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ANALYSIS OF THE FACTUAL SUPPORT OF THE GUILTY PLEA AND SENTENCE BARGAINING IN THE MACEDONIAN CASES AGAINST ILLICIT MANUFACTURE AND TRADE IN FIREARMS

Abstract

With the enactment of the Law on Criminal Procedure in 2010, the Macedonian legislator has introduced many modern adversarial trial instruments that were supposed to improve the efficiency of the Macedonian criminal trials. After ten years from the enactment of this new law that has provided a new concept of the criminal trials, we deem that it is necessary to reevaluate the effects of these reformshi and their practical implementation. In this occasion, the author evaluates the Macedonian court's practice of implementation of the defendant's guilty plea during the main hearing of the criminal trials through the verdicts delivered for the crimes of Illicit Manufacture and Trade of Firearms as regulated in article 396 of the Criminal Code. The author specifically focuses upon the factual support of the guilty plea and analyses the amount of evidence that is needed in order for the court to accept the guilty plea for such cases. Author concludes that in the analyzed cases, the court does not provide sufficient factual support to the defendants' guilty plea and this guilty plea is considered as "regina probationem".

Keywords: sentence bargaining, guilty plea, evidence, factual support

I. INTRODUCTION

Following the latest trends in the comparative criminal procedure for an acceleration of the criminal trials and for improvement of the defendants' human rights protection during the criminal trials, a new Law on Criminal Procedure (LCP)[1] was enacted in 2010 in the Republic of North Macedonia. The enactment of this conceptually new Law was seen as part of the bigger reform of the Macedonian criminal justice system, undertook as part of its EU accession process.

As a complete conceptual turnover, the new Law on Criminal Procedure has marked the biggest shift of the concept of the criminal procedure from inquisitorial, or euro-continental criminal procedure, towards the adversarial criminal trial.[2] This meant that the "wave" of transformation of

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[1] Official Gazette of the Republic of Macedonia, no 150/2010.

[2] See: Matovski, N.; Kalajdziev, G., '*Efficiency of Prosecutorial Investigation in Contrast to Efficiency of the Defense in Reformed Criminal Procedure (with a particular view of the new Macedonian CPC)',* in: Jovanović, I.; Petrović-

the criminal trials that have happened all over Europe, has also touched the Macedonian criminal justice system. Hence, these trends depicted in the modern institutional protection of the defendants' rights through several EU Directives together with the legal doctrine that emerged from the jurisprudence of the European Court for Human Rights (ECtHR) were incorporated into this Law. [3]

The most notable novelties of the LCP were the introduction of guilty plea and sentence bargaining[4]. Since more than 10 years have elapsed from the enactment of this conceptually new LCP, and more than 8 years of its practical implementation, we deem that is appropriate to perform an evaluation of the practical implementation of these specific novelties.

Several studies and reports[5] have pointed out that these novelties are not implemented by the court's practice in significant numbers and the number of cases that were resolved by the use of sentence bargaining or guilty plea is declining over the years. As determined in these studies several problems were detected that might lead or are related to this low number of cases, such as poor legislative provisions, lengthy trials, lenient sanctioning policy, or even misinterpretation or wrongful interpretation of the law by the practitioners.

Considering these arguments, we thought that it is appropriate to evaluate these conclusions through the evaluation of the sentence bargaining and guilty plea procedures but for a specific type of crimes. We wanted to evaluate whether the conclusions from the abovementioned study are related to the types of the crime or they are relevant for all types of crimes and can be generalized. In order to evaluate this hypothesis, we have chosen the crime of Illicit Manufacturing and Trade in Firearms from Article 396 of the Criminal Code, as one specific type of crime that is present in front of the Macedonian courts. The reason for such selection of crimes lays behind the fact that such crime is not the most frequent one, but is present permanently during the years of the implementation of the LCP in front of our courts and is observed on the whole territory of the Republic of North Macedonia. This means that with such crime we could diminish the impact of possible differences to the implementation of the law in regard to the court's so-called, or so called judicial regionalism, that might appear due to the different policy of the Appellate courts' regions. In addition, we have chosen these crimes in order to work with the whole population of the cases and to avoid the possible mistake from the selection of the representative number of the analyzed cases.

Jovanović, A., (eds.), Prosecutorial investigation regional criminal procedure legislation and experiences in an application, OSCE Mission to Serbia, 2014; Buzarovska, G.; Kalajdziev, G., *'Reform of the Criminal Procedure in the Republic of Macedonia'*, Iustinianus Primus Law Review, *vol*. 1, no. 1, 2010

[3] Калајџиев, Г, '*Замки и заблуди на реформата на истрагата' іп Зборник на трудови на Правните факултети во Скопје и Загреб*, ПФ *Скопје/PF Zagreb 2009*.

