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# THE ADMISSION OF GUILT AGREEMENT. ASPECTS OF COMPARATIVE LAW

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***Abstract:*** *The new Criminal Procedure Code brought about not only a series of new institutions in Romanian law, such as the admission of guilt agreement, but also a new vision in regard to what the criminal trial really means. In elaborating the current regulation, numerous factors were considered, which required aligning the current regulation with our continuously changing reality; however we must notice that, by this, the Romanian lawmaker followed the legislative trend which had been imposed by other European states which were, at the beginning, followers of an inquisitorial system of criminal law, by introducing in national law more and more institutions coming from the adversarial system of law, thus reaching a diminished inquisitorial system of law or a mixed system of law.*

***Key words:*** *admission of guilt agreement, Criminal Procedure Code, German Criminal Procedure Code, French Criminal Procedure Code.*

## 1. Introduction

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 if guilt was admitted, the criminal trial would be simplified and shortened, thus benefiting both sides of the trial.

The new Criminal Procedure Code introduces a new procedure, the admission of guilt agreement.

This procedure entails a radical change of the criminal trial, by simplifying the prosecution and by shortening the length of the trial. One of the arguments in favor of this procedure was that of the economical advantage which benefits both parties of a trial, as well as the state by saving human and financial resources [12].

The Romanian lawmaker regulated this procedure by considering the laws of other European states which have already passed certain similar procedures and assumed elements from 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.

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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.

Starting form the above mentioned aspects, we feel that a short presentation of the legal regulation of other states regarding the admission of guilt agreement is necessary, given the current tendency to unify the criminal law of most states on this continent and the process of unifying these laws can only be observed when each legal provision is analyzed, in order to appreciate the extent to which it was modified or the way in which it was implemented or received by the judicial system of that certain country.

## 2. German law

Of all the European states which had an inquisitorial system, Germany's legal history records the first procedure based on the admission of guilt.

Thus, in 1877, by passing a Criminal Procedure Code which was common to all the states on Germany's territory, „the prosecutor was allowed to prosecute the person who was considered guilty of committing a crime, without abusing the prerogatives of its positions; in case the person admitted its guilt and pleaded guilty before the court, this admission was to be considered; however, this admission would only cause substantial effect when the punishment for that deed was fine or imprisonment for a reduced number of years" [4].

Although German legal practice was the first to valorize the admission of guilt in a criminal trial, a similar procedure was introduced in German law in 2009, after more than 20 of negotiating trials and after Germany's Federal Court stated that „negotiating the punishment is not constitutional" [3].

Thus, according to article 257c, alignment 1 of the German Criminal Procedure Code, „in certain cases and after being informed of the procedure, the court can reach an agreement with the participants in regard to the result of the trial". The provisions of article 244 second alignment [Article 244 alignment (2), of the German Criminal Procedure Code: „ In order to establish the truth, the court must administer evidence in regard to all the facts, the evidence must be relevant in order for the court to rule in that certain cause"] are applied accordingly.

Starting from these provisions, we can state that the court is directly involved in reaching an agreement based on the admission of guilt.

Also, we must point out that by the phrase „participants in the trial" both the culprit and prosecutor are considered, although the court is the one which informs them of this procedure.

Furthermore, given that the provisions of article 244 second alignment of the German Criminal Code regarding the administering of evidence are to be applied „in the inquisitorial trial, in spite of the agreement of the parties, the court must seek the truth by itself, as it is not held by the agreement of the parties" [9].

Starting from this provision which entails an active role of the court in regard to the development of the trial after guilt was admitted, we can state that the situations when such an agreement can be reached are not expressly regulated or described by the German lawmaker.

However, the object of the agreement is described in detail; thus, in accordance with the provisions of article 257c alignment 2 of the German Criminal Procedure Code „the object of the admission of guilt agreement can only be

represented by the legal consequences which form the verdict and are contained in the court's ruling, by measures taken in the course of the criminal trial or by some actions of the defendant.

