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**Specification of introduction of agreements into
the criminal process of Ukraine and foreign countries**

Abstract: The article studies basic provisions of institution of conciliation agreements, plea-bargaining agreements in comparison with effective institution of agreements in foreign countries, analyzes its application, indicates positive and negative aspects of implementation of this institution in criminal process of Ukraine.

Keywords: institution of conciliation agreement; of plea-bargaining agreements, mediation; principles of conciliation, restorative justice.

Objective of studies: research of agreements institution in criminal proceedings in Ukraine and origin thereof intends at facilitation of democratic manner of resolution and more loyal approach to the suspect and the accused. The important condition of implementation of such institution is to eliminate all the legal collisions, which have emerged after introduction into the Code of Criminal Procedure, since the agreement-based institution of criminal proceeding is not perfect enough; its certain provisions indicate violation of constitutional rights and freedoms of the citizen.

One of the most talked over and most revolutionary innovations of the new Code of Criminal Procedure of Ukraine is introduction of the new institution which has not been known to the Ukrainian criminal procedure before – criminal proceedings based on agreements.

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Enshrining the institution of agreement-based criminal proceedings in the new edition of the criminal procedure law is a progressive step for Ukraine towards European and world generally accepted standards of criminal justice and is a manifestation of national laws harmonization with EU legislation. This institution is important for jurisprudence, because it leads to a reduction in terms of criminal proceedings, significantly reduces the burden on the courts, saves financial resources of the state and most importantly – facilitates justice, protecting the rights and legitimate interests of a person. That is how the Code of Criminal Procedure of Ukraine introduced new rights and opportunities for those who committed the crime, but regrets it and tries to redeem it. In particular, the possibility of proceeding on the basis of agreements is provided for them.

However, the introduction of the agreements institution into the Ukrainian legislation requires full investigation of this institution and the necessity to eliminate possible negative consequences for the parties involved in the agreement conclusion.

Introduction to the specific order of criminal proceedings on the basis of the agreements into the criminal process is a step towards further humanization of criminal proceedings, approximation of national legislation with the EU laws.

Primary objective of this publication is to specify a range of problematic issues concerning specific procedure of criminal proceeding based on agreements within the litigation proceedings, and to outline means of improvement of the CCP terms.

Acceding to the Council of Europe on November 09, 1995 Ukraine committed itself to reform criminal procedure in terms of quality. International legal acts, practice of the European Court of Human Rights, and recommendations of the Council of Europe in this domain became the basis for that. The key objective of reforming the criminal procedure is to bring it in compliance with international principles and standards taking in consideration historical traditions and real condition of state and social development of Ukraine. The task was assigned not only to reform most institutions of the criminal procedure, but also to implement foreign experience with the maximum quality in order to optimize criminal prosecution. Such work should result in deprivation of criminal procedure of formalism and

bureaucratization. Introduction of such institution as the agreement between the prosecutor and the suspect or the accused should be deemed one of leverages of acceleration of procedures of Ukrainian criminal procedure.

Agreements are a totally new institution for criminal procedure of Ukraine. However, analogues of conciliation agreements between the victim and the suspect or accused may be tracked down on example of the settlement agreement within the civil, commercial (including bankruptcy proceedings), administrative procedures which are formal written arrangement of parties to the litigation entered into for the purposes of dispute resolution.

It should be noted that agreements in the criminal process of Ukraine undoubtedly have the right to exist. However, we should mention that various kinds of agreements have been used in criminal proceedings by leading foreign countries for quite some time.

Plea-bargaining agreement in a criminal process in the modern sense was first introduced in the United States. This is an agreement between the prosecutor and defense attorney which results in termination of the prosecution (despite sufficient evidence) or giving specific punishment promises in exchange for the willingness of the accused to admit guilt. This may be an agreement between the prosecutor and defense attorney (the defendant) which constitutes the prosecution's denial of the indictment in more serious delict (*e.g.*, malicious murder) if the defendant admits his guilt in committing a less serious crime (*e.g.*, murder).

