PRACTICAL ASPECTS OF THE PLEA AGREEMENT IN THE CRIMINAL PROCEDURE LAW OF THE REPUBLIC OF SERBIA

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Abstract: Changes in the sphere of Serbian criminal procedure legislation in the previous years have led to a large number of new legal solutions. One of the major innovations was the introduction of the plea agreement. This institute has been introduced into our criminal procedure law by the Law on Amendments to the Criminal Procedure Code in 2009[2], and with the adoption of the Criminal Procedure Code from 2011[3], it received the legal form in which it is still applied today.The plea agreement has been a topic of interest of the professional public since the very indication of its introduction into our criminal procedure legislation, given that it represents an institute which originates from the Anglo-Saxon law and as such is not inherent to a continental legal system such as ours. Bearing in mind its growing presence, as well as the significant period that has passed since its introduction into our legislation, we consider it necessary to point out some practical aspects of this institute. Therefore, this paper will, on the one hand, present the prosecution's aspect of this institute through the Obligatory Instruction of the Republic Public Prosecutor's Office No. O 5/2013 of 12/26/2013 in relation with the conclusion of plea agreements, which helps to achieve the legality, effectiveness and uniformity of the actions of the prosecutors' offices in its implementation, as well as through certain opinions of the Working Group of the Appellate Public Prosecutor's Office in Novi Sad, formed in order to monitor the implementation of the CPC. On the other hand, the paper will present and analyse the answers of the Criminal Department of the Appellate Court in Novi Sad and the Criminal Department of the Supreme Court of Cassation in connection with some of the controversial legal issues arising from the application of the plea agreement.

Keywords: *plea agreement, prosecutor's actions, case law.*

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2 "Official Gazette of RS", No. 72/2009.
3 "Official Gazette of RS", Nos. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013 and 55/2014. Hereinafter: CPC.

INTRODUCTORY NOTES

The plea agreement is characteristic of Anglo-American legal systems dominated by the accusatory criminal proceedings, however, contemporary tendencies in European law have shown a readiness for its introduction.[4] One of the more significant peculiarities brought about by the process of reforming the criminal legislation of Serbia is the legalization of the plea agreement institute (Бејатовић, 2014: 411). Faster and more efficient criminal procedures and the disburdening of the judiciary have been indicated as the *ratio legis* of this new institute (Шкулић, 2014: 331; Лечић, 2017: 402), and it is believed that in this way a contribution is given to the idea of re-socializing the defendant and humanizing the criminal proceedings (Grubač, Vasiljević, 2013: 576).[5]

In American law, from which it originates, the conclusion of a plea agreement is defined as a procedure in which the defendant and the prosecutor in a criminal case agree to resolve said case, in a mutually satisfactory way, subject to the court's approval. The defendant usually pleads guilty to a lesser criminal offense or to just one or some of the criminal offenses of which he has been charged, and in turn receives a milder sentence than the one that would have been possible for more serious charges (Black's Law Dictionary, cited by: Richardson, 2010: 17). The essence of the plea agreement is an agreement on the concessions that constitute a consideration in response to the defendant's act of self-incrimination (Damaška, 2004: 7).

The long-standing existence of this institute in our criminal procedural law has been marked by a gradual acceptance by the public prosecutor's offices and an increased number of concluded agreements year after year.[6] In addition, certain dilemmas and problems have also arisen, which is not strange, since the institute in question did not previously exist in our legal system. The prosecutorial and judicial organization has made a significant contribution in overcoming them. Namely, the Republic Public Prosecutor has issued the Obligatory Instruction No. O 5/2013 of 12/26/2013, on the application of the plea agreement, bearing in mind the need for lawful and uniform conduct of the public prosecutors in its implementation. Additionally, the Obligatory Instruction of the Republic Public Prosecutor No. O 4/13 of 10/09/2013 has instituted the formation of groups in the appellate public prosecutor's offices, responsible for monitoring the application of the CPC and providing opinions on the perceived difficulties in its application. On the other hand, the criminal departments of the Supreme Court of Cassation and the appellate courts have, through their answers regarding controversial legal issues of the lower courts, constituted a significant mechanism for the unification of court practice in relation to this institute.