A mandatory part of the admission of guilt agreement is confession. The verdict, much like the preventive or security measures, can form the object of an agreement".

As a result we can see that*, lato sensu,* the object of the agreement is the means, the amount and the form of serving the sentence, the measures that the court takes and the defendant's behavior in court. Another mandatory part is the confession of the accused in regard to the fact he is on trial for.

The final thesis of the above quoted legal provision states that the verdict, *stricto sensu*, seen as the court's decision by which the guilt of the perpetrator is established, can represent the object of an agreement.

Another argument for this statement is the fact that „the trial does not establish reasons for guilt, thus it can't reach a verdict in regard to it" [3].

According to article 257c third alignment of the German Criminal Procedure Code „the court will point out to the parties the content of the agreement.

By keeping in mind the circumstances of the cause, but also the general criteria regarding the individualization of punishment, the court will set an upper limit and a lower limit of the punishment. The parties of the trial are entitled to speak.

The agreement is final when the defendant and the prosecutor reach an agreement regarding the suggestion of the court within the preset limits".

In this context, we can see that the right to initiate the trial of a cause based on the admission of guilt is decided by the court.

Furthermore, the court will set the limits of the agreement which will occur between the defendant and the prosecutor.

These provisions suggest that the final verdict of the court „can't represent the object of an agreement, given that the court can only establish the lower limit and the upper limit of the punishment and not the punishment itself" [9].

Given all these, the right of the court to initiate the procedure based on the admission of guilt is not an exclusive right; the German Federal Court ruled, by the August 26th, 2014 decision, that „the agreement of the parties, initiated by the lawyer of the defendant, can represent the basis of a court's decision" [11].

The German lawmaker regulated the right of the prosecutor and the right of the defendant to speak; given the lack of details of the legal provision, we can't state that ensuring this particular type of contradictory trial has an absolute character, as the participants can only argue the matters based on which they reached an agreement.

However, in case an agreement is reached, „the defendant can change his testimony or he can revoke his admission, as it must be provided by the defendant without any constraint" [2].

As for the necessity of consent from the prosecutor in order for the agreement to be valid, the issue of whether these provisions were constitutional or not was raised, because „by taking into account the means by which this procedure is regulated, the decision of the court seems to depend on the consent of the prosecutor regarding the agreement; however, the court can't be prevented from ruling based on the admission of the defendant, even if the prosecutor is opposed, as the attitude of the defendant will be considered throughout the trial" [8].

The provisions of article 257c fourth alignment of the German Criminal

Procedure Code state that „the court is not held by the agreement of the parties in case some circumstances or legal provisions were not considered or certain facts were discovered, facts which were not known at the moment of initiating the procedure and, as a result, the court decided that the preset limits are no longer valid for that certain deed or the guilt of the defendant.

This provision also applies when the defendant's behavior in court is not the one the court predicted it would be when initiating the procedure. In this case, the defendant's admission of guilt will not be used against him".

As a result, in order for the possibility of the agreement to be real, all *de facto* conditions must correspond to those considered by the court. Furthermore, in case the situation is different, the defendant will still be entitled to the benefit of the doubt, as this is expressly regulated by the final thesis of the quoted regulation.

In the same regard, that of respecting all the rights of the defendant, article 257c fifth alignment of the German Criminal Procedure Code states that „the defendant will be informed in regard to all the aspects stated in the fourth alignment".

Thus, he will be unable to plead the lack of information regarding the provisions which will be applied during this procedure; the court is obliged to inform the defendant.

Another aspect regarding the defendant's rights which must be considered is the legal council of the defendant; we can see that „the current regulation makes no distinction between a defendant who has legal council and one who doesn't". [*Entwurf eines Gesetzes zur Regelung der Verständigung im Strafverfahren* (A legal suggestion in order to regulate the admission of guilt agreement), published in Bundesgesetzblatt (Germany's Official Bulletin) no 11736 of January 16th, 2009].

