Gordana Lazetic-Buzarovska, PhD
Boban Misoski, MPhil

Plea Bargaining in the New Law on Criminal Procedure in Republic of Macedonia

Key words: plea bargaining, sentence bargaining, guilty plea, Macedonian Law on Criminal Procedure, accelerated criminal procedure

1. Introduction

On first glance it might appear that the newly proposed decisions of the New Law on Criminal Procedure[1] are opposed to the basis of the classical criminal procedure well known and familiar to the European legal systems. But on the other hand we are witnesses of the ongoing trend during the last two decades when many of the European states have introduced in their criminal procedure several practices that are traditionally more common or have originally been discovered and are trademarks to the Anglo-American adversarial criminal procedure.

Latest trends of mixing the two traditional types of criminal procedures may be explained as a reaction of the european - continental criminal procedure to the public impressions and allegations that european – continental criminal procedure is too formal, rigid, overburdened with unnecessary technicalities, inefficient and not capable to serve equal justice to all. These characteristics of the european – continental criminal procedure have also been accentuated during the measuring the effectiveness of the criminal procedure, as a result of the permanent quest of theory of the criminal procedure for increasing the court efficiency and service of the justice to the citizens in shortest possible time frame. In order to meet these desirable stand points of the criminal procedure European states that traditionally deem their criminal procedure as european -continental or mixed (unlike their US colleagues that consider it as a inquisitorial criminal procedure) have reached toward the traditional institutions of the adversarial criminal procedure that is common for Anglo – American legal tradition. In this sense, in criminal procedures from legal systems that are traditionally closer or are even pillars of the european – continental (inquisitorial) criminal procedure, we can find, with certain modifications, traditional adversarial institutes such as penal order, delivering sentence upon the requests of the parties and plea bargaining procedure.

This is due to the fact that modern aspects of the criminal justice are characterized by permanent and dynamic reform of the criminal procedure in several directions, just to reach their goal – producing equal access to all to the justice system in shortest time[2].

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[1] New Law on Criminal Procedure, has been enacted from the Macedonian Parliament on 18-th November, 2010. Published at the Official Gazette of the Republic of Macedonia, No. 150/10.

[2] Damaska Mirjan, Negotiated Justice in International Criminal Courts, pp. 1019, Journal of International Criminal Justice 2 (2004), Oxford University Press 2004.

An immense support of this trend has been the introduction of the Council's of Europe Recommendation No. (87) 18[3]. This Recommendation was in favor of accelerating and simplifying the criminal procedure by introducing several adversarial instruments common to Anglo – American criminal justice system to the European legal systems. These instruments were: accepting the principle of discretion of the prosecutors in charging of the defendants, plea bargaining procedure, penal order and mediation procedure. These instruments were recognized by the Council of Europe as key instruments toward the increasing of the efficiency of the criminal procedures in Europe.

Many of these instruments would mean de-formalization of the criminal procedure, reaching verdict at earlier stages of the criminal procedure and easier access to justice of the participants by diversion of the criminal process to other non-court institutions, such as mediators or even reparation of the damages by the defendant as a precondition for abandoning of the criminal charges and criminal sanction.

Macedonian criminal procedure was also under severe criticism, because of its inefficiency, formality and inadequate protection of the rights of the participants in the criminal procedure, due to over burdened courts with pending cases.

The way out of this situation was accepting the Council of Europe's recommended scenario and reforming the criminal justice system by adopting instruments that are well accepted and known for their expedition and efficiency in reducing the backlog of the court cases and by simplifying the court procedure.

Reform of the criminal justice system in Macedonia consisted of reform of both Criminal Code and Law on Criminal Procedure. The criminal Code was amended in 2009, but the Law on Criminal Procedure undertook more dramatic changes and it is still in the Parliamentary procedure. Remarkable changes were introduced in the Law on Criminal Procedure and they formed the backbone of the reform of the criminal justice system in the Republic of Macedonia.

This law introduced new practice in criminal procedure, which is closer to adversarial than to mixed uuropean – continental criminal procedure. The New Law on Criminal Procedure has introduced: guilty plea, sentence bargaining and mediation for the first time in criminal justice system in Republic of Macedonia.

Most important novelty is definitely the guilty plea and sentence bargaining due to the fact that mediation as a procedure was already introduced in civil cases and Macedonian legal system has already been familiarized with its positive aspects[4].

