

## Plea Agreement, as a Delayed Novelty in Albanian Code of Criminal Procedure

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### **Abstract:**

*The latest amendments that were implemented to the Criminal Procedure Code of Albania, in 2017, as part of an important legal reform that was undertaken in our country, brought important novelties to criminal trial's procedures, which were expected to improve the legal means of ensuring the right for a fair trial. One of the most prominent legal institutes, which were recently adopted by such amendments, is the plea agreement.*

*A plea agreement, alias a plea bargain, is nothing else but a preliminary request made to the judge for accepting the plea, which directly affects the conviction, the type of the sentence, and also brings procedural consequences related to the execution of the sentence. Such request is jointly drafted by the defendant and the prosecutor, as previously agreed by the latter.*

*The aim of this Article is to provide a thorough analysis of the criminal procedures that shall be carried out by the Court, in cases when a plea agreement is submitted by the defendant and the prosecutor. What are the features of this judgment of a particular kind? What does the international criminal practice of the countries that have previously adopted "plea agreement" indicate? Which are the most crucial issues that are related with implementation of the plea agreement, faced in Albanian case law?*

*These are some of the issues that we have considered to address in this paper, trying to clarify some legal and procedural moments on*

*the topic, as well as attempting to stimulate a legal debate between the lawyers community.*

**Keywords:** agreement, plea, guilty, procedure, trial, prosecution

## **I. THE LEGAL REGIME OF “PLEA AGREEMENT”, UNDER ALBANIAN CRIMINAL PROCEDURE CODE.**

It took nearly two decades after the adoption of the new Post-Communist Code of Criminal Procedure, for the Albanian legislator to complete the mosaic of types of judgment accepted by the Albanian procedural system. Judgment by plea agreement was recently provided in Criminal Procedure Code, after the adoption of Law No. 35/ 2017, by adding five new articles in its Title VII, Chapter IV, Section IV.

A "plea bargain" is nothing but a preliminary agreement drafted by both the defendant and the prosecutor, which sets out the type of the sentence, the execution of the sentence and other procedural aspects, in cases when the defendant agrees to plead guilty.<sup>1</sup>

The new provisions of the Code of Criminal Procedure, adopted by Law No.35 / 2017, have provided for two new forms of special judgments (criminal order and plea bargain) which come immediately after the conclusion of preliminary investigations, and which consist in the manner of terminating the investigative activity of the prosecutor who, after instituting criminal prosecution under Article 148 of the Constitution and pursuant to Articles 278 et seq. of the Code of Criminal Procedure, based on the principle of legality, may address the court with a request for approval of a criminal order or plea agreement with the defendant.

Article 327, paragraph 6, section “b” of Criminal Procedure Code, provides that:

*“6. At the conclusion of the preliminary investigation, the prosecutor proceeds as follows:*

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<sup>1</sup> Article 406/d – 406/f of Criminal Procedure Code of Albania.

- a) order the dismissal of the charge or case, in the cases set forth in paragraph 1 of Article 328, or request the court to dismiss the charge or case in the cases set forth in Article 329/a of the Code;
- b) require the court to refer the case to court when it does not proceed as ruled under Articles 400, 406/a and 406/dh of this Code.”<sup>2</sup>

By analyzing Article 406 /d and ongoing of the Code of Criminal Procedure, we note that the legislator has manifested due diligence, with regards to the prosecutor's request for approval of a plea agreement, aiming to guarantee the defendant's right to a fair trial, by many means. Firstly, by guaranteeing the defendant to be represented by an attorney (which is an obligation on the court in adjudicating the adoption of a plea agreement). Secondly, in terms of his right to express free will, in relation to the type of the proceedings. Thirdly, by personally exercising all the procedural rights which are of a purely personal nature.