As a result, by applying the principle *ubi lex non distinguit, nec nos distinguere debemus* [5], we can see that even if the defendant does not have legal council, he can still enter such an agreement.

Another issue raised by doctrine refers to the extent to which the court can adjudicate on the agreement of the parties. Given that the court can set certain limits for negotiations, but not the final punishment, we feel that the court, in its turn, will be held by these limits „being able to change the agreement without consent from the prosecutor of the defendant, but within the same limits it had set before" [9].

Unlike Romanian law, the procedure before the court is identical with common law, as it takes place by complying with the principle of contradiction, in an attenuated instance, as, if the defendant and the prosecutor reached an agreement, entering evidence or arguing before the court is no longer necessary.

After the verdict is heard, „the court is obliged to inform the defendant of his right to appeal the sentence, even if, throughout the negotiations, he claimed he will not appeal the sentence, as he is not held by his own statement in this matter" [6] as this would mean waiving a right which the defendant did not have during negotiations.

Although there are significant differences between the German and the Romanian Criminal Procedure Law, several aspects are not regulated, such as the content of the agreement or the written form it should have, the necessity to provide legal council, the control of whether the agreement is legal or not.

However, we must state that the court is, in this particular case, the one who supervises the entire procedure.

Furthermore, a particular procedure was regulated after several years of practice, thus this is a *de facto* novelty.

### 3. French law

The second law considered by the Romanian lawmaker in drafting the provisions regarding the admission of guilt agreement was the French one. Given that the French criminal procedure system is also a part of the Roman – German system of law, the institution of admission of guilt agreement is seen as a novelty of the legal system. Thus, in regulating this agreement, France followed Italy without having any practice in this area, as was the case of Germany, „by legally regulating the admission of guilt agreement – *comparution sur reconnaissance préalable de culpabilité* March 9th, 2004" [6].

This institution is regulated in detail in the French law, unlike the Romanian or German law, in article 495-7 – 495-16 of the French Criminal Procedure Code. As a result, in regard to the area where it applies, article 495-7 first alignment of the French Criminal Procedure Code stated that „the prosecutor can enter such an agreement by his own will or by request of the defendant, according to the provisions of the current section, in regard to any person who is brought before him in accordance with the provisions of article 393 of the present code, if the person admits their guilt regarding all the crimes he is charged with, except for those mentioned in articles 495-16 [Article 495-16 of the French Criminal Procedure Code: „The provisions of this section will not apply to minors under the age of 18 and to press offences, manslaughter, political offences or those regulated by special laws"], those who voluntarily or involuntarily cause bodily harm, those of sexual assault stated in articles 222-9 – 222-31-2 of the Criminal Code, as long as the punishment stated by the law for these crimes in no more than 5 years of imprisonment". Although the lawmaker does not clearly state it, we feel that crimes punished by a fine, regardless of the amount, fall in the same category; also „complementary punishments have no incidence over the area of enforcement". [1].

As a result, the area of enforcement of this procedure is strictly limited based on the expressly regulated objective criteria, as the prosecutor has no right to decide on this matter.

The object of the admission of guilt agreement is regulated by the provisions of article 495-8, stating that „the prosecutor can suggest one or more main or complementary punishments, as the nature and the amounts of these will be determined according to article 130-1 and 132-1 of the Criminal Code (regarding the general criteria for individualizing punishment)".

In regard to the way in which the agreement is entered into, we must consider the provisions of article 495-15 first alignment of the French Criminal Procedure Code, stating that „if the accused was directly summoned to justice, being charged with one or more crimes stated in articles 495-7, he can, in his own name or through his lawyer, admit the crimes he is charged with in writing and request the procedure stated in the present section".

In this particular situation, the prosecutor will enforce the legal provisions of this section or he may disagree, thus being held to notify the accused or his lawyer, according to article 495-15 third alignment of the French Criminal Procedure Code.