[3] Recommendation No. (87) 18, of the Committee of Ministers to Member States Concerning the Simplification of the Criminal Justice.

[4] With the enactment of the Law on Mediation, Official Gazette of Republic of Macedonia, No. 60/2006.

2. Plea bargaining in the Macedonian legal system

Adopting the sentence bargaining as a special form of plea bargaining[5] in the New Law on Criminal Procedure was based on comparative research of the solutions existing in several European states and by using vast experience from these mechanisms in the legal tradition in the criminal procedure in UK and USA. The research was focused on the mechanism for accelerating the criminal procedure in Germany, Nederland, Italy, France, Norway, Croatia, Bosnia and Hercegovina and Serbia, and by using their experience most suitable solutions for accelerating and simplifying the criminal procedure in Republic of Macedonia were adopted in order to increase the efficiency of the criminal courts in Macedonia[6].

However, reformation of the legal system does not mean simple adoption or import of foreign instruments for acceleration of the criminal procedure, simply because in case if these instruments are not adjusted to the legal culture and mentality of the people, than they would be observed as foreign body that is doomed to failure. As a result of this, plea bargaining procedure, as originally regulated in USA could not survive in Macedonian conditions.

Reasons for accepting only one type of plea bargaining – sentence bargaining are located in legal culture in Republic of Macedonia. This means that Macedonian legislators meant that it is better for the criminal justice system to keep the principle of mandatory charge of the defendants by the prosecution service. By keeping this principle it is impossible to have charge bargaining in its original type. This is due to requests for more effective location of the possible misuse of official position from the prosecutors, or in order to reduce possible chances for misuse of the official positions of the prosecutors in cases if they do not obey the principles of the plea bargaining procedure.

On the other hand, benefits from proper use of plea bargaining procedure are multiple: saving courts costs, reducing the backlog of the cases, increasing courts and prosecution efficiency and allowing more time for the courts and prosecution for preparation of the more complex cases, etc. Recognizing these benefits, but having on mind Macedonian legal culture, the New Law on Criminal Procedure accepted only sentence bargaining from the plea bargaining procedure, as lesser but more secure solution for bargaining between the prosecutor and the defendant.

2.1. The sentence bargaining according to the provisions of the New Law on Criminal Procedure

The new concept of sentence bargaining was introduced for the first time in Macedonian criminal procedure with the provisions of the Chapter 29 of the New Law on Criminal Procedure. In this chapter, the

[5] Fisher George, Plea bargaining's triumph: a history of plea bargaining in America, Stanford University Press, 2003, pp. 223; See also: Saltzburg, Stephen A. & Capra, Daniel J. American Criminal Procedure, West Group, St, Paul, Minn., 2000.

[6] Бужаровска/Нанев/Мисоски, Компаративно истражување на решенијата за забрзување и поедноставување на казнената постапка, МРКК, бр. 1/2008.

procedure for enacting a verdict during the early stages of the criminal procedure - the investigation phase reached upon a request of the parties expressed by settlement, is introduced. This settlement takes part between the public prosecutor and the defendant.

Under the provisions that regulate the sentence bargaining in the New Law on Criminal Procedure, the parties can only bargain over the type of the criminal sanction and not over the composition of the indictment. In virtue of this solution, an addition to the Draft - Settlement could only be the request for reparation of the damages submitted by the victim of the crime.

The introduction of this solution was mainly inspired and influenced by the Italian procedure for enactment of the verdict upon the request of the parties (patteggiamento[7]). However, the Italian concept of patteggiamento is not entirely and literally introduced in the sentence bargaining process under the Macedonian New Law on Criminal Procedure, because the Macedonian model contains attributes from both the Italian and the original US concept of sentence bargaining.

The Italian influence in the Macedonian model for sentence bargaining is feasible in the part where the basis of the sentence bargaining is introduced, but the Macedonian model is showing its individuality in the part of application of the sentence bargaining. By doing so, the Macedonian model for sentence bargaining is applicable for every type of crimes and contrary to the Italian model it introduces further protection of the rights of the damaged person.

The resemblance of the Macedonian model of sentence bargaining to the US model of sentence bargaining, defined in Federal Rules of Criminal Procedure[8], is feasible in the part of the evaluation of the Draft settlement by the court and in the part of the participation of the court in the phase of the bargaining between the defendant and prosecutor.