4 Settlements with the defendants are more difficult to incorporate into the continental type of penal processes, given that the consensual outcomes undermine several weakened, but still functioning principles of the traditional judiciary, whereby wider cultural differences can also not be denied (Damaška, 2004: 9).

5 For more information on the arguments supporting the introduction of the plea agreement, see: Миловановић, 2010: 417– 420.

6 See: Турањин, 2016: 391– 395 and Трешњев, 2013: 245.

In this sense, a review of the prosecutorial and judicial practical aspects in the implementation of this institute will be presented further in this paper.

ACTIONS OF THE PUBLIC PROSECUTOR IN THE IMPLEMENTATION OF THE PLEA AGREEMENT

In order to achieve the principles of legality, effectiveness and uniformity in the conduct of all public prosecutors, i.e. deputy public prosecutors, the Republic Public Prosecutor has issued the Obligatory Instruction No. O 5/2013 of 12/26/2013 on the implementation of the plea agreement.[7] The justification of its adoption stems from the proclaimed principles on which it is based. It excludes the arbitrariness of prosecutors when concluding the agreement, achieves uniform conduct in these procedures, and thus attains efficiency and facilitates the control of work. It should be kept in mind that the public prosecutor does not have absolute freedom of negotiation in general, nor in respect of certain issues. He has to assess the circumstances of the case and account for his actions as he does in the event of any other decision based on the principle of expediency (Grubač, Vasiljević, 2013: 576).

When proposing, negotiating and concluding the agreements, the actions of the public prosecutor are based on the principles of efficiency, transparency, uniformity, absence of discrimination, protection of the interests of the injured party, as well as on the protection of the public interest in the effective and consistent application of criminal law. In the procedure of concluding the agreement, an obvious tendency can be observed to satisfy the interests of the state, which exercises its right to conduct punishment through the prosecutor, but also to satisfy the individual interests of the defence, through obtaining a more favourable judgment. An intention is also noticeable to, through the agreement, as one of the instruments of consensual, but also restorative justice, simultaneously perform the restitution of the injured person (Илић, 2012: 407).

The right to propose the conclusion of the agreement belongs exclusively to the public prosecutor and the defendant, i.e. his defence counsel, and it is entirely irrelevant which of these entities will initiate the conclusion of the agreement (Чворовић, 2013: 275). Information on proposing, negotiating and concluding the plea agreement are entered into an official note signed by the public prosecutor/deputy public prosecutor, defendant and the defence counsel.

According to the Instruction, the procedure for the conclusion of the agreement includes the following stages: proposal, negotiation, conclusion of the agreement and procedure before the competent court.

The proposal represents the stage of the proceedings in which the readiness to negotiate a plea agreement is expressed. The proposal may contain an invitation to negotiate the conclusion of the agreement, and it may also contain the offer

7 Hereinafter referred to as: Instruction.

itself, that is, a proposal of the elements of the agreement. When considering the possibility of proposing an agreement, the public prosecutor is obliged to conscientiously and responsibly analyse the criminal charge, the order for conducting the investigation, as well as the indictment, the report from the penal and misdemeanour records for the defendant and additionally, depending on the evidentiary actions that have been taken, to hear the defendant. When considering whether to propose the conclusion of a plea agreement in a specific case, the prosecutor should take into account the gravity of the criminal offense, possible punishments, the interests of the injured parties, the probability of success in trial, prosecutorial resources and the degree of remorse of the defendant. On the other hand, the defence counsel should consider the strength of the prosecution evidence and the defendant's attitude on the conclusion of the agreement (Richardson, 2010: 23).[8]