In regard to these provisions, we can see that they are rather similar to those of article 479 of the Romanian Criminal Procedure Code.

The same article regulates legal assistance in this matter; thus alignment 4 states that „the declaration by which a person admits to committing a crime he is charged with is kept on the record and the

suggestion regarding the punishment is made by the prosecutor in the presence of the lawyer of the accused, appointed or chosen by the president of the bar; the accused will be informed of the fact that he will have to pay the fee of the lawyer, except for the cases where he meets the necessary conditions to qualify for legal assistance.

A person can't waive its right to be assisted by a lawyer. The lawyer can consult the documents of the case on the spot".

As a result, legal assistance is mandatory, regardless of the crime, as the role of the lawyer is to „facilitate confrontation, to help point out the position of each of the parties" [10].

The importance of legal assistance in this matter is supported by the provisions of the fifth alignment, with the following content: „the person can freely consult with his lawyer, when the prosecutor is not present, in order to communicate the decision he made.

The person is previously informed by the prosecutor that he can request a continuance of 10 days during which he can decide whether he accepts or declines the suggestion which was made to him".

If the person decides to accept (in the presence of his lawyer), the punishment which was suggested by the prosecutor is „immediately enforced in front of the president of the court or the judge, thus the court must rule on acknowledging the agreement.

In case the person is not detained or arrested, he can be summoned by the president of the court within a month", in accordance with the provisions of article 495-9, first alignment of the French Criminal Procedure Code.

The person who entered such an agreement will be heard by the judge, based on the regulations of article 495-9 second alignment: „after verifying the reality of the crime and the legal regulation, the judge can decide to acknowledge the punishment suggested by the prosecutor.

He will rule on this matter within the same day, by ordinance.

The procedure stated in the previous alignment is public; the presence of the prosecutor is not mandatory".

As a result, although in France „the prosecutor has the initiative of entering into such an agreement", [6] he will not be heard by the court, thus considering that, by suggesting the punishment, he had been heard.

Given all these, another situation can occur, one where thee person refuses to accept the agreement suggested by the prosecutor or the court refuses to acknowledge the agreement of the parties; in this case, the prosecutor, if there is no new information, apprises the correctional court and the judge, in order for the criminal trial to continue in the usual manner, according to the provisions of article 495 second alignment of the French Criminal Procedure Code.

Unlike the provisions of the Romanian Criminal Procedure Code or those of the German Criminal Procedure Code, the regulations of the French Criminal Procedure Code contain details regarding the enforcement of this procedure and communicating it to the victim of the crime.

Thus, the victim of the crime ‘'is invited before the court, along with the accused, in order to ask for compensation of the prejudice he suffered as a result of the crime'', as stated in article 495-13.

Another specificity of French law in regard to the procedure of the agreement is that, regardless of the solution of the court, the victim is the holder of the right to appeal the sentence, according to the final thesis of the quoted article.

In regard to the civil trial, doctrine has shown that ‘’once the civil trial begins, it will continue even if the agreement is dismissed’’ [7].

The court invested with solving the agreement will first rule by decision [Article 495-11, second alignment, first thesis of the French Criminal Procedure Code: „the decision has the same effects as a conviction sentence. It will be executed immediately”], the convicted person or the victim can appeal this sentence.

According to the provisions of article 495-11, third alignment, final thesis „the prosecutor can also appeal this sentence, under the same conditions”.

Given the above presented legal provisions, we can appreciate that this procedure „allows the person who committed a crime and admits the deed to accept the punishment as suggested by the prosecutor and avoid trial, thus considering all the procedural guarantees he can benefit from” [15].

## 4. Conclusions

The novelty character of the admission of guilt agreement generates several controversies and we feel that only a unified practice could clear many of these inaccuracies in regard to the regulations for applying this procedure, as the Romanian lawmaker was inspired by the laws of other European countries, mainly from the German and French law, the matter we have discussed shows the most relevant aspects of regulating the institution of admission of guilt agreement in the law of these European states.

