Settlement in Criminal Proceedings
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Abstract: Settlement is a procedure with a longstanding legal tradition in the countries that follow the Anglo-Saxon law (USA and Great Britain), as well as in some European countries, for an example Italy and some of the countries of former Yugoslavia (Croatia and Bosnia and Herzegovina). The new Law on Criminal Procedure of Republic of Macedonia of 2010 has introduced various new institutes, procedures and mechanisms originating from the adversarial systems among which the possibility of plea bargaining. Plea bargaining is an agreement which ultimately must be accepted and approved by the Judge of the preliminary proceedings.

Key words: Plea bargaining; Public prosecutor; Defender; Judge of the preliminary proceedings; Draft plea bargaining agreement.

1. Introduction

The need to accelerate the criminal procedure, as well as the increasing of the efficiency of the criminal justice system were one of the reasons for reform of the criminal legislation in the Republic of Macedonia that resulted in the adoption of the new Law on Criminal Procedure of 2010. In order to achieve this aim, several new accelerated proceedings were provided by the Law.

One of these proceedings is the plea bargaining procedure and among the most significant reasons for its implementation in the Law is due to the need to compel greater initiative to the prosecution as well as to the defense i.e. their readiness to initiate, to approach to a settlement, to accept the proposal of the other party as well as to negotiate and to find compromise. Seeking possible solutions for overcoming the formalism, the dominant role of the court during the criminal procedure and the longstanding of the procedure – point to the plea bargaining as a way to accelerate the procedure, and this provide not presentation of evidence related to the factual situation, if it is undeniable for the parties and the defender.

The acceleration refers to not presenting evidence related to the factual situation and the procedure is simple, fast and efficient, since the court should only pronounce the sanction.

2. Concept of plea bargaining

Precondition for the rule of the law is the efficient penal justice and it can be ensured through procedures that enable depenalisation, alternative forms of criminal prosecution, simplification of the criminal procedure as well as extrajudicial settlement. The aspiration after the criminal justice to be available equally to all citizens as well as to be realized at the shortest possible term contribute to the contemporary aspects of the criminal justice to be characterized by a dynamic reform and development of the proceedings to constant demanding of various solutions that would go towards accelerating the criminal procedure and the simplified procedure to be considered as a precondition for accelerating the criminal procedure.

Certain Anglo-Saxon institutions, adapted to the characteristics of the mixed criminal procedure, in the last decade become a reality in the judicial practice and in the legislation in many countries in which the mixed criminal procedure has been accused of being slow, inflexible, excessively formal and inefficient. A key role in the acceptance of the various forms of plea bargaining, was partly played by the acceptance of the Recommendation no. R (87) 18 of Committee of Ministers of the Council of Europe concerning the simplification of criminal justice which expressly recommends plea bargaining procedure as a way to accelerate proceedings– when the defendant pleads guilty, he/she should not be left long in doubt regarding the sanction that follows.

In case the defendant confesses, the rules of procedure must be simplified. The acceleration refers to not presenting evidence related to the factual situation and the procedure is fast, effective and simple, since the court should only pronounce the sanction. On the other hand, the defendant knows that he will get a mitigated sentence and the main reason for mitigated sentence is the fact that the defendant giving a statement to plead guilty waives the right to be judged in regular criminal procedure.

The new Law on Criminal Procedure of the Republic of Macedonia have been introduced various new institutions, proceedings and mechanisms originating from the accusatorial systems and among them there is a possibility of plea bargaining. The plea bargaining is an agreement which eventually should be accepted and approved by the judge – in relation to the accusations, pleading guilty and the sentence. The plea bargaining is not different from any other
negotiation process, under which the aim is to convince the prosecutor to reduce the charges basics and adopt a more favorable sentence for the defendant which will be evaluated as acceptable and appropriate by the trial judge or to convince the prosecutor to drop the charge. The purpose of the plea bargaining is basically the entire case to be dismissed in a summary procedure. Instead of going through a judicial process that requires a lot of resources and time, the defendant agrees consciously, rationally to plead guilty voluntarily, with an understanding that in return he will get a more favorable sentence than the one that he would get if sentenced in a court procedure.