According to the Instruction, the negotiations are conducted by the public prosecutor or the deputy public prosecutor acting in the case, per prior approval of the public prosecutor or person so authorized by him, for the offer which will be presented during the negotiations, or for the reply to an already presented offer, i.e. for all conditions within the framework of the negotiations. If the person authorized to file a restitution claim has failed to institute a restitution claim, the public prosecutor will invite said person to file the claim prior to the conclusion of the agreement, as well as to submit the evidence for such a claim. The invitation of the public prosecutor and the response of the authorized person will be entered into an official note. If possible, the public prosecutor will, before the commencement of negotiations with the defendant or his defence counsel, hear the injured party with regard to the restitution claim, and inform him on the possibility of the defendant becoming obliged to fulfil one of the measures that can be imposed in the course of the procedure for the deferment of criminal prosecution.[9] The Instruction provides that, prior to the commencement of the negotiations, the public prosecutor is obliged to instruct the defendant on the following: 1) that he must hire a defence counsel, if he has not already done so; 2) that he can withdraw from the proposal (given or offered) until the conclusion of the agreement; 3) on the legal elements of the agreement referred to in the provision of Art. 313 of the CPC and the consequences of the concluded agreement, and in particular that

8 In addition to receiving a more lenient punishment, which is the primary goal of the defendant, his additional incentive to conclude the plea agreement may be to avoid the uncertainty related to the outcome of the proceedings, which certain individuals find hard to endure, as well as to avoid the unpleasant situations that may arise during the trial. In particular, the motive of the defendant to engage in the conclusion of an agreement may be the desire to avoid the costs of the criminal proceedings or an inability to bear them (Delibašić, 2014: 264).
9 See provision of Art. 283, p. 1 of the CPC. In this respect, we consider that, of particular interest for the injured party are the measures that have the potential to bring said party into a state which existed prior to the commission of the criminal offense, and these are measures ordering the defendant to rectify the detrimental consequences resulting from the commission of the criminal offense or to indemnify the damage caused (Art. 283, p. 1, item 2 of the CPC) and to fulfil the maintenance obligations which have fallen due (Art. 283, p. 1, item 4 of the CPC).

he is waiving the right to a trial and that he accepts the limitation of the right to appeal against a court decision issued on the basis of the agreement. The public prosecutor makes an official note on this.

An official note is composed on the course and outcome of the negotiations, into which relevant circumstances are entered, particularly the date, time and place of the negotiations, information on the identity of the persons present, personal data of the defendant if he is present, criminal offense or offenses which are the subject of the negotiations, case number, legal advice given to the defendant, possible interruptions and continuations of the negotiations, reasons for the presented offer, possible new offer, circumstances relevant for the determination of the sentence, and reasons for the final acceptance or rejection of the offer by the opposing party. Consent to the terms agreed upon in the course of the negotiations is given by the public prosecutor or person so authorized by him.

The negotiations refer to the harmonization regarding the obligatory elements of the plea agreement.[10] Therefore, the provision of the agreement containing the description of the criminal offense and the confession of the defendant must contain a detailed description of the criminal offense and a full confession related both to the factual description of the events, from which the elements of the body of the criminal offense, i.e. criminal offenses, are derived, and to their legal qualification. The confession cannot be partial, conditional or incomplete. Also, other evidence must also exist, not in conflict with the confession.

An important element of the agreement is the consent of the defendant and the prosecutor on the level of punishment and other criminal sanctions that will be imposed on the defendant. When negotiating the level of punishment and other criminal sanctions, the public prosecutor must take into account the rules of criminal law related to the determination of the punishment referred to in Art. 54 of the Criminal Code[11], the rules on the legal limitations for the mitigation of penalties referred to in Art. 57 of the CC, as well as the conditions for pronouncing a suspended sentence and other criminal sanctions. All circumstances from Art. 54 of the CC, i.e. Art. 56 of the CC, as well as those based on which the remittance from punishment is carried out (Art. 58 of the CC), must be established, especially when it comes to especially mitigating circumstances that justify the application of the institute of penalty mitigation.