However, the Macedonian model shows some uniqueness by requesting the presence of the defense lawyer during the whole phase of the sentence bargaining, as a measure for precaution for the protection of the rights of the defendant. The acceptance of this traditional adversarial institute of sentence bargaining[9], with several modifications and adjustments towards the Macedonian legal culture, for the first time in the Macedonian criminal procedure provides an opportunity for the parties to reach an acceptable resolution of the case in the earliest phase of the criminal procedure, during the investigation.

This procedure is based upon the prerogatives of the public prosecutor to act by his official duty in prosecuting defendants (article 39). According to this article, he is given the authorization to negotiate in order to find acceptable settlement with the defendant, so that the

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[7] Alesandro D'Andrea, Скратени постапки, Збирка на текстови, Twinning Project Fight Against Organized Crime and Corruption Unit – Public Prosecutors Office, Skopje, 2009, pp. 65-68. See also: Maffei, Stefano, Negotiations on evidence, Negotiations on sentence, (Adversarial experiments in Italian Criminal Procedure), Journal of International Criminal Justice, 2 (2004), p. 1050-1069, Oxford University Press, 2004

[8] Available on the official web page of the US Federal Courts: http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/CR2009.pdf

[9] Articles 483 to 490 of the New Law on Criminal Procedure.

defendant accepts the proposed sentence with several benefits for him/her as a result of the shortening the legal procedure.

The defendant is entitled to express his defense freely and he has the right not to be forced to accept the settlement. The defendant is also released from the obligation to provide any facts that will harm him/her or his/hers close relatives and he has a privilege of non self-incrimination. Also, he has a right to state all of the relevant facts that may benefit his/hers position.

The *Judge of the pretrial phase* acts as a warrant for protection of defendant's rights and liberties during this pretrial phase of the criminal procedure. Under the provisions of the New Law on Criminal Procedure this judicial body is authorized to act upon protection of the defendant's rights during the investigation phase, which is, according to the concept of the New Law on Criminal Procedure, conducted by the prosecutor and the judicial police.

This same judicial organ is obliged to evaluate the proposed settlement, to establish if there are some legal mistakes and faults in sense of factual mistakes and voluntary mistakes of the defendant and to reach the verdict in this early phase of the criminal procedure.

According to the New Law on Criminal Procedure it is possible to initiate a sentence bargaining procedure during the first appearance of the defendant in the court. This procedure takes place in the phase of introduction of the defendant to his/her rights. At the same time, the court will instruct the defendant of his/hers right to bargain over the sentence with the prosecutor.

This is basically the only involvement of the court, and it is limited to the initiation of the bargaining process from sentence bargaining procedure.

Considering the provisions of the Macedonian New Law on Criminal Procedure, sentence bargaining can be essentially divided to two formal stages.

a) First stage regulates the formal conditions for submitting of the settlement and it consists of the following determinations:

- Beginning of the sentence bargaining is not preconditioned by submitting a defendant's guilty plea;
- Sentence bargaining is allowed for every type of criminal act;
- Draft settlement submitted to the court bears consent of both parties of the bargaining process;
- Constituent part of Draft – settlement is the proposed sanction of a certain type and severity. Proposed sanction can be mitigated to the legal minimum for the particular criminal act determined in the Criminal Code.
- By virtue of his authority, the Public prosecutor considers the rights of the damaged person, but the damaged is not an active participant of the sentence bargaining process.
- The presence of the defense lawyer during the sentence bargaining process is mandatory.
- It is strictly forbidden for the judge to be involved or to participate in any kind of action during the sentence bargaining process.

By these provisions, we can notice that Macedonian sentence bargaining process has accepted some characteristics from the original sentence bargaining concepts, but it has adapted them to reach particular (or even unique) Macedonian requests.

The first characteristic is the mandatory presence of the defense lawyer[10] during the sentence bargaining process. With this solution the New Law on Criminal Procedure has expanded the possibilities for mandatory defense during the criminal procedure even in cases where the defendant does not have sufficient funds for mandatory defense. This solution was constructed under the request for efficient protection of the defendants' rights. The Macedonian New Law on Criminal Procedure took into consideration the legal culture and the Macedonian mentality. In order to reach standards such as an equality of arms, protection of the privilege against self-incrimination and protection of indigent defendants it is mandatory to posses assistance from a defense lawyer.

The presence of the defense lawyer is particularly important for protection of the rights of the indigent defendants, as in most cases they will not be aware of the legal consequences of entering into the sentence bargaining procedure.