The institution of agreements in the criminal process of Ukraine aims to promote democratic resolution of issues and a more loyal approach to the suspect and the accused. An important condition for the implementation of such institution is to eliminate all legal conflicts arising from introduction thereof. With this also a number of issues should be solved related to the conceptual approach to symbiosis of best features of the Anglo-Saxon and Romano-Germanic legal systems in order to create the model most suitable and successful for our legislation that could radically change the legal procedure for resolving conflicts in a qualitatively new and more democratic direction.

Studying the experience of foreign countries (England and Wales, Italy, Spain, Germany, Russian Federation, USA, France and some CIS countries) proves its effectiveness. However, the model of plea-bargaining agreement enshrined in the CCP of Ukraine is not a copy of any foreign versions, as it takes into account the peculiarities of Ukrainian legal system.

First of all, it should be noted that the reduction of proceedings and preliminary investigation is reflected in Recommendation No. 6 R (87) 18 of the Committee of Ministers of Council of Europe to Member States of September 17, 1987 “Concerning the Simplification of Criminal Justice”. Sub-clause 6, clause a. 6 *Judicial investigation prior to and during the hearing* of the document recommends to member states to implement the procedure of “the defendant's plea” (so-called plea-bargaining agreement) or similar procedure if constitutional and legal traditions allow it.

However, it is necessary that the accused appear in court at an early stage of the proceedings to declare publicly that he accepts the charges against him. Thus, the need for judicial review of that voluntary agreement is stipulated. The trial court should be able to decide in these cases, whether it's possible to omit the whole process of investigation or part thereof and immediately begin consideration of the offender, sentencing and, if possible, the question of compensation.

But the origins of system of this type of agreements as plea-bargaining agreement should be searched for in Anglo-Saxon jurisprudence, where the said institution appeared in the XIX century and has over 150 years of practice. Plea agreement is the dominant institution of criminal proceedings in the United States, moreover, it is not an element that complements the criminal justice system, but in fact is this system. Institution of plea-bargaining agreement is spread in the states of classical accusatory criminal process, especially in England and the US, where 70-90% of all criminal cases are resolved in a simplified manner by signing the plea agreement between the prosecution and defense. Simplified procedures of criminal cases consideration are gaining more development in European countries, including

Germany, Italy, Spain, Benelux countries, Poland, Czech Republic, Slovakia, and Russia.

The most important feature of Anglo-Saxon model of plea-bargaining agreement in this country is almost absolute discretionary nature of powers of the prosecution. Thus, the most characteristic features of such agreement in the US are:

a) the refusal of either party from the "competition" with its procedural opponent affects judgment on the merits: if the criminal prosecution is refused from by the prosecution, the court is not entitled to bring a conviction, even if it is convinced of the validity thereof, and if the defendant pleads guilty, the court, seeing the voluntary plea, shall bring the verdict of guilty and the infliction of punishment without judicial investigation;

b) the individual's admission of guilt completely relieves the prosecution of the burden of proof;

c) if the accused and the prosecutor did not agree during the negotiations, the accused has the right to engage in such negotiations directly with the judge;

d) if the individual waives the agreement, the court, most frequently with a jury, rules on the more severe punishment to the accused.

In addition, within the American criminal proceedings two types of agreements are concluded – plea agreement and agreement on cooperation with the investigation (it can be combined with the plea or not, when there is a so-called transformation into the witness of the Government).

In civil law countries, the plea agreement has a number of fundamental differences, due to the fact that the powers of prosecution are limited by law, including the principles of expediency (France, Netherlands) and legitimacy (Germany, Italy), which are basis for the prosecutorial authority in the exercise of criminal prosecution. It also should be noted that the court proceedings of some European countries mean not the plea agreement but conformity with the prosecution (e.g., *conformidat* in Spain, *abbreviato* in Italy).