10 The plea agreement contains the following: 1) a description of the criminal offense which is the subject-matter of the charges; 2) a confession of the defendant that he committed the criminal offense that is the subject-matter of the agreement; 3) an agreement on the type, extent or scope of the penalty or other criminal sanction; 4) an agreement on the costs of the criminal proceedings, on confiscation of pecuniary benefits from the crime and the restitution claim, if one has been submitted; 5) a statement on the parties' and defence counsel's waiver of the right to appeal against a decision with which the court has accepted the agreement in its entirety, except in the case when the judgement is not related to the agreement or if there are reasons for the criminal proceedings to be suspended and 6) the signatures of the parties and the defence counsel

11 "Official Gazette of RS", No. 85/2005, No. 88/2005, No. 107/2005, No. 72/2009, No. 111/2009, No. 121/2012, No. 104/2013, No. 108/2014 and No. 94/2016. Hereinafter referred to as: CC.

In addition to the type of criminal offense and the prescribed punishment for the criminal offense which is the subject of the negotiations, the public prosecutor must also bear in mind the following circumstances: the previous life of the defendant, his previous convictions, i.e. recidivism, his conduct after the committed offense, degree of remorse, incentives, motives, health condition, family situation, financial situation, etc. The public prosecutor is obliged to obtain information on the above circumstances and, as a rule, the facts regarding these circumstances must be known prior to the commencement of the process of negotiating an agreement and used as guidelines during the negotiations and conclusion of the plea agreement. In this sense, the public prosecutor is obliged to obtain a report from the penal and misdemeanour records for the defendant. When it comes to the proposal of a fine, whether in daily amounts or in a fixed amount, as well as in the event of a restitution claim, it is necessary for the public prosecutor to obtain the information on the financial situation of the defendant.

The public prosecutor and the defendant must settle on the type and measure or extent of the criminal sanction in the agreement. If a penalty is proposed for several criminal offenses, the agreement must indicate a specific penalty for each offense, followed by a single penalty, in accordance with the rules on the determination of a single penalty referred to in Art. 60 of the CC, in order for the court to be able to assess whether the agreement is lawful in relation to the proposed criminal sanction.

When negotiating the level of punishment and other criminal sanctions, the public prosecutor must take into account the penal policy of the competent court in relation to the criminal offense that is the reason for conducting the negotiating procedure for the conclusion of the agreement. In this regard, the appellate public prosecutor's offices are obliged to draft and submit to the public prosecutors' offices in their appellate area, an analysis of the penal policy, twice a year. The above analysis provides data on the penal policy of the competent court, i.e. data on the legally pronounced criminal sanctions for specific criminal acts for which plea agreements are negotiated.

Another obligatory element of the agreement is the costs of the criminal proceedings. If the agreement has been concluded, thus avoiding the long-running criminal proceedings, the public prosecutor may reach an agreement on the exemption from the costs of the criminal proceedings with the defendant, if the defendant is of poor financial situation or for other justified reasons.

If material gains have been obtained by the criminal offense, the provision on their seizure is entered into the agreement.

A provision of the agreement may, in accordance with the provisions of the CPC and the Law on Obligations, determine the type, amount, time limit and manner of realizing the restitution claim, or provide that the agreement shall have no effect on the rights of the injured party to the realization of the restitution claim. The agreement will provide that the defendant will, fully or partially, in-

demnify the injured party for the value requested by the restitution claim, or that the restitution claim will be discussed in civil proceedings.

Given that the legislator has also provided, as an obligatory element, the waiver of the parties and the defence counsel of the right to appeal against a decision by which the court has fully accepted the agreement, except in the cases when the judgement is not related to the agreement or if there are reasons for the criminal proceedings to be suspended, it is necessary to enter this statement into the agreement.

In the end, the plea agreement is signed by the public prosecutor, i.e. deputy public prosecutor, the defendant and his defence counsel.