[4] *These two aspects or instrum*ents of the criminal procedure, also recognized by the *CoE's Recommendation No. (87) 18, of the Committee of Ministers to Member States Concerning the Simplification of the Criminal Justice*, were envisioned as one of the so-called "holy grail" instruments, which would increase the effectiveness and efficiency of the criminal trials in Republic of North Macedonia, while at the same time with equal success would protect defendants' rights to a fair trial. Also see: Buzarovska, G.; Misoski, B., *'Plea Bargaining under the CPC of the Republic of Macedonia'*, in: Jovanovic, I.; Stanisavljevic, M. (eds.), Simplified Forms of Procedures in Criminal Matters – Regional Criminal Procedure Legislation and Experiences in Application, OSCE Mission to Serbia, 2013

[5] For example see the Annual reports of the CAFT from court monitoring of criminal cases in front of the Basic Courts in Republic of North Macedonia, available on the web site: АНАЛИЗИ – all4fairtrials.org.mk, or Misoski, B., *Factual Support of the Guilty Plea and Sentence Bargaining During the Criminal Procedure - the Macedonian Experience*, EU AND COMPARATIVE LAW ISSUES AND CHALLENGES SERIES (ECLIC), vol. 4, 2020, available at: FACTUAL SUPPORT OF THE GUILTY PLEA AND SENTENCE BARGAINING DURING THE CRIMINAL PROCEDURE - THE MACEDONIAN EXPERIENCE | EU and comparative law issues and challenges series (ECLIC) (srce.hr).

Finally, the selection of such crime for comparison was due to the severity of the sanction of this crime, particularly for is aggravated types, where it interrelates to more serious crimes, such as crimes committed or related to the organized crime.

Due to this, in to the following lines of this article, we will evaluate whether the sentence bargaining procedure and guilty pleas by the defendants' for the committed crime of Illicit Manufacture and Trade in Firearms are facing the same or similar problems, particularly considering the level of persuasion of the court while accepting the guilty plea or draft-settlement as result of the sentence bargaining. This issue is particularly important since it can be considered as one of the most important reasons for diminishing the public trust into the fairness of these instruments in the Republic of North Macedonia.

II. GUILTY PLEA AND SENTENCE BARGAINING IN THE MACEDONIAN LCP EXPLAINED IN A NUTSHELL

Since we are analyzing the court's practice in regard with the proper implementation of these most specific legal transplants[6], we deem that it is necessary once again in this occasion, in a nutshell, to reread the LCP's articles that are regulating the guilty plea and sentence bargaining.

1.1. In accordance with the Macedonian LCP, **sentence bargaining** is considered as an instrument for early resolution of the criminal case during the investigative phase, while a guilty plea is reserved for the later stages of the criminal procedure. Macedonian sentence bargaining procedure is characterized by the absence of the explicit guilty plea for the introduction of this instrument during the pretrial procedure. The theory behind this legislative decision rests upon two facts. The first one is that at this stage it is too early to discuss the formal guilty plea since in this phase there is no formal indictment submitted to the court. In addition, during this phase, the court is still not involved regarding the factual determination of the guilt, since, as regulated in the LCP, only the court determines the guilt of the defendant in a criminal case. Due to this, at this stage, the court serves only as a guarantee for the legality of the undertaken legal actions of the prosecutor and protector of the suspect's rights.

Additionally, in some cases, it might be possible that the whole evidence is not discovered or known to the prosecution, and due to this, the prosecution might not expect that suspect will plead guilty, resulting with the fact that implementation of the sentence bargaining procedure during the investigative phase of the criminal trial rests solely upon the wish of the suspect. Despite the fact that the suspect, together with his attorney, can enter voluntarily into sentence bargaining procedure, it is not allowed bargaining over the composition of the charges due to the strict principle of legality of charging.

The consequences of this principle oblige the prosecutor to indict for every crime that is known that the suspect has committed, while an early and speedy resolution of the criminal case rests solely upon the decision of the suspect. In such cases during the bargaining process over the types and severity of the criminal sanctions, the prosecutor and suspect together with defense attorney[7] should reach a mutually acceptable draft settlement that must be verified by the court.[8]

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[6] See: Misoski, B., *"Delayed Justice - Macedonian Experience with Guilty Plea and Sentence Bargaining"*, SEEU Review, *vol*. 11, issue 1. 2016, available online: [https://content.sciendo.com/view/journals/seeur/11/1/article-p99.xml], accessed December 2020.

[7] See article 74, LCP.

[8] See: articles 483 to 490, LCP.

The suspect is entitled to express his defense freely and cannot be forced to accept the settlement. The suspect does not have any obligation to provide facts that will harm him/hers or his/hers close relatives and has a privilege of non-self-incrimination, for further crimes that are not part of the draft settlement. In virtue of this solution, only the request for reparation of the damages can be considered as an addition to the draft - settlement.[9] The indemnification, however, is not part of the bargaining process between the suspect and the prosecutor, which leads to the situation where the suspects only accept in full or reject the request for indemnification submitted by the injured or damaged party. In the later case, the injured or damaged party will be informed to exercise his/hers right to indemnification in civil procedure.