In this line, the purpose of the legislator (*ratione legis*) has been to maintain a fair and proportionate balance between the defendant's right for a due process, and the principle of economics and judicial efficiency, which aims to avoid judgment on the basis of the charge, charging the defendant and terminating the criminal case as soon as possible, thus guaranteeing another constitutional principle, that of the administration of justice by the Court.<sup>3</sup>

### **Which is the procedural moment of submitting the plea agreement to the Court?**

Criminal Procedure Code provides that, **from the moment in which the name of the person attributed to the criminal offense is registered**, until the judgment has commenced, the prosecutor, defendant, or his special representative may propose reaching an agreement on the terms of the guilty plea and the imposition of sentence. Thus, upon reaching a plea agreement, the prosecutor submits it to the court for approval, along with all the acts of preliminary investigation.

When the agreement is presented at the preliminary hearing, the court shall assess the grounds of the agreement, in accordance with

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<sup>2</sup> Article 327, paragraph 6, section “b” of Criminal Procedure Code of Albania.

<sup>3</sup> Cited by: Muci, Emona, Criminal Court Decision 2018/A.No, Pogradec Court of District.

the provisions of paragraph 5 of Article 332/c of the Code of Criminal Procedure. This article rules that, like claims for invalidity of acts, inadmissibility of evidence, requests for summary judgment, etc. even the request for approval of the agreement is presented at this stage of the procedure.

Pursuant to Article 406/d/1 of the Code of Criminal Procedure, the request for approval of a plea agreement must be submitted to the court for approval without the main trial being initiated. This is a normal requirement based on the criterion that "plea agreement" like other specific types of judgment such as "direct judgment" and "summary judgment" rely on the principle of judicial economy, by preventing endless court hearings, administrative work, stress, emotions and fatigue of the judge, prosecutor or even of the defendant.

### **Which are the legal requirements for establishing a plea agreement, between the prosecutor and the defendant?**

Pursuant to Article 406/d/2 of the Code of Criminal Procedure, the defendant's attorney must be present in the parties' negotiations for reaching a plea agreement.<sup>4</sup> This has been considered by the legislator as an added guarantee for the accused party who must be represented by an important procedural subject with legal qualifications such as an attorney.

The criminal offense charged to the defendant seeking judgment by plea agreement must provide for a maximum sentence of up to 7 years in prison. This provision, is in accordance of the other requirement of Article 406 /d /2 of the Code of Criminal Procedure, which indicates that, a single judge adjudicates offenses for which a maximum sentence of no more than 10 years is provided. Albanian legislator has defined such limits, in order to prevent the doers of criminal offenses to take any advantage from such legal "opportunity" and/or "convenience." For the category of collaborators of justice, this restriction does not apply, leaving the prosecution and the court open to stimulate repentant persons, to assist the justice in uncovering criminal offenses and bringing perpetrators to criminal responsibility.

Pursuant to Article 406 /d/3 of the Criminal Procedure Code, the agreement must be made in writing; reflecting and clearly describing the criminal fact the defendant is accused of and its legal

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<sup>4</sup> Article 406/d/2 of Criminal Procedure Code of Albania.

qualification. <sup>5</sup> The relevance of this provision stems from the fact that the agreement should not serve as a shield for the parties to "conceal" a more serious legal qualification of the criminal offense for which the agreement is exercised and the judge to be satisfied that the criminal fact and legal qualification of the action coincides with the reality and the evidence administered during the preliminary investigation and formally studied by the judge.

The agreement must contain the defendant's guilty plea, the type and the extent of the main criminal conviction, as well as the manner of its execution, for which the parties have agreed to, as well as the amount of the procedural costs.<sup>6</sup> The guilty plea is an indisputable condition of the Court in order to approve the agreement. It is important to note that, the criminal procedural law has given to both the attorney and the prosecutor the authority to make the classification of the legal offense, which in the normal criminal judgement procedure is a prerogative which is attributed solely to the prosecutor. The legislator has also ruled that plea agreements indicating a partial admission of charges cannot be accepted.<sup>7</sup> In our opinion, such ruling is very logical, due to the fact that partially accepting the charges would put the judgment on course and would lose the essence of a fast, fair and objective trial.

The plea agreement shall be made in written and signed by the parties, the prosecutor, and his attorney.<sup>8</sup> The procedural law in this case has determined the signing of the agreement by the prosecutor and the defendant's attorney, without specifying if the defendant shall necessarily sign personally, or his attorney's signature is sufficient. In our view, there is no obligation under this article, indicating that the plea agreement shall be signed by both the defendant and the attorney, indicating that the signature of one of them is sufficient.

