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# Admission of Guilt Agreement as a Special Procedure of the Penal Trial – A Particular Attention upon the Romanian Model

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**Abstract:** The current paper focuses on the legal institution of criminal procedure law, which has been recently implemented in the Romanian justice system in criminal matters. The special procedure of the admission of guilt agreement has been expected by specialists, in particular by practitioners for a long time period to be regulated in the Code of penal procedure. The simplified special procedure is analyzed from the point of view of the advantages it presents and from the point of view of the defendant's rights during the criminal proceedings, while he admits the guilt agreement. The particularities of the admission of guilt agreement in the Romanian criminal justice will be emphasized as well as the consequences it produces. A research survey has been conducted on the special procedure most relevant elements and their impact in practice.

**Keywords:** Admission of Guilt Agreement, Special Procedure, Negotiation of Accusation, Legal Consequences

## Introduction

During the transition period in Romania, since 1990 till the end of the 2000's, the justice in criminal matters has been featured by solving penal cases exceeding the reasonable time. For this reason, Romania was several times amended by the European Court of Human Rights of Strasbourg because of the infringement of the article 6 point 1 of the European Convention on Human Rights, which regulates the principle of solving penal cases in a reasonable time (Jurisprudenta CEDO, 2008). In these circumstances, the Romanian authorities reacted in starting the reform in the field of justice in criminal matters. It had as the main objective one of the most important law drafts which was finalized in 2010, once the Law no. 135/2010 on the Romanian Code of penal procedure was adopted. It entered into force on the 1<sup>st</sup> of February 2014. The essential stipulations of its content refer to the increase of the penal trial guarantees, but no such increase is introduced on the implementation of the standards regarding the negotiation of accusation.

The discussion should be structured into two sides. On the one hand, the *de iure* situation made specialists in the field of penal procedure analyze the institution itself and think over the aspects of the penal procedure Code, which were partially obsolete, inconsistent with the

provisions of the European Council and of the European Court of Human Rights of Strasbourg. On the other hand, Romania, as a Member State of the European Union, joined on the 1<sup>st</sup> of January 2007, has made huge efforts in purpose to harmonize its home legislation in criminal matters with the community acquis.

Moreover, exceeding the Romania's geo-political and legislative framework, it is well-known the legal institution of the negotiation of accusation is regulated in several penal procedure countries' legislation. From this point of view, the special procedure mechanism of solving the penal cases creates the opportunity of pointing out the following outlines.

First of all, from the penal special procedure regulation implemented in penal justice it is obviously that very few criminal cases go to the penal trial under the ordinary penal procedure. Most of them are solved within the admission of guilt agreement procedure. This means that a judicial negotiation is signed between the attorney and defendant, in accordance with article 478 of the Romanian Code of penal procedure, which has as a consequence the simplification of criminal procedure, also called "the parties' agreements".

The terminology in the matter offers a large area of terms and expressions in accordance with the judicial system the defendants belong to. One of these legal expressions is the *admission of guilt agreement*.

Basically, from a terminological point of view, doctrine frequently uses the legal expression “*negotiation of accusation*”, even if it is not regulated by the Romanian Code of penal procedure. The Romanian legislator preferred the expression “*guilt agreement*” which is more adequately for the entire judicial system in criminal matters in Romania. For this reason, in the current paper both expressions will be used.

Secondly, for the defendant, the intervention on the admission of guilt in exchange for renunciation of penal punishment is convenient due to the fact that this is the only one way of the defendant’s punishment reduction.

Thirdly, according to the special simplified procedure, the defendant can *plead guilty* in particular cases expressly regulated by the Code of penal procedure.

Nevertheless, the judicial system in criminal cases is accustomed to the idea that most cases will be solved through the special procedure of the negotiation of accusation, instead of the ordinary procedure.

In Romania, aspects regarding the particular features of the admission of guilt agreement in criminal proceedings have been examined in a few monographs and research papers. This means that there are journals which published articles regarding the current topic the motives which prove the preoccupation of lawyers and theorists in criminal matters with analyzing the new simplified procedure of the admission of guilt agreement.

## Aims

In the current research study a comprehensive research on both defining aspects of the admission of guilt agreement and of the other interfacing penal trial institutions in Romania will be carried out, knowing the fact that exceeding the Romanian judicial area, the concept of “*the negotiation of accusation*” is frequently met in the justice courts’ jurisprudence.

The current research study also has the purpose to carry out a complete analysis in the field, to examine the achievements in practice under all aspects, the challenges the jurisprudence is confronted with, as well as to elaborate the specific suppositions and *de lege ferenda* proposals in order to improve the mechanism of achieving a penal justice through derogation from the ordinary legal procedure in criminal cases.