The plea bargaining is possible as soon as after the initiation of the investigation procedure when the prosecutor already has „grounds for suspicion“ that a person has committed a crime, but before to be examined the defendant first. The plea bargaining largely becomes simpler, if the defendant until then remained silent and defense lawyer has full access to the evidence and the documentation of the Prosecutor’s office.

In Civil Law system, the options for plea bargaining are restricted sentence bargaining since it would be antithetical to Macedonian criminal justice system for the Judge to overlook the facts and disregard his or her obligations in searching for the truth. That said under certain circumstances, the possibility may exist to convince the Prosecutor that it is in the interests of justice to drop certain charges, on the basis that despite his or her initial evaluation of the evidence, further review indicates that they should be dismissed due to the insufficient evidence.

In any event, whether it is a Common Law or Civil Law system, it is ultimately to the Judge to decide whether to accept, modify or reject a plea agreement. Judges of the preliminary phase can not participate in the plea agreement procedure between the Prosecutor and the Counsel. If the plea agreement is accepted, both parties have waived their right to appeal the judgment.

3. Forms of plea bargaining

Despite the fact that the plea bargaining originates from Anglo-Saxon law, it is important to note that there is a significant difference between the incentives to bargain for a plea guilty in common law states and in the European countries. Anglo-Saxon model of plea bargaining is focused on the scope of the charges – the number, description and legal qualification of the crime (charge bargaining), while the European legislation recognizes a concept whereby subject of plea bargaining is the type and the severity of the criminal sanction (sentence bargaining). Several forms of plea bargaining exist, they are not mutually exclusive and can be combined:

Charge bargaining – bargaining about the content of the indictment regarding the description and the legal qualification of the crimes;
Fact bargaining – consent of selective presentation of facts if the defendant pleads guilty;
Sentence bargaining – regarding only at the type and the severity of the criminal sanction, without the possibility to influence the content of the indictment.

Special forms of plea bargaining:
Nolo contendere pleas – sanction is accepted without an expressly given guilty plea. There are several advantages for the defendant and in fact an obligation for damage compensation is avoided that could follow in a civil procedure that would come after the completion of the criminal procedure where the defendant pleaded guilty; Alford pleas - a case where the defendant does not plead guilty but confirms that the prosecution has sufficient evidence to establish guilt.

The settlement and the plea bargaining lead to complete restructure of the role of the procedural subjects, the opposing parties and the defendant of the acting. For the first time, the disposition of the parties and the defender’s willingness is enabled, actually the readiness of the accused to confess and hence this to be a precondition for avoiding the classical criminal procedure. The settlement leads to rationalization, simplification and acceleration of the criminal procedure and all of this leads to effectuation of the criminal justice.

4. Settlement according to the provisions of the Law on Criminal Procedure in the Republic of Macedonia

The Law on Criminal Procedure of 2010 proposed a procedure for reaching a verdict based on a settlement between the public prosecutor and the suspect. Therefore, for the first time the settlement of the parties was enabled in order to reach a compromise.

Settlement in the Law on Criminal Procedure is an opportunity that can arise during the investigation procedure or after the public prosecutor will issue an order for bringing the investigation procedure until he or she prepares and hands the indictment to the court. If the order of initiating the investigation procedure refers to several crimes, all or just a part of the crimes can be included in the settlement.

The settlement procedure has a greater number of features, one of which is the severity of the crime and the settlement is allowed for all the crimes regardless the severity of the criminal sanction. Participants in the settlement are: the public prosecutor on the one hand and the suspect and his or her defense attorney, on the other hand.