The second characteristic is the mandatory absence of the judge during the sentence bargaining process. This means that the judge should be introduced with the outcome of the sentence bargaining procedure only at the end, when the Draft – settlement is submitted to the court. Through this solution the judge would keep his non biased position and he would not be affected by the statements given by the parties during the sentence bargaining procedure. This position of the judge also removes his authority to influence the parties, particularly the Public Prosecutor in determining the type and severity of the proposed sanction. This solution is in essence very close to the original and required role of the court during the bargaining process[11].

Finally, the New Law on Criminal Procedure provides additional protection of the rights of the damaged person by allowing this person's claim to be implemented into the Draft – Settlement. If damaged person does not submit his damage request, than he/she is entitled to receive a copy from the verdict delivered upon written settlement for sentence bargaining from the court. Than, the damaged person can exercise his/her rights in a civil procedure.

[10] During the sentence bargaining process the defendant must have a defense lawyer. If the defendant does not have a defense lawyer, than the President of the Court will appoint him a defense lawyer by official duty.

[11] Alschuler Albert W., The Trial Judge's Role in Plea Bargaining, Part I, *Columbia Law Review*, Vol. 76, No. 7. (Nov., 1976), pp. 1059-1154;

b) The second stage contains the provisions regulating the deliberation of the court[12].

This stage is initiated when the parties submit the Draft – Settlement to the court - judge of the pretrial phase and its characteristics are as follows:

- The judge of the pretrial phase has an active role and he enacts the verdict during the investigation of the criminal procedure;

- The draft – Settlement is examined by the judge of the pretrial phase on a special hearing set up to evaluate the legality and voluntarity of the Draft - Settlement. During this court hearing a written record is kept.

- During this hearing for evaluation of the Draft – Settlement, the court initially examines whether the Draft – Settlement is voluntary submitted and examines whether the defendant is aware of, and understands the legal consequences of the court's acceptance of the Draft – Settlement, as well, as the consequences related to the request of the damaged person for restitution of the damages if they are included in the Draft – Settlement. The court also questions the defendant whether he/she accepts the part of the Draft – Settlement where the costs of the criminal procedure are noted.

- The judge of the pretrial phase is obliged to inform the parties that they can withdraw from the Draft – Settlement at any moment during the phase of court evaluation of the Draft – Settlement, and if they do not withdraw from the Draft – Settlement, than the court will enact a verdict that is final. This means that if the parties are satisfied with the Draft – Settlement and if the court approves it, then by enactment of the verdict the court will deem that the parties have waived their right to submit legal remedy upon this verdict.

This part of the Macedonian sentence bargaining is generally taken from the US plea bargaining regulation. An example for drafting of these provisions was the original concept of plea bargaining genuinely regulated in the US Federal Rules of Criminal procedure in its article 11[13]. In this fashion, the Macedonian legislator tried to implement all procedural guarantees for the defendant in order to secure voluntary and conscious participation of the defendant during the sentence bargaining process. The reason for adopting this solution is simple. Only the US criminal system has best regulated plea bargaining procedure, and by its court practice it has developed best procedural guarantees for the protection of the rights of the defendants during the plea bargaining

[12] The New Law proscribes the elements of the Draft - Settlement: a) participants in the sentence bargaining personal data, b) legal qualification and factual basis of the crime that is subject of the Draft - Settlement, c) Proposed sanction by its type and severity, d) claims for restitution of the damages, e) statement of the defendant that he voluntarily and knowingly accepts the Draft – Settlement with all legal consequences, f) statements from the defendant and the prosecutor that they waive their right to submit a legal remedy upon the verdict of the court that is enacted by acceptance of the Draft – Settlement of the court, g) determination of the costs of the proceedings, h) signature of the prosecutor, defendant and defense lawyer and, i) place and date when Draft – Settlement was composed.

[13] Available on the official web page of the US Federal Courts: http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/CR2009.pdf

process. Due to the fact that this is an essential part of the sentence bargaining process, it was necessary for the Macedonian type of sentence bargaining not to improvise and not to adjust the essence of the sentence bargaining to its legal culture, and only reasonable solution was to copy and to implement these safeguards from its origin.

By adopting these procedural rules, the Macedonian legislator have introduced two possibilities for the parties to withdraw from the submitted Draft – Settlement.

1. The first possibility to withdraw from the Draft – Settlement and from all preconditions determined in it is the explicit withdrawal from the Draft – Settlement. This means that during the phase of court examination any of the parties can express its grounds and reasons for non acceptance of the Draft – Settlement.