In order to achieve this goal, the following aims have been established:

- Identifying the factors that favor the initiation of the admission of guilt agreement both by defendant and attorney
- Researching the real value concerning the implementation of the European principles regulated in the reference documents in the home penal justice
- Defining the admission of guilt agreement concept and the relevance of its regulation in the Romanian Code of penal procedure

- Researching the doctrinaire premises in the matter and the objective conditions of achieving the simplification of the penal trial
- Establishing the legal effects which result as a consequence of the admission of guilt agreement procedure incidence
- Conducting research surveys on the main elements of the special procedure of the admission of guilt agreement and their impact on the penal justice in Romania
- Analyzing and discussing their results
- Proposing *de lege ferenda* pertinent solutions that must be taken into consideration by the legislator in the upcoming revision of the Code of penal procedure

## Methodology and Scientific Background

In researching the current legal institution of penal trial, the scientific works and the official normative documents of Romania have been taken into account.

From a qualitative point of view, there have been used a mixed-method, the analysis and synthesis, the systematic method and the juridical method, which allowed the carrying out of a thorough research study concerning the admission of guilt agreement.

The quantitative research methodology has been also preferred. It consists in research surveys on multiple choice questions conducted among specialists in criminal matters. Information from the research survey also carried out among practitioners between the age of 28 and 62 was used. It was also combined with consultation of the national experts in criminal matters. The research survey results will be discussed in the Section eight.

Detailed research activity shows us the admission of guilt agreement was and is still kept in the lawyers’ attention due to the fact that the simplified special procedure remains one of high interest at the moment in the context of the new legal order in Romania.

From the perspective of the contemporary conditions comparing with the legal provisions and social values, the admission of guilt agreement is also of scientific interest.

The theoretical basis of research is founded on the work of authors, such as Nicolae Volonciu, Andrei Zarafiu, Mihail Udroui, Mireille Delmas-Marty, Mario Chiavario, Matthew Duffin, Giulio Ubertis, Anne Deysine, Emilio Viano a.s.o.

## Theoretical Approach and Practical Framework

### General Remarks

Theoretically speaking, the research study is part of the perfecting plan of the new legislation in criminal matters in Romania, having as the main purpose updating provisions which regulate the legal institution of the admission of guilt agreement.

In 2006, I initiated a research project on the arguments regarding the necessity to regulate the special procedure of the negotiation of accusation in the Romanian Code of penal procedure (Magherescu, 2006c; 2006d). At that time, the admission of guilt agreement was not regulated by the previous Code, even if the legal realities of the Romanian society required such a legislative modification. Thus, the current research is a continuation of the previous research activity, conducted after a five-year period of time from the new Code of penal procedure's entrance into force. The Code of penal procedure regulates the *admission of guilt agreement* within the Chapter I of the Title IV entitled "*Special Procedures*", at the article 478-488 thereof.

Its applicative value consists in the fact that the research study is part of the scientific research plan of *de lege ferenda* proposals containing also appropriate solutions which could be taken into account by the legislator for the future.

Taking into account all these aspects stated above, a few remarks for improving the legal institution of the admission of guilt agreement regulated by the Romanian Code of penal procedure must be highlighted as well as the advantages and drawbacks this kind of penal procedure presents in practice.

### *Overview of the Admission of Guilt Agreement*

Analyzing from the point of view of its origin, the special procedure of the admission of guilt agreement came from 17th century (Magherescu, 2006d). It is currently regulated by several penal justice systems all over the world, including in the Great Britain (Bond, 1982). Taking into account its efficiency, it has been appreciated as being one of the best models implemented among them (Magherescu, 2006d).

As a general remark pointed out on the admission of guilt agreement, authors has provided the defendant's guilt admission during the criminal proceedings appeared in the 19th century in the United States of America (Alschuler, 1979). Although it has been featured by several critiques (Viano, 2012), doctrine has argued the American plea bargaining procedure is "*fair, just and procedurally sound*" (U.S. Department of Justice, 2011).

At present, the legal institution of the admission of guilt agreement is regulated in several countries' criminal legislation around the world, such as Italy (Marcolini, 2005), France (Niang, 2014), Canada (Brook *et al.*, 2016), Australia (Flynn and Freiberg, 2018), Hungary (Kiss and Farkas, 2018), Estonia (Sillaots, 2004), India (Santhy, 2013).