## References

1. Cotoi, F., Brutaru, V.: *Efectele recunoaşterii vinovăţiei în dreptul penal* (*The effects of admitting guilt in criminal law*). Bucharest. C.H. Beck Publishing House, 2013, p. 177.
2. Hauer, J.: *Geständnis und Absprache Recunoaşterea vinovăţiei şi acordul* (*Admission of guilt and agreement*). Berlin. Dunker&Humbolt Verlag, 2007, p. 226.
3. Laliashvili, T.: *Negocierea pedepsei în procesul penal german (Negotiating the punishment in the German criminal trial)*. In: Revista Forumul Judecătorilor (The judges' forum magazine) (2007) No. 3, p. 91. Available at: www.forumuljudecatorilor.ro. Accessed: 20.07.2015.
4. Langbein, J. H.: *Mixed Court and Jury Court. Could the Continental Alternative fill the American need?* In: American Bar Foundation Research Journal. (1981), p. 200. Available at: www.law.yale.edu/ documents/pdf/ Faculty/Langbein_Mixed_Court_and_ Jury_Court. Accessed: 25.08.2015.
5. Murzea, C.I., Schiopu, S.D., Bianov, A.M.: *Crestomatie de texte juridice latine* (*Latin legal texts chrestomathy*). Brasov. Romprint House Publishing, 2006, p. 325.
6. Pradel, J.: *Le plaider coupable, confrontation des droits américain, italien et français*. In: Revue international de droit comparé (2005) No. 2, p. 474. Available at : http://www.persee.fr/web/revues/home/prescript/article/ridc_0035-3337_2005_num_57_2_19357. Accessed: 25.07.2015.
7. Saas, C.: *De la composition pénale au plaider-coupable: le pouvoir de sanction du procureur*. In: Revue de science criminelle et de droit comparé (2014) No 4, p. 841. Available at www.mpicc.de. Accessed: 25.07.2015.
8. Schwarz, O., Kleinknecht, Th., Meyer, K., et al.: *Strafprozessordnung (Criminal procedure)*. München. C.H. Beck Verlag, 2014, p. 971.

9. Tsujimoto, N.: *Eine inhaltliche Analyse der Verständigung im deutschen Strafprozess aus der Perspektive eines Außenstehenden*, (*O analiză a conținutului recunoaşterii vinovăției în dreptul procesual penal german din perspectiva unui străin). Zeitschrift für Internationale* Strafrechtsdogmatik (Strafrechtsdogmatik *An analysis of the admission of guilt in German criminal trial from a foreigner's perspective)*. In: International Criminal Law magazine (2012) No. 12, p. 618. Available at: www.zis-online.com. Accessed: 16.07.2015.
10. Tulkens, F.: *La justice négociée*. In: Document de travail (1995) No. 37, p. 14. Available at: www.uclouvain.be. Accessed: 16.07.2015.
11. *** *Beschluss der Bundesverfassungsgericht vom 26. August 2014 – 2 BvR 2048 – /*13 (*The German Federal Constitutional Court decision no 2 BvR 2048-/13 of August 26th,* 2014). Available at www.rechtsluppe.de. Accessed: 16.08.2015.
12. *** *Expunerea de motive a Legii nr.135 din 1 iulie 2010 privind Codulde procedură penală*, publicată în Monitorul Oficial al României, Partea I, nr. 486 din 15 iulie 2010, cu modificările şi completările ulterioare (*The motivation of Law no 135 of June 1st, 2010 regarding the Criminal Procedure Code* was published in the Official Bulletin of Romania, part. I, no 486 of July 15th, 2010 with subsequent changes and additions).
13. *** French Criminal Procedure Code
14. *** German Criminal Procedure Code
15. *** *Le plaider coupable*, Les documents de travail du Sénat, Série Législation Comparée, 2003 No. LC 122, p. 5. Available at www.senat.fr. Accessed: 16.08.2015.