The agreement must be reviewed by the court within 30 days of its submission. (Article 406/dh/2 of the Criminal Code). We believe that the legislator must had provided for a time limit up to 15 days, due to the fact that, these kinds of judgments in order to be more effective have to be finished in a short period. However, a 30 days

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<sup>5</sup> Article 406/d/3 of Criminal Procedure Code of Albania

<sup>6</sup> Article 406/3/b and c, of Criminal Procedure Code of Albania.

<sup>7</sup> Article 406/5/d of Criminal Procedure Code of Albania.

<sup>8</sup> Article 406/d/5 of Criminal Procedure Code of Albania.

deadline has been deemed as appropriate, considering the work load of some of the major courts in Albania.

The court hearing should be held with the presence of the prosecutor, the defendant and his or her attorney. Here, we suggest the presence of the defendant in the hearing not to be mandatory, if he is represented by an attorney, through a valid power of attorney. By analogy, in case of summary judgments, the presence of the defendant is not obligatory, if its attorney is present in the pleading.

After being requested by the Court pursuant to Article 406/dh/4 of the Code of Criminal Procedure the defendant must state that he made the plea agreement of his own free will, was represented by his attorney in the negotiations for reaching and signing the plea agreement, and understands the legal consequences of its content. This is a procedural guarantee for the defendant that his will is not impaired, that he understands the agreement and its substance and legal consequences. The legislator has ruled that both defendants who are under a restrictive security measure, such as jail or home arrest and defendants who are being investigated by lighter security measures, shall appear in person the court hearing of the plea agreement.

The defendant must understand the consequences of the court's approval of the agreement. (Article 406 / dh-4 of the Code of Criminal Procedure). It is the duty of the defendant's attorney to explain to the defendant the consequences that are binding upon him as soon as the agreement is approved by the Court. Here, it arise the question whether the court should again explain to the defendant the plea agreement procedure during the hearing or will it merely be construed by the obligation that the defendant should have understood the procedural consequences of the agreement in advance? The judicial practices studied for the purpose of this paper, outline that the court is also involved in explaining to the defendant the consequences of the plea agreement.

The defendant must give his consent for the agreement to be approved by the court and put into execution. This obligation is related to the above point where the defendant after having understood what the agreement is, signed it and expressed the will of the judge he says the last word before the judge giving a formal consent that the agreement should now become a fact the procedural consequences of its implementation begin.

## II. ADVANTAGES THAT PLEA AGREEMENT BROUGHT IN CRIMINAL PROCEDURAL SYSTEM OF ALBANIA

By the systematic and teleological interpretation (*ratione legis*) of the procedural provisions governing this new form of judgment (Articles 406/d to 406/f of the Code of Criminal Procedure), it can be concluded that the aim of the legislator consisted in the directions stipulated below:

First, to increase the effectiveness and efficiency of prosecution by the prosecution body, in accordance with the principle of legality. The defendant does not seek further evidence, does not challenge the legal qualification of the criminal offense, and pleads guilty.

Second, to improve the administration of justice by the court and to protect the defendant's right for a due process, as required by Article 6 of European Convention of Human Rights. The aim of the institute of plea agreement was also to respect constitutional principle of investigation and adjudication within a reasonable time.

Third, the adherence to the principle of judicial economy. There are no preliminary sessions, and endless foundation sessions. Fifth, respecting and guaranteeing the rights of the victim in the investigation phase and judicial process.

## III. PRACTICAL ISSUES OF PLEA AGREEMENT JUDGMENTS FACED BY ALBANIAN COURTS.<sup>9</sup>

In this section of the paper, we are providing a list of the reasons why different court tribunals have dismissed the request submitted by defendants for a plea agreement judgment.

The District Court of Tirana, in a criminal case, has ruled that the stay of execution of the sentence to prison and probation service by the defendant should not be accepted, since the defendant turned out to have been convicted once more by the Court for the same criminal offense, even though according to the statements at of facts, he was not sentenced to prison. The Court argued that under these circumstances, this defendant was previously given an alternative

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<sup>9</sup> The issues referred in this Section, are encountered in different criminal judgments held in Tirana District Court in 2018. N.A 2018.

sentence, which failed to achieve the purpose its purpose, special and general restraint, and rehabilitation.