A plea agreement may also contain some optional elements.[12]

If the defendant is charged with several criminal offenses, the parties may agree that the public prosecutor shall refrain from criminal prosecution for some of these offenses, if this proves to be expedient in terms of achieving the purpose of the plea agreement, in the circumstances of the given case, whereby the reasons are entered into the official note.

The criminal offense, or criminal offenses for which the public prosecutor has given a statement on desisting from criminal prosecution, not covered by the plea agreement, will be an integral part of the indictment submitted to the court together with the agreement.

The law provides a possibility to determine obligations – measures referred to in Art. 283, p. 1 of the CPC, for the defendant, in the course of the negotiations, in relation to the criminal offenses that are the subject of the agreement. Bearing in mind that the condition for determining these obligations by a plea agreement is that, with regards to the nature of the obligations, it is possible to commence their fulfilment prior to the submission of the agreement to the court, when the defendant and the public prosecutor reach an agreement on the application of one of the listed obligations or measures, it is necessary for the defendant to submit proof of commencing the fulfilment of these obligations to the public prosecutor.

The agreement may specify which property originating from the criminal offense will be seized from the defendant. Even though, in general, the possibility of an agreement of any kind exists here as well, it is considered unacceptable to contract the possibility of retaining the obtained material gains in the agreement (*Илић et al.*, 2013: 723).

The plea agreement is considered concluded when it is signed by the public prosecutor, i.e. deputy public prosecutor, the defendant and his defence counsel. The public prosecutor submits the signed agreement to the competent court for further action, along with the indictment, the evidence that is not in conflict with the confession and possible proof of the commenced fulfilment of obligations referred to in Art. 283 of the CPC.

The Republic Public Prosecutor's Office has established a control regime over the concluded agreements. Namely, the first instance prosecutor's office that con-

cluded a plea agreement is obliged to inform the Republic Public Prosecutor's Office on the case in which this institute has been applied, through its regional appellate prosecutor's office, in a manner in which, upon the completion of the procedure for the conclusion of the agreement, it submits, with the memo, all submissions and documents related to the specific procedure, from its beginning to the end, regardless of the manner of its completion, along with the legally binding court decision rendered in the procedure for the verification of the agreement (memo of the Appellate Public Prosecutor's Office in Novi Sad No. A 84/14 of 03/20/2014). In this way the Republic Public Prosecutor's Office supervises the work of the prosecutor's offices in the implementation of the conclusion of the agreement, thus avoiding potential unlawfulness, and monitors and examines the practice of the prosecutor's offices regarding the plea agreements.

SOME CONTROVERSIAL ISSUES FROM COURT PRACTICE REGARDING THE IMPLEMENTATION OF THE PLEA AGREEMENT

For a certain time in practice it was questionable whether the implementation of the agreement is allowed in summary proceedings (where there is no investigation stage), bearing in mind the provision of Art. 313, p. 1 of the CPC, according to which the public prosecutor and the defendant can conclude a plea agreement from the moment of issuance of an order to carry out an investigation, until the conclusion of the main hearing. A literal interpretation of this provision would mean that the application of the agreement is not possible in cases where only certain evidentiary actions are carried out, i.e. where there is no investigation. However, according to the opinion of the Working Group of the Appellate Public Prosecutor's Office in Novi Sad, given in the report No. A 168/13 of 10/09/2013, the conclusion of an agreement is allowed in this situation as well, which is in accordance with the purpose which was intended by the introduction of this institute. Namely, a wider interpretation is more in line with the *ratio legis* of the plea agreement, according to which the conclusion of the agreement is always possible, in the summary proceedings as well as in the general criminal procedure, when the indictment is filed directly (Škulić, Ilić, 2013: 69).