In Germany, where the institution of plea-bargaining agreement was actually introduced in 2009, its conclusion does not relieve the prosecution of proving all

material facts of the case and does not replace the court (a similar practice existing in Spain, in contrast to the US practice). Also, in contrast to the US model before making a plea agreement, a defendant has the right to study the case materials in order to, accordingly, be aware of the prosecution's evidence base, to realistically assess own chances in negotiations. Plea agreement in Germany, in particular, has the following features:

a) punishment can include only fines, imprisonment for up to one year, limitation of special rights and confiscation of proceeds derived from the offense;

b) the prosecutor must obtain permission from the judge for the document to come into force, after which it is transferred to the defendant, who has 14 days to accept the offer or choose the trial of the case on a general basis.

In France, as in the US, the majority of registered cases of crimes do not end in litigation (institution of agreements was introduced in the Code of Criminal Procedure in 1999).

Plea agreement in France is characterized in the following facts:

a) the agreement may be concluded only in the specific category of crime (as a measure of responsibility for them a fine or imprisonment for up to 5 years is prescribed);

b) the accused is given the opportunity to conclude a plea-bargaining agreement or to abandon the procedure within 10 days;

c) the reduced judicial procedure of the case takes two stages: the judge's listening to the accused, criminal charges management (in fact it is the judicial supervision of the agreement made); the punishment comes into force when the judge approves it (and not approves the agreement reached between the prosecutor and the accused as provided for in Germany).

In France and Germany involvement of the defense attorney in the conclusion of the plea is mandatory. Institution of an agreement between the accused and the prosecutor exists also in some CIS countries. According to the CCP of Republic of Moldova, at the conclusion of an agreement with the prosecution the accused party is not free from the burden of proof; moreover, the law prohibits the judicial authority

to engage in negotiations. CCP of the Republic of Uzbekistan stipulates the following on plea agreements: one of conditions of the plea is lack of objections on the part of the victim; such plea agreement can be entered into both during the pre-trial and trial. In the Republic of Uzbekistan the plea agreement occurs in most cases. Appropriate legal institution is stipulated by the CCP of Georgia of 2009. The above innovations are available also in the procedural law of the Russian Federation – 2009 Law no. 141 FZ of the CCP of Russian Federation is supplemented with chapter 40-1 *Special procedure for making a judgment at the conclusion of the pre-trial agreement on cooperation*. Analysis of the Russian legal institution indicates its similarity to the American agreement as seen in the conditions of application, the rules of implementation, etc. However, this similarity does not give grounds to conclude on the common nature of American and Russian models of the agreement. As for their differences, for example, in Russia the court's position is more active than in the US, the Russian agreement procedure is used in the narrower category of cases.

Thus, it is clear that the introduction of plea agreement institution, of course, can provide much greater efficiency of the criminal prosecution of any country. In summary, it should be noted that the CCP of Ukraine was subjected to two international expert evaluations and discussed at the joint meeting of experts of the Council of Europe and representatives of Ukraine in Strasbourg and Kyiv. The main problem that our nation may face in the practical application of such institution as the plea-bargaining agreement is possible corruption in the activities of prosecutors and judges. In this regard, scientists and practitioners of law continue to work hard to find tools that would help to minimize them. Procedural control over the exercise of rights of a person who wishes to make a plea agreement should take place on the part of both the prosecutor and the judge directly.

Such an institution as “plea-bargain agreement” is developed in the states of classical accusatory criminal process, especially in England and the US, where 70-90% of all criminal cases are solved in a simplified manner by signing the plea between the prosecution and defense. Such resolution of the case is seen as an important condition for preserving the effective functioning of the judicial system of

the US as it allows avoiding full consideration of the case, which reduces the burden on courts and judges.

Thus, according to S. Velyanovskiy, in the US 90% of criminal cases the accused pleads guilty. Approximately 50% of pleas are the result of an agreement between the accused and the prosecutor [9].