At the end, the constituent part of the draft – settlement is the proposed sanction of a certain type and severity, which can be mitigated to the legal minimum for the particular criminal act determined in the Criminal Code.[10]

During the phase of sentence bargaining, the pretrial phase judge evaluates the legality and voluntariness of the parties to submit the draft settlement and is not involved in the process of bargaining between the parties.[11] Through this legal provision, the judge would keep its unbiased position and would not be affected by the statements given by the parties during the sentence bargaining procedure. This solution is in essence very close to the original model and desired role of the court during the bargaining process.[12] During this phase, the parties can withdraw from the submitted draft settlement, but if they do not, and if the court accepts it, then the court delivers a verdict, which is final, and cannot be objected by the parties with the regular legal remedies.[13]

Providing the opportunity to the pretrial phase judge to evaluate the enclosed list of evidence in support to the submitted draft settlement, basically, means that the Macedonian legislator has accepted the solution where the draft – settlement must be grounded with sufficient evidence in order for the court to accept it. This in essence means that the court, besides evaluating the legality and voluntary nature of the settlement, must examine whether there is enough evidence in support of the court's verdict.[14]

1.2. Guilty plea, on the other hand, as regulated in the Macedonian LCP, can be submitted to the court on three occasions. In any of these cases, prior to the guilty plea given by the defendant, there must be a formal indictment submitted by the public prosecutor to the court. First possibility for the defendant to plead guilty is upon receiving the indictment.[15] Second possibility for the defendant to plead guilty is during the phase of examination of the legality of the submitted indictment,[16] while the third possibility is during the defendant's first hearing of the trial.[17]

In any of these cases, the defendant can plead guilty for one, several or every account of the indictment. In such case, the judge or the judicial council, depending on the severity of the crime, must schedule a hearing to determine whether the defendant's guilty plea is voluntarily and whether

[9] See: article 483, LCP.
[10] See: particularly articles 484 to 487, LCP.
[11] See: article 487, LCP, Misoski, B.; Ilikj Dimoski, D., *'Judges' Role in the Evaluation of the Defendant's Plea within the Sentence Bargaining Procedure'*, Journal of the Faculty of Security, University St. Klement of Ohrid, Bitola, 2016
[12] See: Alschuler, A. W., *'The Trial Judge's Role in Plea Bargaining, Part I'*, Columbia Law Review, *vol.* 76, no. 7, 1976, pp. 1059-1154.
[13] See: article 488, LCP.
[14] See: article 489, LCP.
[15] See: articles 329 and 330, LCP.
[16] See: articles 333 to 336, LCP.
[17] See: articles 380, 381, LCP.

the defendant is aware of the legal consequences of the guilty plea. The court must also evaluate whether there is enough evidence supporting the defendant's guilty plea.
In order to prevent any misuse of the defendant's guilty plea in further court proceedings, the LCP prohibits the court to use the defendant's guilty plea in any subsequent phases of the criminal trial if this guilty plea was rejected by the court. In such cases, any records that contain the defendants guilty plea are put aside of the case file and cannot be used in any further court proceedings.[18]
Guilty plea submitted before the beginning of the main hearing of the criminal trial serves as a starting point for initiation of the sentence bargaining procedure.[19] This means that in cases when the indictment is submitted, the defendant's guilty plea is a starting point for the commencement of the sentence bargaining procedure between the defendant and his/hers defense attorney and the public prosecutor. In such a case, the same provisions that are regulating the sentence bargaining procedure during the investigative phase of the criminal procedure are in power for regulating the sentence bargaining procedure during the phase of control of the indictment.[20] If both parties reach a mutually acceptable solution regarding the type and severity of a criminal sanction, they submit the draft settlement to the court. Prior to the evaluation of the submitted draft settlement, the court must determine that the guilty plea was voluntary and intelligent, and after that, the court evaluates the submitted draft settlement upon the same grounds as the evaluation of the draft settlement during the investigative phase.[21]
If the defendant pleads guilty at the first hearing of the main trial, then the procedure is slightly different and the parties will not commence the sentence bargaining procedure. In such cases, the court will only shorten the evidentiary phase of the main hearing and will examine only the evidence that are important for deliberating the type and severity of sanction upon the crimes for which the defendant has pleaded guilty. Guilty plea can be submitted to the court immediately after the opening statements from the parties, and before the procedure for presentation of the evidence of the parties. In such a situation, the court is also obliged to evaluate whether the defendant's guilty plea is intelligent and voluntary.[22] This means that in such cases the guilty plea is not considered as a trigger for the sentence bargaining procedure, but merely as a tool for an abbreviation of the evidentiary phase of the main hearing. As a result of the guilty plea at the main hearing the court can impose a mitigated sanction, and the court has to provide an elaborate explanation for its rationale. This leads to the conclusion that in such cases the guilty plea is evaluated in light with the veracity of the presented evidence. After the deliberation of such a verdict, the parties are not allowed to submit legal remedies for an undetermined factual state.[23]
It is worthy to mention that in such cases when the defendant’s pleads guilty at the main hearing the judge can evaluate as much as needed evidence in support of the guilty plea. Meaning that in such cases there is no provision from the LCP that regulates the amount or the quality of the evidence that judge needs to discover as support to the guilty plea.
However, one provision of the LCP seems problematic into support of the above-mentioned conclusion regarding the judge's role of the evaluation of the facts and evidences during the main hearing. Provision of article 381, paragraph 3, of the LCP stipulates that after the defendant’s guilty plea and the evaluation whether this plea is intelligent, voluntary and whether the defendant is