The dilemma in court proceedings arose in a situation in which, in a plea agreement, the public prosecutor and the defendant reached an agreement that the court shall pronounce a safety measure of compulsory drug addiction treatment to the defendant, without subjecting the defendant to an expert examination during the investigation, meaning that the pronouncement of said measure was not proposed by an expert, nor was any medical documentation indicating that the defendant is a drug addict submitted with the agreement. At the sessions of the Criminal Department of the Appellate Court in Novi Sad held on 10/29/2014 and 10/30/2014, a view was adopted that, in this situation, there are conditions for the agreement to be rejected in the sense of the provision of Art. 318, p. 1, item

2 of the CPC, since the condition from Art. 317, p. 1, item 4 of the CPC has not been met, given that the criminal sanction, which is a safety measure of medical nature, in relation to which the public prosecutor and the defendant have concluded the agreement, was not proposed in accordance with the law. We consider this view to be correct, because it is our belief that, for each element envisaged by the agreement, there must be a factual basis in the case file. In the described situation this was not the case, since the agreement between the prosecutor's office and the defendant in this part was not based on any evidence that would indicate that the safety measure needs to be imposed on the defendant.

At the same session, an issue of how to act in a situation in which the public prosecutor and the defendant, in a plea agreement, stipulate that the drugs, money, telephones or weapons are to be seized from the defendant, when these objects are not in the deposit of the prosecutor's office or the court, was also discussed, i.e. whether a judge can impose a measure of seizure of objects, without actually seeing said object. Similarly to the previous case, it is necessary to have evidence in the case files that the said objects have indeed been seized (e.g. a certificate on the seizure of objects) and that the seized objects are related to the committed criminal offense, and that the obtained evidence casts no doubt on this fact. In this case it is irrelevant if these objects are in a court deposit or possibly stored by another state authority.

A controversial issue of applying the provision of Art. 406, p. 1, item 5 of the CPC, i.e. of presenting the contents of the testimony of a co-defendant, also arose in practice. Specifically, if several persons were indicted in one proceeding and separate proceedings were then initiated for some of these persons, for certain reasons, or if they were tried *in absentia*, whether such persons can be examined as witnesses or should the contents of the testimonies of co-defendants, for whom the procedure has been completed, be presented by applying the said legal provision?

According to the stance of the Supreme Court of Cassation from the session held on 05/13/2014, there are three procedural situations in which this issue arises as controversial. First, a situation in which the proceedings were conducted against several persons, and then repeated against the defendant who was tried *in absentia* (the proceedings have been finally completed against the co-defendants). In this procedural situation, the provision of Art. 481, p. 2 of the CPC is applied, according to which the accomplice of the defendant who has already been convicted cannot be questioned or confronted with the defendant in the repeated proceedings, but instead the presentation of the content of the testimony of the convicted accomplice should be performed in accordance with Art. 406, p. 1, item 5 of the CPC, whereby the judgment cannot be based exclusively or to a decisive extent on such evidence.

The second procedural situation occurs when several persons are indicted, but the verdict against one person is abolished in the appeals procedure, while the verdicts against the others are confirmed and become enforceable, so the ques-

tion arises as to whether the co-defendants, whose verdicts have become final, can be examined as witnesses?

The third procedural situation occurs when the procedure against several co-defendants is separated (irrespective of whether one of the proceedings has been legally terminated or two proceedings are in progress).

Considering that the legislator's intention was to avoid the duplication of the process roles in the given procedural situations (that the person becomes both the defendant and the witness), the Supreme Court of Cassation is of the view that, in these three procedural situations, the defendants cannot be examined as witnesses, but that instead, the transcripts of the contents of their previous testimonies should be presented in the manner provided for by the provision of Art. 406, p. 1, item 5 of the CPC, i.e. so that the transcripts of their testimonies are read, and if the panel considers it necessary, the president of the panel will summarize their contents or read them. In other procedural situations, apart from the ones described above, guided by the principles of immediacy and contradiction, the court is not obliged to apply this provision, but must explain in detail and clearly justify such a decision. In the above sense, the co-defendant whose criminal proceedings have already been completed by a legally binding judgement rendered under the plea agreement cannot be summoned and re-examined at the main hearing, but instead his testimony should be presented by applying the provision of Art. 406, p. 1, item 5 of the CPC (response of the Criminal Department of the Supreme Court of Cassation of 03/31/2014).