According to L. Freedman, in some regions of the US up to 90% of defendants choose the “plea-bargaining agreement” [8 p. 314]. According to V. Makhov and M. Pieshkov, more than 90% criminal cases in the US do not go through the procedure of the trial. In some cases, plea entails a simplified procedure in court, and in others where pre-trial investigation is unable to collect evidence implicating the accused, without the accused’s pleading guilty, the so-called “plea-bargaining agreement” is entered into [2, p. 5].

However, D.V. Filin in his works notes that American scientists associate the “plea-bargaining agreement” not with the inability to establish the circumstances of the criminal case, but, above all, with the desire of the accused and the prosecutor to avoid unpredictable jury, especially in those cases where the result is determined by talent and professional skills of the lawyer and the prosecutor. This problem gains its relevance for the CIS as well, where the judicial reform is made, one of the objectives of which is to return to such form of justice as the jury [7].

The practice of plea agreements had developed in the United States not only in order to avoid cumbersome judicial proceedings. At the beginning of the century jury could make verdicts for five criminal cases a day. However, after 60-ties there has been a so-called “revolution of criminal procedure” when the rights of the defense have been expanded, so criminal proceedings became long and difficult. In this case, there is not enough time for establishing the truth and the most important is to be on time with resolving a social conflict.

On the European continent the main cause of violation of the rights of the accused to an immediate trial is difficult, pedantic, written registration of the case in the pre-trial stage of the criminal process. So there are a number of reduced

procedures aimed at the elimination of preliminary investigation in cases of minor offenses or when the suspect is arrested at the scene.

Russia has the simplified form of the trial introduced at the legislation level when the defendants all plead guilty in full and their pleas are not challenged, while the judge has no doubt on the guilt of the defendants. Then it's possible to instantly switch to the arguments of parties. But this is not a "plea agreement" in the sense of American practice because jury has to make a verdict.

As law professor Stephen Thaman says in his article, it is similar to what is used in European countries. Thus, informal German agreements are actually agreements on simplification of the trial in exchange for dismissal of the case for some of the crime or reduction of the punishment limits. Such informal negotiations take place in approximately 30-40% of cases and in half of all cases of economic crimes. In these negotiations the accused accepts or rejects requests for investigation of certain evidence, or pleads guilty and thus contributes to a significant reduction of the investigation. At the pre-trial process negotiations are conducted between the defender and the prosecutor for the purpose of limiting the scope of indictment [5].

As shown by the international practice, the most successful procedure is the one that will allow application of similar simplification in all cases involving imprisonment for a term not exceeding five years. Such shortened procedure of the trial is more adversarial than a jury procedure in force, because only evidence presented by the parties will be investigated.

The institution of "plea-bargaining agreement" has been applied in the US for over 150 years. In modern legislation the plea-bargaining agreement got enshrined in Rule 11 (cl. E) of Federal Rules of Criminal Procedure in district courts of the United States (1997). Plea bargaining (plea bargaining) is a written agreement between the accused and the defense attorney, on the one hand, and the prosecution, on the other hand, where the parties agree on the specific solution of criminal case.

Often the essence of this agreement is to ensure that the accused pleads guilty to a less serious crime than he actually did, and in exchange for that the person that

supports prosecution requires a milder punishment than that which would be subject to principal approach to investigation and trial.

Pleading guilty by the accused in the said case under the US law generally entails simplification of further proceedings: preliminary hearing is not a mandatory stage; by concluding the agreement the accused thereby waives the right to trial by jury; the agreement resolves disputes of the parties on the guilt of the accused; there is almost no research of evidence in court; consideration ends with conviction unless the accused refused the plea bargaining and any other significant circumstances arose. Therefore, such an agreement just replaces the jury's verdict of guilt, but also eliminates the adversarial principle and the associated risk of unpredictable process.

The possibility of making plea bargaining applies to all criminal proceedings. Often the accused waives preliminary investigation, which entails milder punishment or reduced scope of the indictment.