[18] See: article 335, LCP.
[19] See: article 334, LCP.
[20] See: articles 335 and 485, LCP.
[21] See: article 334, LCP.
[22] See: article 381, LCP.
[23] See: article 381, LCP.

aware of the consequences of the guilty plea (paragraph 2 of the article 381), the court will examine only the evidence that are relevant for determination of the criminal sanction.
Possible narrow interpretation of this provision, or interpretation solely in *strictu sensu*, might lead to situations where the court will consider the defendant's guilty plea as *regina probationem* and the defendant's prior criminal record will appear as one of the most important evidence in the determination of the criminal sanction.

III. GUILTY PLEA AND SENTENCE BARGAINING IN PRACTICE

The necessity for reevaluation of the effects of the Macedonian guilty plea and sentence bargaining instruments is based upon the fact that legal transplants that are adapted to the legal culture and local tradition, usually lose their original edge within the practical implementation and tend to adapt to the local legal culture. Henceforward, within this period there are several published analysis that draws the general perception regarding the efficacy of these solutions in practice. From these documents, it becomes obvious that these legal transplants were not used in such measure and frequency as it was expected. In addition, the level of their practical use by the Macedonian courts is in constant decline instead of increase. Statistically, the level of resolved cases using these legal instruments has declined over the years of their implementation.[24] For example, an NGO[25] that monitor's court proceedings in the Republic of North Macedonia in its Annual reports have noticed that the numbers have dropped from 40 guilty pleas in 2017, over 26 in 2018, to just 7 in 2019. The same situation can be observed from the Annual reports from the courts and Public Prosecution Offices. For example, State Prosecution for Organized Crime and Corruption have concluded 36 draft settlements in 2014, 28 in 2015, 19 in 2016, 2 in 2017 and 9 in 2019.[26]

Reasons for such decline in the practical implementation might be based upon several hypotheses that are interconnected with each other. As explained elsewhere[27], the legal imperfections, poor activism from the higher courts into providing additional legal opinions in liaison with lenient sanctioning policy and lengthy trials, deficiency of further bylaws or sentence guidelines, toping with the controversial nature of these legal transplants leads to this constant drop of the cases resolved through guilty plea and sentence bargaining instruments by the Macedonian courts.

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[24] See the data from the Annual reports of the courts available on: [http://www.sud.mk/wps/portal/osskopje1/sud/izvestai/svi/!ut/p/z1/hZDBboJAEIafxQNHmTFQWL2tltIqjYmVCnNpgGwXEmDNukj69lLrpUmlc5vJ9_2TGSBIgNrsXMnMVKrN6qFPyfuY46M3W64w2m58hvw1DqI4fFlHDy4croAXui6yDUbsbbdEHqDP9nOO4RMCjfvvQEBFp7VoDaRGd-IWOeJ8R-Kd4jj49B-yBpK1yn8O5G3uMAmkxafQQtudHsalMcfTwkIL-763pVKyFnahGgv_Ukp1MpD8JuH5umf8O8cmbqYJTin_cno5mVwA7bpoKQ!!/dz/d5/L2dBISEvZ0FBIS9nQSEh/?categoryValue=%2Fpublic_design%2FIzvestaii%2FTip_na_izvestaii%2FGodisen&yearCat=0&reportTypeSel=%2Fpublic_design%2FIzvestaii%2FTip_na_izvestaii%2FGodisen], accessed December 2020.

[25] See: Misoski, B.; Avramovski, D.; Petrovska, N., *'Analysis of the Data Collected from the Court Proceeding Monitored in 2017'*, Coalition All for Fair Trials, Skopje, OSCE, 2018; Misoski, B.; Avramovski, D.; Petrovska, N., *'Analysis of the Data Collected from the Court Proceeding Monitored in 2018'*, Coalition All for Fair Trials, Skopje, OSCE, 2019; Misoski, B.; Avramovski, D.; Petrovska, N., *'Analysis of the Data Collected from the Court Proceeding Monitored in 2017'*, Coalition All for Fair Trials, Skopje, OSCE, 2020.

[26] See the Annual Reports of the Public Prosecution Office in the Republic of North Macedonia, available: [http://jorm.gov.mk/category/dokumenti/izvestai/], accessed December 2020.

[27] See Misoski, B., op cit, ECLIC Vol. 4, 2020.