2. The second possibility that the parties withdraw from the submitted Draft – Settlement is by request from the court during the phase of examination of the Draft – Settlement to enact a sanction that differs from proposed on in Draft – Settlement, or the request from the court to nullify a part or whole Draft – Settlement. This is basically a situation where some of the parties break the promises that they have given during the sanction bargaining process.

If none of the parties has withdrawn from the Draft – Settlement, the court can conclude the sentence bargaining process with its formal decision. The court can deliberate two different types of decisions.

1. The first type of decision is delivered when the sentence bargaining process concludes with formal **Decision for Rejecting the Draft – Settlement by the court.** This decision is delivered in cases when any of the parties have withdrawn from the conditions determined in the Draft – Settlement.

This type of **Decision for Rejecting the Draft – Settlement** is also enacted by the court in case the parties have proposed to the court to deliver a sanction that does not adequately reflect the conditions and factual basis determined by the submitted evidence enclosed to the Draft – Settlement.

Basically, by adopting these standards, the Macedonian legislator has accepted the solution that the Draft – Settlement must be grounded on with sufficient evidence in order for the court to accept it. This means that in essence the court, besides evaluating the voluntary nature of the Settlement, must examine whether there is enough evidence that may support deliberation of that particularly proposed verdict. Otherwise, the court cannot support its decision for acceptance of the submitted Draft – Settlement and by doing that to deliver the particular verdict.

This first type of decision by the court basically means that by rejecting the submitted Draft – Settlement the court has declared that the sentence bargaining procedure was unsuccessful. In virtue of this decision the court returns all the case files to the prosecutor and informs him/her that the records from the hearing, together with the Draft – Settlement and the evidence submitted within can not be used in any other phase of the criminal procedure. These documents of the case file

are enclosed in envelope and this envelope cannot be opened or used as evidence in any further proceedings.

2. The second type of decision by the court is the **Decision for Acceptance of the Draft – Settlement**. This means that, after conducting the hearing, the judge of the pretrial phase will reach a formal Decision for Acceptance of the Draft – Settlement and he will enact a verdict with the same sanction as the one in the submitted Draft – Settlement.

This verdict is constituted by all elements that are characteristic for the verdict where the defendant is found guilty according to the New Law on Criminal Procedure. The verdict is declared immediately after the closing of the hearing. After that it is submitted in writing to to the public prosecutor, defendant and his/her defense counsel, immediately or no later than three days after the day when it was publicly announced. This time - gap is proscribed for the cases which are more complex and where the court needs an additional time for preparation of the written groundings of the verdict. However, a dilemma remains for this time frame, because it is not clear why would the court need additional time for writing down this kind of verdict since all the groundings were already given by the parties in the submitted Draft – Settlement. In any circumstance, even if this exception becomes unofficial rule in practice, the three days period still does not mean that the court will overburden itself with these cases and it will still not harm courts efficiency and resolving of the cases in due period of time.

Damaged person also receives a copy of the verdict and if he/she is not satisfied how the claim was resolved he/she has the right to readdress the damage claims in a civil procedure.

Delivering this type of verdict means that one criminal case has been fully resolved and the verdict is final.

With resolving a criminal case in this fashion it is obvious that the criminal procedure is accelerated and it is reasonable to expect that the use of this type of resolution of the criminal cases by sentence bargaining, at the beginning of the procedure, many of the “simple” criminal cases will be resolved in lesser time. This will reduce the burden of cases in front of Macedonian courts, which can increase public impression of the court procedures as prompt, efficient and just.

2.2. Guilty plea according to the provisions of the New Law on Criminal Procedure

The New Law on Criminal Procedure proscribes three possibilities for the defendant to plea guilty during the criminal procedure.

Depending on the occasion of submitting guilty plea of the defendant, possible outcomes of the criminal procedure may vary.

a) Guilty plea during the investigation phase of the criminal procedure

Defendant can plead guilty as soon as he/she receives the indictment from the prosecutor[14]. This means that as soon as he/she finds out the charges against him/her, he/she can decide whether to plead guilty or not. On this occasion, defendant can plead guilty for one, several or every account submitted against him/her in the indictment. In this case, the judge or the judicial council of the evaluation of the indictment must schedule a hearing for evaluation of the indictment where he/she will perform the following actions:

- Determine whether the defendant's guilty plea was submitted voluntarily, whether the defendant is aware of the legal consequences of the guilty plea including the courts costs and costs for restitution of the damages to the damaged party.
- To evaluate whether there is enough evidence that is supporting defendant's guilty plea.