However, the most profitable for the American justice system is the rejection of jury's trial which can reach several days and several weeks, and even months. When the death penalty threatens the accused, there is a special procedure for the jury selection, which is sometimes longer than research of proofs and delivery of judgment.

The term *plea bargaining* can be defined as the process during which the accused (defendant) and the prosecutor for the criminal case are developing the same decision on the case. This decision is subject to approval by the court. However, the court is not involved in the negotiations leading to such agreement, and in the US such participation is generally prohibited to the court. Plea agreements are especially advantageous to prosecutors in cases connected with organized crime, as such agreement may lead to the participation of the accused in the investigation and punishment of members of criminal organizations.

International supervisors and experts come to a consensus that most sentences in felony (serious crimes) category in the US are a result of plea agreement obtained as the final result of negotiations or bargaining between the accused and defense.

In this case, the plea is the means by which a defendant may admit guilt and show willingness to take responsibility for their behavior.

Duty of proving guilt in criminal proceedings rests with the public prosecutor, who must prove each element of violation of laws. The accused never has the necessity to prove innocence. The accused is presumed innocent on the stage of a criminal investigation and under the law is not guilty until the recognition of his guilt by the court, admission of guilt according to the plea statement, or failure to contest the charges according to the *nolo contendere* statement – a statement of the defendant that he does not wish to challenge the charges filed. Thus, the power of public prosecution is based not on whether the accused has committed the offense but on the evidence that the state has based on which it can be proved that the accused has committed this crime.

In this case, when a plea-bargaining agreement is made, there is a risk of the acquittal for the state.

For the defendant, the court may end up considering several charges related to the same offense; during the hearing of the case evidence can appear that burden the guilt thus affecting the severity of the sentence. Typically, articles of the Criminal Code provide a wide range of penalties, from fines to the sentence.

Justice administration in the US is also related to significant expenses, of both public and private entities. The set budgets provided for prosecutors and public defenders carry the heavy burden when the case is being prepared for trial. Thus, both the prosecution and defense are interested in plea.

For years the United States had no single official system of negotiations on the plea-bargaining agreement. System of negotiations on the conclusion of agreements has been recognized as official when in 1974 amendment to Rule 11 of the Federal Law governing criminal proceedings was approved.

However, according to V.D. Filin, plea agreement which operates in the US, under no circumstances can be borrowed to our legislation, because it is contrary to the principle of objective truth and presumption of innocence. It is unacceptable for our legal system and cannot be proposed for implementation within the criminal

procedural law of Ukraine [7]. A different matter is a reasonable compromise, the achievement of which, without undermining the principles of objective truth, presumption of innocence, justice, law and other applicable principles of criminal justice, can help to eliminate the negative effects of crime [7].

It is desirable that agreements are made subject to full ensuring the right to legal assistance, *i.e.*, involvement of the defender of the suspect or the accused. This applies particularly to plea-bargaining agreement, because the suspect or the accused, when concluding this agreement, unconditionally acknowledges their guilt and agrees imposing a certain type of punishment. He thus renounces his right to judicial hearing of his case, in which the prosecution has to prove his guilt. Moreover, the defense will subsequently lose the right to appeal and cassation of the approved the sentence (subject to certain exceptions referred to below). Meanwhile the prosecutor by entering into the agreement gets exempted from the obligation to conduct full investigation and prove the guilt of the suspect or the accused in court.

To sum it up, we can deduce that when exercising their right to make an agreement within the criminal proceedings, the parties are competent to act only in the scope and according to the procedure, as stipulated by the Code of Criminal Procedure of Ukraine.

Thus, the introduction of agreements institution simplified greatly the procedure for consideration of certain categories of criminal cases, which will facilitate reducing the term of prisoners remand, common procedural time limits of criminal cases consideration and saving budgetary spending allocated to the administration of justice in criminal cases, as well as reducing the burden on the judicial and law enforcement system.

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