alignment of the Criminal Procedure Code, stating that "if prosecution began for more than one culprit, *each of them* can conclude an admission of guilt agreement without interfering with the benefit of the doubt to which the defendants who did not conclude an agreement are still entitled". As a result, if two or more people commit a crime, regardless of the form of plurality (natural, formed or occasional), this does not exclude the possibility of concluding an agreement. Even if all the defendants want an agreement, it will be concluded separately, with each of them. Thus, by way of interpretation, we can deduce that, when two or more people commit a crime, the competent court will be appraised with a number of agreements which is equal to the number of defendants who had expressed their intent to conclude such an agreement. In this context, the provisions

of article 483 second alignment of the Criminal Procedure Code are contradictory, as it states that "*if the agreement is concluded* only in regard to certain crimes or in regard to certain defendants, the appraisal of the court is made separately. The prosecutor files before the court *only the prosecution papers* which refer to the crimes and the persons *who concluded the agreement"*.

In this case, we believe that these provisions were not correlative, as the admission of guilt agreement has an *in personam* character, thus the defendant is the only one who benefits from the effects of the agreement and, as a consequence, each defendant must conclude an agreement separately. So, neither the form of plurality, nor the ways of occasional plurality of the way in which the co-participant (author, instigator, accomplice) acted do not affect the defendant's possibility to conclude de admission of guilt agreement.

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