Again, these procedural steps are very similar if not the same with the US criminal procedure.

By performing these steps, the court basically evaluates the guilty plea, and it is put into written record.

The judge for evaluation of the indictment or the council for evaluation of the indictment are judicial bodies that are authorized to evaluate the indictment under the provisions of the New Law on Criminal Procedure. The distinction between these two judicial bodies that basically undertake the same authority is upon the indictment and whether it is consisted of crimes that are punishable up to ten years of imprisonment, or crimes punishable with imprisonment above ten years. This means that for more severe crimes the authorized body for evaluation of the submitted indictment before the main hearing consists of three professional judges. In its essence, the review of the indictment is a special phase of the criminal procedure in which the indictment submitted to the court is evaluated by the court on several accounts:

- Whether the act that is object of the indictment is a criminal act;
- Whether there are circumstance that exclude the criminal liability, and there is no ground for applying security measures;
- Whether there is no request by an authorized prosecutor or approval by a competent state body, if this is required pursuant to the law, or that there are circumstances that would exclude criminal prosecution;
- Whether there is sufficient evidence proposed to be presented during the main hearing.

The main idea behind this solution is to terminate the criminal procedure at its early stage if the court determines a presence of one of the above mentioned circumstances.

[14] Articles 329, 330 and 333 to 336 of the New Law on Criminal Procedure.

The reasoning for the different structure of the body authorized for evaluation of the indictment is as follows: for more severe criminal acts it is necessary to have court council that will have stronger authority in its decision than a single judge.

Even when a guilty plea is submitted, the judge or the council for evaluation of the indictment is authorized to reject the guilty plea, and this court decision is noted into the court's records.

In this case the judge or the judicial council will inform the parties about its decision and the hearing for an evaluation of the indictment will continue.

In order to prevent any misuse of the defendant's guilty plea in further court proceedings, the New Law on Criminal Procedure proscribes that the court cannot use a guilty plea in cases where such plea is rejected by the court. In such cases the records that contain the defendants guilty plea are put aside of the case file and they cannot be used as evidence in any further court proceedings.

If a judge or a judicial council for evaluation of the indictment accepts defendants guilty plea, than the hearing can be delayed upon request of the parties. This is done in order that the parties can perform sentence bargaining and submit Draft – Settlement to the court, so that the court can enact a verdict upon the sentence bargaining. In essence, at this stage the parties should perform sentence bargaining as it was regulated during the investigation.

The court hearing cannot be delayed longer than 15 days, to prevent any undue delay of the criminal procedure. At the same time if a court delays its hearing, the next hearing should be scheduled in the above mentioned time frame. By doing so, the court reduces its waste of the resources for unnecessary services, such as delivering the invitation for that court hearing to the parties. Having this provision in mind, we can conclude that the parties have a time-frame of 15 days in order to reach mutual agreement about the type and severity of the sanction that they will propose to the court in their Draft - Settlement.

If the parties submit Draft – Settlement to the court on the scheduled court hearing, than the court will evaluate this Draft – Settlement and it may or may not accept this Draft – Settlement.

- If the court determines that the Draft – Settlement is inacceptable then it will reach a formal Decision for Rejection of the Draft – Settlement and it will continue to evaluate the previously submitted indictment. The rejected Draft – Settlement by the court can not be considered as evidence during the next phases of the criminal procedure and this Draft – Settlement is put aside from the courts file.
- If the court accepts the Draft – Settlement than the judge or the council for evaluation of the indictment will enact a verdict according to the provisions for enactment of the verdict upon a sentence bargaining during the investigation, according to the provisions of the New Law on Criminal Procedure.

In some cases, the guilty plea can be given only for some or several accounts of the indictment during the hearing for evaluation of the indictment. In such cases, the court will perform the procedure for

enactment a verdict upon a Draft – Settlement as a part of sentence bargaining procedure, if the court finds the Draft – Settlement acceptable and submitted for the accounts of the indictment. For the rest of the accounts the court will perform evaluation of the indictment and continue with the regular criminal procedure. If the prosecutor decides to charge the defendant on the remaining counts, at this stage of the procedure the court will enact final decisions only for the accounts accepted as guilty plea, and for the rest of the accounts of the indictment regular criminal procedure will be performed .