In a different criminal case, the plea agreement contained no disposition on material evidence, breaching the provision of Article 406/d, paragraph 3, letter “ç” of the Criminal Procedure Code. The Court has also found that the plea agreement of the defendant and the prosecutor of 10.01.2018 was not valid, as long as it does not concretely contain the type and duration of criminal sentence for each criminal offense committed<sup>10</sup> and pursuant to Article 406/a, paragraph 2 of the Code of Criminal Procedure, the court awarded the rejection of the agreement.

During a court hearing in District Court of Tirana, held on 29.10.2018, the defendant stated with her free will that she withdraws the consent given for the approval of the plea agreement, as she has committed none of the offenses for which she is charged and did not accept to plead guilty. We remind here that pleading guilty is the main consideration for plea agreement. There have been cases when the plea agreement request is dismissed by the Court due to the defendant absence in the trial, without legal cause, despite his regular knowledge of the conduct of the. In this case, defendant's attorney requested that the plea agreement to be dismissed as the defendant could not appear before the court, and the withdrawal of the agreement must be accepted.

In different cases, the Court has dismissed the plea agreement due to the fact the defendant had accepted the plea, only on the condition to be convicted by an alternative sentence to prison, such as probation. It is important to underline that Criminal Procedure Code explicitly has provided that in cases of judgments by plea agreement, the defendant must had admitted to plead guilty, without conditions on the type or amount of the sentence. A plea agreement, under such conditions, shall be deemed as inadmissible by the courts.

There have been cases in which the Court has dismissed a judgment by plea agreement, due to defendant's will to change the conditions of the agreement settled before with the prosecutor. The Court is not entitled to “negotiate” the terms of a plea agreement with the defendant, because, as mentioned above, the “negotiation” phase

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<sup>10</sup> Pursuant to Article 406/d, paragraph 3, letter "c" of Criminal Procedure Code, the plea agreement must contain the type and the duration of the sentence, otherwise it is considered void.

is carried out by the prosecutor and the defendant. The Court has only the authority to ratify such agreement, or to dismiss it.

## CONCLUSIONS

From the analysis laid out in this paper, we noted that Albanian attorneys, but also the majority of the persons under investigation (defendants) have welcomed the judgment by plea agreement, as it requires no lengthy and bureaucratic judicial procedures. It is also welcomed by a non-minor number of judges, considering the current situation when some of the judges are being dismissed from the vetting process and this is accompanied by a heavy burden of work on the current judges.

On the other hand, from the analysis of this new legal institute, from the discussions, complaints of lawyers and prosecutors, we note that there is reluctance from the Albanian courts to accept this kind of special judgment. Apart to the practical issues stipulated above in this paper, we believe that there are other subjective motives for which the Albanian judge to not accept this kind of judgment. Assuming that there is some "professional jealousy" from judges to approve a plea agreement drafted by the defendant and prosecutor, we expect colleagues' opinions on this discussion.

Criminal Procedure Code has not addressed the cases when the prosecutor dismisses a defendant's request to settle a plea agreement, even though there are no legal grounds on such rejections. We suggest that Criminal Procedure Code shall be amended and there must be provisions that regulate such situation, by granting to the defendant the right to appeal the prosecutor's rejection to settle a plea agreement.

There is a crucial need for prosecutors and attorneys to get the necessary professional training on procedures of judgment by plea agreement. The General Prosecution of Albania and Albanian Chamber of Advocacy shall take the necessary steps in this regard.

While Criminal Procedure Code lays down the essential elements of a plea agreement, we believe that there is need for a unification of the content of plea agreement, which can be made by the General Prosecution of Albania.

In cases of summary judgments, the defendant is entitled to a 1/3 reduction of the sentence by prison that the Court renders. By

analogy, we suggest the Criminal Procedure Code must be amended, and there must be provisions that hinder the defendant to go for a plea agreement, by providing different priorities for the defendants in these cases, such as the reduction of the sentence.

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