In order to evaluate these conclusions in these occasions, we have tried to evaluate the practice of whether the implementation of the sentence bargaining and guilty plea instruments is conditioned upon the type of the crimes.
Since the number of the organized crimes where these instruments were implemented, as described from the publicly available reports from this Public Prosecution Office, we thought to compare these numbers with one specific crime that sometimes is rather connected with organized crime, or in several cases serves as a previous crime for preparation for other violent crimes – crime of Illicit Manufacture and Trade with Firearms.
The nature itself of this crime is rather general and it is not contradictive, which is important to have on mind when we compare it to the overall crimes. This means that in this occasion we want to test the hypothesis whether the reduction or low implementation of the number of the guilty pleas and sentence bargaining depends upon the type of the crimes.
Despite the fact that we have rather a low number of cases, it becomes obvious from the initial analysis of the data that the number of cases for the crime of Illicit Manufacture and Trade with Firearms that were resolved by using the guilty plea or sentence bargaining does not differ from the general impression for the rest of the crimes.
Furthermore, we can conclude that the numbers even correspond with the conclusion that a very low number of cases are resolved using these adversarial elements. Translated into numbers we can conclude that only 5.4% of all cases regarding the illicit manufacture or trade-in firearms are resolved with defendants' guilty plea or through sentence bargaining during the main hearing of the criminal trial. Or, only 53 of the cases out of 969 were resolved with defendants' guilty plea or with sentence bargaining procedure.
The number of cases was derived from the research of the publicly available criminal verdicts from the Basic Courts in North Macedonia in the period of the past 8 years. Meaning that we have analyzed only the final verdicts from the Macedonian courts that were published on the court's website.[28] We can't deem that this number represents the whole population of this type of cases, since maybe all court cases were not uploaded on the website. However, considering the legal obligation for the courts for public availability of the verdicts and the number of verdicts we can be sure that the majority of the cases are uploaded onto the court's server and that these conclusion deriving from this data can be considered as relevant for sketching the real situation of the courts jurisprudence in the Republic of North Macedonia. To have more precise insight into this phenomena we have observed only the final verdicts, meaning that there will be no further alterations upon the case outcome due to the procedure-driven before the higher courts as part of the appeal procedure.
Having said this we can confirm the already derivate conclusion that we have a very low number of court cases where the defendants' guilty plea is taken as a measure for the acceleration of the criminal procedure, nor that we have a significant number of court cases that are resolved through sentence bargaining procedure in order to abbreviate the criminal trials and make them more efficient and less time-consuming.

Further analysis of these verdicts have drawn the impressions that the judges have also built, rather, consistent sanctioning policy regarding such crimes. Despite the fact that these crimes are not the most frequent types of crimes that are dealt by the Macedonian courts, since such a pattern

[28] The data is available through the use of the search engine of the publicly available verdicts on the Official Courts' web site: Одлуки (sud.mk), the research of these verdicts was performed in the period of December 2020, till January 2021.

confirms the general impression, it deserves additional attention in regard to the general implementation of the defendants' guilty plea and sentence bargaining.
In addition, from the data gathered from the verdicts where the defendants' have pleaded guilty, it seems that appears another additional conclusion. This conclusion is that in cases where the defendants' plead guilty during the main hearing the courts evaluate very few additional evidence in support of this guilty plea. The issue of the level of factual support and requested evidence as support of the guilty plea, it seems that is becoming another black hole for the increase of the use of these consensual justice instruments in North Macedonia.
Hence, as we have observed the practice[29] the judges remained reluctant to examine further factual support to the guilty plea and sentence bargaining when these instruments were introduced in front of the courts. Unfortunately, in cases when the defendants' were pleading guilty it is obvious that the court does not even bother to read the list of evidence of haven't raised any doubts in the veracity of the defendants' plea.
From the evidence derived from the analyzed verdicts it becomes obvious that in cases when there was not a guilty plea, the court have addressed additional attention in to the court, meaning that in most cases it has evaluated substantially more evidences as a support to its decision. On the contrary, it appeared that the judges were more prone to accept these guilty pleas and draft settlements without scrutinizing the factual support behind them. For these reasons, we think that we should address this issue more thoroughly in the next chapter of this article.

IV. LEVEL OF FACTUAL SUPPORT OF THE GUILTY PLEA AND DRAFT-SETTLEMENT

A commonly understood and accepted fact is that the burden of persuasion of the court regarding the veracity of the guilty plea rest upon the prosecution. This means that despite the defendant's guilty plea, the prosecutor must provide a clear, sufficient and legally acceptable amount of evidence to the court as factual support to this plea. Henceforward, these evidence should prior satisfy prosecutors' case theory and subsequently should serve as evidence at the main hearing in order to persuade the court beyond a reasonable doubt.[30] At the same time, defendant's guilty plea should not serve to prosecution as a fact-finding instrument, nor should it be the sole and only evidence upon which the verdict is based.[31] Furthermore, during the investigation phase, the prosecutor should accept the suspect's initiative for sentence bargaining only in cases when the prosecutor, upon the available facts, is persuaded on the level higher than a preponderance of evidence and closer to beyond reasonable doubt of the suspects' guilt.[32]
Unfortunately, from the available data from the court cases, we can conclude that this abovementioned guilty plea and sentence bargaining fundamentals are not completely respected. Due to this, we have observed several cases where the judges have performed their activities is contrary to these, so to say, basic principles of a guilty plea and sentence bargaining.