At a first glance it is somewhat difficult to understand the idea for making distinction between this procedure and the procedure for enacting a verdict during the investigation phase. The legislator's idea in separating these two instruments for acceleration of the criminal procedure can be supported by several arguments.

At first glance it becomes obvious that delivering the verdict during the investigation phase is an earlier resolution of the criminal case in circumstances when there is enough evidence that without any doubt points out to the defendant as a perpetrator of the crime. In this case it is pointless to request a guilty plea from the defendant, since the factual basis is more-less clear for determination his guilt.

On the other hand, guilty plea during the phase of evaluation of the indictment means that a prosecutor has certain amount of evidence related with the defendant as a perpetrator of the crime, but that is yet to be determined during the main hearing when evidence against defendant is introduced. Therefore, in this case it is necessary to have the defendant's guilty plea as a support to the prosecutor's evidence, in order to begin the sentence bargaining procedure and to resolve the case before the main hearing.

This legislator's proposal is a tailor made solution to the Macedonian circumstances where it is necessary to have one intermediate phase between the investigation and main hearing, to prevent the court from dealing with case technicalities and to strengthen its position as a protector of defendant's rights from ungrounded prosecutions.

Deliberating upon this solution from a comparative aspect, it becomes obvious that it is not based on the original US or even Italian role-model, but it is more likely an adjustment of the original guilty plea and sentence bargaining process to suit the specific Macedonian conditions.

b) Guilty plea during the main hearing

According to the provisions of the New Law on Criminal Procedure, the defendant can also plead guilty during the main hearing[15]. This takes place immediately after the opening statements from the parties, and before the procedure for presentation of the evidence of the parties. In this phase, the presiding judge of the court council can ask the defendant to plead upon the counts from the indictment, or the defendant

[15] Articles 380 and 381 of the New Law on Criminal Procedure.

can voluntary plead guilty in front of the court upon one, several or every count from the indictment.

During the first session of the main hearing, guilty plea can be given regardless of the type and severity of the criminal act that is in the indictment.

After the guilty plea, the presiding judge must question the defendant and appraise whether:

- The guilty plea is voluntary.
- The defendant is aware of and understands the legal consequences of the guilty plea, coupled with the consequences for restitution of the damages and costs from the criminal procedure.

If the court reaches a positive answer to the above mentioned dilemmas, than the guilty plea will be accepted. This acceptance will result in instructing the parties to present only the evidence relevant for determination of the type of the sanction during the evidentiary phase of the main hearing. It means that in this case the court will not adjourn the hearing for sentence bargaining procedure, but it will just evaluate the evidence in favor of the criminal sanction that the court will individually determine.

It has to be mentioned that this situation is unique to the Macedonian regulation, where the court does not allow the parties to bargain over the sentence in this phase. It means that in this case, the court will not be a rubber stamp over the proposed sanction and it will perform the above mentioned activities for determination of the sanction having in mind the defendant's guilty plea as a mean for mitigating the sanction. The court will explain the reasons for this mitigation in the verdict's rationale. This solution also prevents the judge or the council to interfere with the defendant's free will and determination to plea or not plea guilty. In this case the opportunities of the prosecutor to become vindictive toward a defendant for not pleading guilty at an early stage of the criminal procedure are limited or impossible.

In cases when court does not accept the defendant's guilty plea, the main hearing will proceed with regular dynamics and the previously given guilty plea will not be considered as evidence presented in front of the court.

After reaching a verdict upon the accepted guilty plea, the court will not accept a request for submission of legal remedies from the parties upon wrong or undetermined factual state.

Accepting these novelties in the New Law will promote acceleration of the main hearings where guilty plea is submitted by the defendant. These novelties will not change the court reasoning in determination of the criminal reliability and guilt of the defendant, but they will simply address to the evidentiary procedure that will be reduced from the presentation of the evidence that will be covered by the guilty plea by the defendant.

On the other hand, the New Law on Criminal Procedure does not accept guilty plea of defendants after the phase of presentation of the evidence is finished. This is a way of not accepting the privileges for the

defendant who will plea guilty when he/she will hear every fact presented against his/her favor, and to plea guilty just to plea guilty, because at this moment the defendant is aware that the prosecution has won its case. This means that defendants can not be privileged for wasting courts time.