In practice, the courts have interpreted the permissibility for the court to determine that the sentence of imprisonment of up to one year, determined by a plea agreement, is to be enforced as house arrest, in a situation where the public prosecutor and the defendant did not agree that the prison sentence will be so executed, in various ways. In part of the practice, there is an attitude that there are no obstacles for the court to determine this manner of execution of the prison sentence.[13] On the other hand, in court practice there have also been attitudes that the court is not authorized to act in this way, so the controversial issue was referred to the Supreme Court of Cassation.

According to the legal understanding of the Criminal Department of the Supreme Court of Cassation, determined at the session held on 09/28/2015 and verified on 11/09/2015, the sentence of imprisonment of up to one year, which will be executed as house arrest, must be proposed in the written plea agreement between the parties which is submitted to the court, and the court that is deciding on the agreement is authorized to accept it if it has been proposed by the concluded agreement in accordance with the criminal law and other laws. If this is not provided for in the submitted plea agreement, the deciding court is not authorized to independently rule that the imprisonment sentence be served as house arrest in the verdict accepting the agreement, not even following a consensual, oral proposal of the parties at the hearing at which a decision on the agreement is

13 See: Турањин, 2016: 145 – 146.

being reached, nor if it is of the opinion that the conditions for determining the so-called house arrest have been met. Therefore, the view is that the court must not exit the framework set forth by the agreement.

Even though in the agreement, in general, there is a possibility of negotiations of any kind with respect to the seizure of material gains as well, it is considered unacceptable for the agreement to allow the possibility of retaining the acquired material gains (*Илић et al.*, 2013: 723). However, in court proceedings, cases have been noted in which the court has, contrary to the imperative provisions of criminal substantive law, accepted an agreement, even though the agreement excluded the implementation of obligatory seizure of means intended for or used for the commission of a criminal offense. In one case, the defendants A.A. and B.B. were found guilty by a verdict reached on the basis of a plea agreement, for the criminal offense of an illicit crossing of the state border and attempted people smuggling in co-perpetration referred to in Art. 350, p. 2 in relation to Art. 30 and Art. 33 of the CC. However, the agreement did not include a provision stating that the means intended for or used in the commission of this criminal offense will be seized, which is obligatory in the sense of the provision of Art. 350, p. 5 of the CC, and in that sense there was no possibility for the parties to exclude the application of this norm of the criminal law which is imperative in nature. That is why the Supreme Court of Cassation found that, in this case, the law was violated in favour of the defendants, since the court should have rejected such an unlawful plea agreement (Verdict of the Supreme Court of Cassation No. Kzz 979/2017 of 10/11/2017).

In practice, the dilemma arose as to whether the public prosecutor can be obliged by an agreement to provide a "positive opinion", i.e. to agree to a release on parole, if the defendant files a motion for a release on parole. It is clear that the prosecutor's office cannot assume this type of obligation, because that would mean undertaking obligations that depend on future uncertain circumstances. On the other hand, this would obstruct the very institute of parole. Despite the fact that the consent of the prosecutor's office is not a condition for passing a court decision, it is our belief that such a determinant should not be found in a plea agreement. However, this is not an obstacle for the prosecutor's office to accept the obligation to give consent for the defendant's release on parole, if and when the legal requirements for the defendant's release on parole become fulfilled (Трешњев, 2013: 248). Such a solution has found its application in court practice, so, in addition to the obligatory and optional elements, this circumstance can also be provided for in the agreement (e.g. Decision of the Appellate Court in Belgrade Kž2 Po1 No. 212/12 of 05/22/2012).