With the adoption of the Law of Sentencing, the public prosecutor is obliged to settle within the
framework of that Law. The consent of both parties is also one of the features of the settlement procedure. It is not allowed the settlement to be submitted by only one party. The plea bargaining is allowed at any time after the public prosecutor has given an order to begin an investigation procedure until the evaluation of the indictment. When it comes to the forms of plea bargaining, our legislator accepted sentence bargaining and not charge bargaining. Guilty plea is not a precondition to start the plea bargaining procedure during the investigation procedure. When it comes to the settlement in the phase of evaluation of the indictment, the confession is an important precondition for starting the settlement procedure. In order to protect the injured party, the public prosecutor is legally obliged to attach to the draft plea bargaining agreement, together with all gathered evidence, a written statement signed by the injured party regarding the type and the amount of civil claim on property. In the settlement procedure, the presence of the defense is obligatory. From the moment of the initiating the settlement procedure, the suspect must have a defense that he will choose alone or the defense will be placed after an official capacity. The subject of the plea bargaining is the type and the level of the sanction included in the draft plea bargaining. The draft plea bargaining must precisely indicate the sanction proposed determined by type and severity within the legal framework for the specific crime. The plea bargaining procedure prohibited the involvement of the court. The reason is to ensure that the court does not influence the parties and the defense attorney in any way, regarding the decision whether to get involved in a plea bargaining procedure, as well as regarding the choice of the type and level of the criminal sanction. The non participation of the court is due to the new role of the public prosecutor as a responsible process subject who conducts the investigation procedure, on the one hand, and the result of the need to preserve the impartiality of the judge for the preliminary criminal investigation, as an arbitrator who will decide whether the proposed settlement will be accepted or not, on the other hand. If the settlement procedure is successful, it results with a preparation of proposed settlement that is submitted to a competent judge for the preliminary criminal investigation.

5. Which stage is possible the settlement procedure

Our Law on Criminal Procedure is limited in the process of settlement and reaching a verdict in relation to a settlement to „bringing a charge“. According to Article 483 paragraph 1 from the Law on Criminal Procedure to bringing a charge, the public prosecutor and the suspect may submit a proposal settlement requesting from the judge for the preliminary criminal investigation to apply a sanction determined by type and severity, in a legal framework for the crime, but not below the limits for mitigation the sentence defined by the Criminal Code. Our legislator has not accepted the concept of settlement in a stage of a main hearing. Some countries in the region that changed the laws on criminal procedure before us, introducing innovations, including settlement, accepted the settlement to take place during the main hearing. Although the Law states that the settlement can take place „until the submission of the indictment“, it also allows the possibility of the settlement procedure to take place at the stage of evaluation of the indictment. At this stage the accused knows the evidence of the prosecution’s office as well as of the defense. He also knows the evidence on which the prosecution based the indictment and that may be presented at the main hearing. The court has already evaluated whether the evidence are collected in a legal way or the accused together with his defense already has its theory of the case.

6. The role of the parties in the settlement procedure

All the subjects that participate in the settlement, including the court during the action stated in the procedure, in terms of the motives, intentions and consequences are obligated to ensure legality and legal certainty. The parties should have equal negotiating positions in the settlement procedure. All subjects participating in this procedure are obligated to respect the International Human Rights Standards, primarily the waiver of the Article 6 right to a fair trial from the European Convention on Human Rights. In order to provide these principles, it is necessary to build a system of mutual trust and respect for the responsibilities among all mentioned subjects.

7. Conclusion

In the Republic of Macedonia, the settlement as a procedure, for the first time was introduced in the new Law on Criminal Procedure on November 18, 2010, which started to be implemented on December, 2013. The idea to research this procedure arose from the fact that it is a new institution introduced by the new Law on Criminal Procedure which previously did not exist in the criminal procedure in the Republic of Macedonia. Seeking possible solutions to overcome the formalism, the dominant role of the court during the criminal procedure as well as the longstanding of the procedure– suggests that the settlement is as a way to accelerate the procedure and it refers to not presenting of evidence related to the factual situation, if it is indisputable for the parties.
and the defender. By accepting the settlement, it is essentially that the principle of autonomy of the will of the parties is being affirmed in relation to initiation and participation in the settlement.

The party evaluates whether to take part in this procedure from the quality of the available evidence and from the assessment of the factual situation. The participation of the parties in the settlement does not represent a guarantee that it will end successfully. The successful final outcome depends on the readiness to negotiate and the acceptability that will follow the settlement.

8. References