Allowing bargaining process during the main hearing would lead to experiences which are similar to the Italian criminal procedure, or to the German federal criminal procedure. This is especially the case in German criminal procedure where it is possible to enter into informal bargaining procedure between the defendant and the prosecution during the main hearing. This possibility is simply undefined in the German Code on Criminal Procedure, but remains to exist in practice, allowed by decisions of the German Federal Constitutional Court and German Federal Court[16]. The German experience is more informal and it is bargain in open court where one of the participants of the sentence bargaining process is also the judge[17].

On the contrary to this decision where bargaining procedure is left aside of the court's watch during the main hearing, the Macedonian idea is to prevent the parties to have the bargaining opportunity during the main hearing. In this phase the main hearing should be timely concentrated, and delaying it for undertaking bargaining process would just mean inefficient spending of the scarce court resources. The Macedonian idea is also that the judge remains impartial arbiter in the criminal cases in order to insure the proper protection of the defendant's rights. This solution is also in accordance to the original US concept of plea bargaining procedure.

Additional concern in the allowing of the sentence bargaining procedure during the main hearing is that this practice may open possibilities for misuse of the official duty of the prosecutor in order to bargain over the evidence that he/she will propose during the evidentiary procedure in court. This conclusion is also supported by the fact that the acceptances of this solution will only unnecessary delay the obvious resolution of the criminal case.

c) Guilty plea during the accelerated procedure

According to the provision of the New Law on Criminal Procedure this procedure is dedicated for criminal acts that are punishable by jail for up to 5 years. Similarly to the regular criminal

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[16] Federal Constitutional Court (Bundesverfassungsgericht), 27 january 1987 and decisions of the Federal Court (Bundesgerichtshof), 7 june 1989, 4 july 1990, 28 august 1997. Michael Bohlander, BGH, Neue Juristische Wocheverfassungsgericht (1987) 2662; Also see: Françoise Tulkens, Negotiated Justice, in European Criminal Procedures, Ed. by, Delmas-Marty, Mirreille and Spencer, J. R., Cambridge University Press, 2002, pp. 663.

[17] Rodolphe Juy- Birman, "The German system", European Criminal Procedures, (eds. M.Delmas-Marty / J.R. Spencer), Cambridge University Press, 2002, pp. 316-317; Markus Dirk Dubber, American Plea Bargains, German Lay Judges, and the Crisis of Criminal Procedure, Stanford Law Review, Vol. 49, No. 3. (Feb.,1997), pp. 560; Joachim Herrmann, The Rule of Compulsory Prosecution and the Scope of Prosecutorial Discretion in Germany, The University of Chicago Law Review, Vol. 41, No. 3. (Spring, 1974), pp. 468-505.

procedure, if the defendant plead guilty during the first session of the main hearing of the accelerated procedure the court will undertake the proceedings by analogy that are regulating guilty plea given during the first session of the main hearing in regular procedure[18].

3. Conclusion

Guilty plea and sentence bargaining as traditional adversarial institutes, due to their noted characteristic for acceleration of the criminal procedure, have found their place in European - continental criminal justice systems. Sentence bargaining is frequently present in the states with legal system that have not accepted prosecutors vast discretion in criminal charges.

According to the New Law on Criminal Procedure sentence bargaining and guilty plea are introduced in the Macedonian legal system. There are differences between these institutes regarding the time of their application during the criminal procedure. The sentence bargaining is frequently used at the earlier stages of the criminal procedure, such as during the investigation and until the phase of examination of the indictment, while the guilty plea is more common to be found during the more formal stages of the criminal procedure, such as the main hearing. The guilty plea under the Macedonian model serves as a way of reducing the main hearing, particularly the evidentiary procedure. In these cases, there is reduction in the presentation of the evidences, and in virtue of this solution only evidences that are necessary to determine the sanction is presented in front of the court.

The possible difficulties and weaknesses in future implementation of these solutions in practice might be found in the Criminal Code. This is because the sanctions for the crimes are determined into broad scales in the Criminal Code. As such, considering the penal policy of the Macedonian courts that aim towards the minimum of the legally determined sanction, it is difficult to envisage what would be the benefits for the defendants if they enter into sentence bargaining procedure. Naturally, any reduction in the burden of the courts that may result from these solutions will be a benefit for the Macedonian criminal justice system. However in order to achieve more serious implementation of these solutions, it is necessary to instigate reforms of the Criminal Code, particularly in the modification of the determined legal frames of the sanctions.

[18] Article 480 of the New Law on Criminal Procedure.

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