[29] See: Annual Report of the Data from the court proceedings, Coalition All for Fair Trials of 2019, op. cit.
[30] See: Hall, D. E., *'Criminal Law and Procedure'*, 5thEdition, Delmar Cengage Learning, 2009, pp. 394; Tapper, C., *'Cross and Tapper on Evidence'*, 12th Edition, Oxford University Press, 2010.
[31] See more at: Damaška, M., *'Okrivljenikov iskaz kako dokaz u suvremenom krivičnom procesu'*, Narodne Novine, Zagreb, 1962, pp. 65 *ff.*
[32] See: Viano, E., *'Plea Bargaining in the United States: a Perversion of Justice'*, Revue Internationale De Droit Penal, *vol.* 83, no. 1-2, 2012, available at: [https://www.cairn.info/revue-internationale-de-droit-penal-2012-1-page-109.htm#], accessed January, 2021.

As discussed elsewhere, several evidences witnessed such malpractice of these instruments.[33] Considering the data gathered from the research of the judgments regarding the crime of illicit manufacture and trade with firearms, we can conclude that almost in every case of those 53 recorded where the defendants pleaded guilty, the court did not provide substantive effort in order to examine additional evidence in order to examine the veracity of the plea.

Furthermore, in every case, the one and only additional evidence that was examined by the court was the defendants' previous criminal record.

In comparison to the remaining of judgments, we were able to note that in cases when defendants' did not plead guilty the court has examined several other evidences in order to prove the prosecutors' theory of the case. Hence, in such cases in front of the courts usually were examined forensic witnesses regarding the property of the firearms, ballistic reports whether the firearms were operational, and usually the evidence regarding the property ownership or property connection with the defendant where the firearms were discovered. Furthermore, in several cases, there were imposed also special investigative measure in order for prosecutors to prove the trading or possession of the firearms. However, we could not find even a single case where the verdict is based upon two evidence, where one is the mere existence of the firearm, while the second evidence is the defendant's prior criminal record.

If we further analyze these verdicts we could provide additional information regarding the type and quantity of the examined evidence, but we deem that such analysis is obsolete, since the simple comparison and basic analysis have confirmed our main hypothesis. Hence, we can conclude that the same pattern of evaluation and evidential support of the guilty plea is evident in the cases where the crime is illicit manufacture and trade of firearms.

In search for the reasons of such courts' practice, one possible explanation might be the narrow interpretation of the legal provisions of the LCP by the judges. This reflection can be based on the provisions of article 381 paragraph 3, of the LCP, where it is clearly stated that after the defendant's guilty plea and the evaluation by the court whether the plea is intelligent, voluntary and whether the defendant is aware of the consequences of the guilty plea (paragraph 2 of the article 381), the court will examine only the evidence that are relevant for determination of the criminal sanction.

The wording of this provision indeed supports the judges' position of addressing specific info to the defendant's prior criminal record, since this evidence is the most important in regard to the deliberation of the severity of the criminal sanction in regarding the fact that the defendant is the first time offender or is a recidivist.

However, it is safe to say that such interpretation to this legal provision is at least improper, problematic or even theoretically unsupported. This is due to the fact that based upon the theoretical bases for determining the sanction into Macedonian theory of criminal law and theory of criminal procedure law[34], we cannot find any statement or rule that regulates that there is a division of the evidence in sense evidence for determining the guilt and evidence for determining the criminal sanction. This means that all evidence should be interconnected into the justification of the case theory, and all evidence should provide a level of certainty for the court that is beyond a reasonable doubt.

Henceforward, such doctrinal explanation of the evidence should lead towards the possibility for the court to be able individually and autonomously to determine which evidence of the submitted

[33] See: Fisher G., Plea Bargaining Triumph: A History of Plea Bargaining in America, Stanford University Press, 2003.

[34] Kalajdziev G., Lazetic G., Misoski B., Ilikj Dimoski D., Criminal Procedure Law, 2015 (in Macedonian)

list of evidence, as part of the indictment, should be publicly evaluated or examined during the main hearing as support to the guilty plea. An additional fact that supports this view is the fact that sometimes the same evidence could be used for proving the guilt of the defendant, but at the same time, it could be used for the determination of the sanction. Such as the example where the evidence of defendants' gambling debts could serve as proof of the defendant's motive for murdering his/hers grandparent in order to inherit their asset and leads towards the aggravated type of the crime of murder, but at the same time, this evidence could serve as evidence for determination of the length of the prison sentence.

Besides the doctrinal explanation of such improper *stricto sensu* reading of article 381 of the LCP, additional support for the need for a broader reading of this provision can be found into the relation of this LCP article to the other articles of the same law. Hence, the idea of a broader reading of this provision can be based upon the provisions of article 334, line 2, of paragraph 1, of the LCP, which states that while examining the guilty plea, given during the phase of evaluation of the indictment, the court examines whether there are sufficient evidence in support to this defendant's guilty plea. The rationale behind this provision is that during the examination of the defendant's guilty plea, the court should hear the whole testimony from the defendant, based upon the listed evidence into the indictment. Meaning that the defendant's plea should be in structural connection with the listed evidence, in a way of providing a non-contradictory story of one life situation supported with the listed facts.