The starting point of each agreement is the statement of the defendant by which he confesses to committing a criminal offense of which he is charged. The confession should also include the subjective and objective characteristics of the criminal offense, as well as its legal qualification.[14] In that sense, the confession of

14 In theory, two groups of motives which guide the defendants in giving confessions have

the defendant, as an essential element of the agreement, must be complete, voluntary, conscious, and supported by other evidence (Бајовић, 2009: 168). However, the question arises as to whether the defendant can withdraw the confession given under the agreement, and if he can, what the fate of the agreement is in that situation. The answer to the first part of the question arises from the provisions of Art. 68, p. 1, item 2 and Art. 86 p. 4 of the CPC. Namely, it is stipulated that the defendant, during the hearing, has the right to admit or not admit guilt, and that he may withdraw his previously given confession, whereby the proceeding authority may invite him to state the reasons for doing so. Therefore, there are no impediments for the defendant to revoke his confession during the proceedings, even in the case of an already concluded agreement. If this happens, the court will reject such an agreement, because this will cause one of the elements, which the agreement is based on, to cease to exist. Such a case also occurred in court practice: a stance was taken that the defendant can revoke his confession even after the agreement has been signed, and that the court is to reject an agreement if the defendant declares that he is revoking his confession at a hearing scheduled in connection with the agreement (Decision of the Higher Court in Belgrade – War Crimes Department SPK. Po2 No. 1/12 of 05/18/2012).

CONCLUSION

There is no doubt that the plea agreement has, within a relatively short period of time from its introduction into our criminal procedural legislation, become a very common and efficient way of ending the proceedings. In addition, there is a noticeable growing trend when it comes to the application of this institute. We believe that this acceptance of the agreement stems from several circumstances.

The prosecutorial organization has, in the previous period, organized several seminars on the topic of the plea agreement, which, in addition to the normative and theoretical aspects of this institute, also consisted of workshops that represented the simulations of the procedure for the conclusion of the agreement. An Obligatory Instruction of the Republic Public Prosecutor was also issued, regarding the application of the agreement, in order to achieve the legality, effectiveness and uniformity of work of the prosecutor's offices in its implementation, control mechanisms have been established and working groups have been formed at the appellate public prosecutor's offices in order to monitor the implementation of the CPC, which have, by resolving the issues of the lower prosecutor's offices, solved practical dilemmas and thus motivated and encouraged the prosecutor's offices to continue with the application of the agreement.

been emphasized: an awareness of the existence of other evidence, for which it is assumed that they can lead to a conviction in and of themselves, and expectation of a lower sentence. Empirical studies have not confirmed a significant effect of the defendant's prognosis of the inevitability of a conviction due to other evidence, on his decision to give a confession. This means that the provided confessions were motivated by an expectation of a more favourable sentence (Бркић, 2014: 325).

Judicial officials have also attended seminars on this topic, and through the rationales of the answers adopted at the sessions of the Supreme Court of Cassation and the appellate courts, as well as the actions of higher courts, views have been adopted regarding controversial legal issues in court practice, in relation to the implementation of the agreement.

The defence counsels, as obligatory participants in the procedure for the conclusion of the agreement, have also attended seminars in this area, and a Handbook for Lawyers in relation to the expertise of representation in criminal proceedings, which also relates to the plea agreement, has been published as well (Lochary, 2013: 8– 12).

It is our belief that the joining of said circumstances, along with the views of the professional public, which are, with certain reserves, almost unanimously oriented in favour of the plea agreement, have created the preconditions for this institute to be accepted in our law.

Last but not least, it should be noted that the legal formulations of the provisions related to the plea agreement, despite certain deficiencies and vague points that were not the subject of this paper, represent a generally good foundation for its implementation.

Of course, not all controversial situations that may arise from the application of the agreement in the future have been solved during its implementation thus far. However, it was demonstrated that the previous difficulties in practice were not insurmountable and that they did not pose an obstacle to the ever-increasing application of the agreement.

We are of the opinion that the application of the plea agreement, with certain improvements of the legal text, and with the continuation of the activities of the judicial and prosecutorial organization in the field of solving practical problems in the conclusion and application of the agreement, will continue its growing trend, and that the plea agreement will continue to justify its purpose as an institute that contributes to faster and more efficient criminal procedures.

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