In addition, the practice for a broader interpretation of Article 381 of the LCP, can be also based upon the provisions of article 483 paragraph 2, which regulates that after the sentence bargaining procedure the public prosecutor within the signed draft settlement is obliged to provide all evidence, together with the signed defendant's statement regarding the type and the amount of the indemnification. This provision paves the road to the active role of the judge while examining the submitted draft settlement, and connecting it with all evidence at least from the list of evidence which are placed on his/hers desk. [35]

However, despite the fact that we have noticed such inconsistency of the implementation of the LCP provisions by the judges, we cannot completely conclude that judges wrongfully implement the LCP provisions, since the *stricto sensu* interpretation is desired into the criminal law, however, it is needless to mention that such interpretation into the criminal procedure law is not always justified, since the principle of a fair trial in such situations prevails, meaning that the court should exercise its authority with higher independence over the prosecutors into the criminal procedure and should examine more evidence in order to support its decision. This means that if take into consideration the legal culture of the Macedonian legal system and ongoing process of reduction of judges activism and increasing of the level of normative regulation or even overregulation we can conclude that in order to avoid such judges practice we need to remodel the wording of the provisions of the article 381 of the LCP. The remodelling of this provision of article 381 of LCP can be done with simple deletion of the word: "sentence" in this paragraph, which would lead to the situation where the judges should examine additional evidence in support of the defendant's guilty plea.

Another, but the more robust, possible solution might be the legislative intervention with the institutionalization of the sentence hearing. This hearing might improve the veracity of the court's

[35] For example, see the original US experience from the Federal Courts, or desired judges' position at the pela bargaining process: Israel, J. H.; Kamisar, Y.; LaFave, W. R., *'Criminal Procedure and the Constitution, Leading Supreme Court Cases and Introductory Text'*, Thomson West, 2003; Ingram, L. J., *Criminal Evidence*, 12-ed. Elsevier, 2015; Alschuler, op. cit.

practice with the implementation of the sentence bargaining and guilty plea and is practically another legal transplant from the original US federal criminal procedure.[36] Even though these proposed solutions might seem like shifting the burden of proof from the prosecutor to the court, in fact, they only strengthen the judges' position to request the prosecutor to discover evidence in open court upon the courts need.

V. CONCLUSION

Guilty plea and sentence bargaining as two powerful instruments, well known from the comparative criminal procedures, for accelerating the criminal procedure at the same time protecting the scarce judicial assets while not jeopardizing the justice, seems that have different meaning enshrined by the Macedonian courts' practice.

This means that these traditionally adversarial instruments adjusted to Macedonian legal culture have not produced expected results into the reduction of the court cases nor they have increased the level of trust and confidence into the Macedonian courts.

Several reasons that might have led to such a situation were discussed, among which, the level of factual support to these instruments have appeared to be one of the key factors that can lead to the decrease of their use in practice by the courts.

In this occasion, we have tested this hypothesis in regard to a specific and relatively small sample of criminal court verdicts, but the analyzed data have shown identical results as previous studies.

Hence, we can conclude that the low number of guilty pleas by the defendants in cases of illicit manufacture and trade of firearms can based upon the fact that when there is a guilty plea involved the courts tend not to overwhelm themselves into fact-finding activities and they tend to accept these guilty pleas without thorough evaluation of the factual evidence.

Reasons for such courts' activity is primarily based upon a narrow interpretation of the LCP's provisions that are regulating the guilty plea and sentence bargaining procedure by the judges.

Due to these, we deem that the judges must improve their practice in a way of providing additional effort into a critical examination of the evidence in cases when the defendants' pleaded guilty. Hence it is of utmost importance that the judges while examining whether the defendant's guilty plea is intelligent and voluntary, must be assured beyond a preponderance of evidence and closely to beyond reasonable doubt that such plea is supported with proper facts.

Finally, we think that with small legislative intervention in the LCP's provisions we could change such position of the judges, which on one hand might lead towards the improvement of the level of trust and confidence in the courts, and on the other hand could increase the number of such case dispositions.

[36] See: Sprack, *op. cit.*, note 34; Israel; Kamisar; LaFave, *op. cit.*, note 43

Bibliography:

BOOKS AND ARTICLES

1. Alschuler, W., *'The Trial Judge's Role in Plea Bargaining, Part I'*, Columbia Law Review, *vol.* 76, no. 7, 1976, pp. 1059-1154.
2. Boari, N.; Fiorentini, G., *'An Economic Analysis of Plea Bargaining: the Incentives of the Parties in the Mixed Penal System'*, International Review of Law and Economics, *vol.* 21, no. 2, June, 2001, pp. 213-231
3. Buzarovska, G.; Misoski, B., *'Plea Bargaining in the New Law on Criminal Procedure in Republic of Macedonia'*, Iustinianus Primus Law Review, *vol.* 1, no. 2, 2010
4. Buzarovska, G.; Misoski, B., *'Plea Bargaining under the CPC of the Republic of Macedonia'*, in: Jovanovic, I.; Stansavljevic, M., (eds.), Simplified Forms of Procedures in Criminal Matters – Regional Criminal Procedure Legislation and Experiences in Application, OSCE Mission to Serbia, 2013, pp.223-231.
5. Damaška, M., *'Okrivljenikov iskaz kako dokaz u suvremenom krivičnom procesu'*, Narodne Novine, Zagreb, 1962
6. Fisher, G., '*Plea bargaining's triumph: a history of plea bargaining in America'*, Stanford University Press, 2003
7. Hall, D. E., *'Criminal Law and Procedure'*, 5thEdition, Delmar Cengage Learning, 2009
8. Herzog, S., *'Public support for Plea Bargaining Practices*', Crime and Delinquency, *vol.* 50, no. 4, 2004, pp. 590-614.
9. Ingram, L. J., *Criminal Evidence*, 12-ed. Elsevier, 2015
10. Israel, J. H.; Kamisar, Y.; LaFave, W. R., *'Criminal Procedure and the Constitution, Leading Supreme Court Cases and Introductory Text'*, Thomson West, 2003
11. Jovanovic, I.; Stanisavljevic, M. (eds.), *'Simplified Forms of Procedures in Criminal Matters – Regional Criminal Procedure Legislation and Experiences in Application'*, OSCE Mission to Serbia, 2013
12. Kalajdziev, G., *et al., 'Rearrangement of the Main Hearing in Republic of Macedonia'*, МРКПК, бр. 2-3, 2008, pp. 213-234
13. Matovski, N.; Kalajdziev, G., *'Efficiency of Prosecutorial Investigation in Contrast to Efficiency of the Defense in Reformed Criminal Procedure (with a particular view of the new Macedonian CPC)'*, in: Jovanović, I.; Petrović-Jovanović, A., (eds.), Prosecutorial investigation regional criminal procedure legislation and experiences in application, OSCE Mission to Serbia, 2014, pp. 259-270.
14. McConville, M., *'Plea Bargaining: Ethics and Politics'*, Journal of Law and Society, *vol.* 25, no. 4 1998, pp. 562-587
15. Misoski, B.; Avramovski, D., Petrovska, N., *'Analysis of the Data Collected from the Court Proceeding Monitored in 2017'*, Coalition All for Fair Trials, Skopje, OSCE, 2018
16. Misoski, B.; Avramovski, D., Petrovska, N., *'Analysis of the Data Collected from the Court Proceeding Monitored in 2018'*, Coalition All for Fair Trials, Skopje, OSCE, 2019
17. Misoski, B.; Avramovski, D., Petrovska, N., *'Analysis of the Data Collected from the Court Proceeding Monitored in 2017'*, Coalition All for Fair Trials, Skopje, OSCE, 2020
18. Misoski, B.; Ilikj Dimoski, D., *'Judges' Role in the Evaluation of the Defendant's Plea within the Sentence Bargaining Procedure'*, Journal of the Faculty of Security, University St. Klement of Ohrid, Bitola, 2016.
19. Misoski, B., *"Delayed Justice - Macedonian Experience with Guilty Plea and Sentence Bargaining"*, SEEU Review, *vol*. 11, issue 1, 2016, available online: [https://content.sciendo.com/view/journals/seeur/11/1/article-p99.xml],

20. Misoski, B., *Factual Support of the Guilty Plea and Sentence Bargaining During the Criminal Procedure - the Macedonian Experience*, EU AND COMPARATIVE LAW ISSUES AND CHALLENGES SERIES (ECLIC), vol. 4, 2020.
21. Petrovska, N.; Amet, S.; Hadzizafirov, Z., *'Efficient Criminal Justice: Analysis of the SPO Cases*, FIOOM, 2020, (in Macedonian), available at: [https://all4fairtrials.org.mk/wp-content/uploads/2020/04/BP-TA2020-FK-MKD.pdf]
22. Sprack, J., *'A Practical Approach to Criminal Procedure'*, Oxford University Press, 10-th Edition 2005
23. Tapper, C., *'Cross and Tapper on Evidence'*, 12th Edition, Oxford University Press, 2010.
24. Yue, M., *'Prosecutorial Discretion and Plea Bargaining in the USA, Germany, France and Italy: A Comparative Perspective'*, International Criminal Justice Review, *vol.* 12, 2001, pp.22-52.
25. Viano, E., *'Plea Bargaining in the United States: a Perversion of Justice'*, Revue Internationale De Droit Penal *vol.* 83, no. 1-2, 2012, available at: [https://www.cairn.info/revue-internationale-de-droit-penal-2012-1-page-109.htm#]
26. Калајџиев, Г., *'Замки и заблуди на реформата на истрагата' іп Зборник на трудови на Правните факултети во Скопје и Загреб*, ПФ Скопје/PF Zagreb 2009

EU LAW

1. *CoE's Recommendation No. (87) 18, of the Committee of Ministers to Member States Concerning the Simplification of the Criminal Justice*

LIST OF NATIONAL REGULATIONS, ACTS AND COURT DECISIONS

1. Law on Criminal Procedure, Official Gazette, No, 150/2010
2. Official Gazette of the Republic of Macedonia, no 150/2010