The legal expression of the admission of guilt procedure comes from the French legal system which particularly means a negotiation between accusation and defendant in order to reduce the penalty and which has as a consequence the acceptance of the admission of guilt by

the defendant in exchange for some advantages from the accusation side (for example, a mitigation of juridical integration, reduction of accusation, recommendation of mitigation of punishment by the instance or other legal promises concerning the penalty) (Duffin, 1999).

One of the consequences that occur in practice refers to the legal function of judicial simplification. It involves both the investigation and judgment phase and basically means the defendant will avoid to be judged in accordance with the ordinary procedure. Actually, this consequence has legal effect only if the guilt agreement is admitted by the court of law. Otherwise, it will be rejected and will pursue the ordinary procedure (Deysine, 2002).

One of the special procedure main features consists in the fact that the admission of guilt agreement has advantages for both parties involved in the penal trial. On the one hand, it is advantageous for the justice system in criminal matters, due to the fact that if the penal trial ends in the investigation phase, the overcharge of the courts of justice with less important and complex offences is avoided (Peroni and Bovio, 2004; Lee, 2014). On the other hand, the special procedure is advantageous for defendant, because only on this way the punishment stipulated by the penal law for the offences committed will be reduced (Magherescu, 2003).

A particular feature of the Romanian penal trial is given by the fact that although the defendant admits to plead guilty and signs a guilt agreement with the attorney, the penal case does not end in the investigation phase. It is sent to trial in order for the court of law to "validate" it and pronounce the decision. When the court of law admits the guilt agreement, then a reduction of punishment will be pronounced (Udroiu, 2014).

From a jurisprudence point of view, the Romanian Code of penal procedure into force must improve the legal procedure due to the fact that at present some contradictory opinions regarding the legal entities as part of the special procedure, the minors' rights as well as the lawyers' rights are pointed out by doctrine (Lupou, 2016).

## **Guiding Principles Applied in the Admission of Guilt Agreement**

### *Accusation and its Modification*

Both doctrine and jurisprudence agree there is no connection between the legal procedure of the admission the guilt agreement and *the modification of accusation*, although a dialectical nexus between the two notions produces certain legal effects having relevance in practice (Penal Decision no. 528 of 10 July 2018 of the Court of Appeal of Iasi). In other words, admitting the guilt agreement is incompatible with the modification of accusation that would be pronounced by the court of law. Moreover, during the investigation phase a modification of accusation cannot be stated by the attorney after the time of signing the guilt agreement with the defendant.

From the point of view of the accusation features, at least three such features must be highlighted. The *official character* of the accusation is one of them, its *completeness* as well as the *defendant's right to be informed* about the charge the attorney has formulated against him and about the deeds' legal integration.

### *Right to a Fair Trial*

The right to a fair trial as a fundamental principle which features the special procedure of the admission of guilt agreement must be analyzed from two points of view. One of these involves the efficiency of the presumption of innocence and another one focuses on solving the penal cases in a reasonable period of time.

Knowing the fact that one of the penal trial's purpose is that of reducing the time of judging and pronouncing the punishment in penal cases, an inconvenience arose regarding the presumption of innocence. This means that the defendant once renounces to the right to silence he also renounces to the effect of the presumption of innocence. In this circumstance, the qualitative approach of the issue must be discussed on its efficiency and consequence in cases solved within the simplified procedure.

In accordance with the principle of the presumption of innocence, any person accused of having committed an offence is considered innocent until his guilt will be established throughout the public penal trial with the guarantees of defense (Article 6 of the European Convention on Human Rights). This principle has a major relevance concerning the intervention of the admission of guilt agreement in the penal case, especially due to the result of simplification of penal procedure (Chiavario, 1998).

On the one hand, in accordance with the European provisions, it is wrong to consider the defendant guilty, *id est*, as someone whose guilt has been already established and proved. On the other hand, when the defendant has been proved guilty and the legal situation has been established by the definitive court of justice's decision, then the accusation turns into conviction (Sentence on 28 May 2018: Case Bikas v. Germany – HUDOC; Article 6 of the European Convention on Human Rights). *Per a contrario*, if the defendant admits the guilt in the investigation phase and signs a guilt agreement with the attorney, this situation will certainly lead to the simplification of penal procedure during this phase (Magherescu, 2006d).

Speaking about the fair trial (Benedek, 2006a) as framework for the simplification of penal trial, another principle on solving penal cases in a reasonable period of time must be pointed out in this context.

The European Court of Human Rights' jurisprudence stated several sentences that were pronounced against Romania on infringing principle of reasonable time in

the penal trial, such as Sentence of 30 September 2008: The case Drăgănescu v. Romania; Sentence of 16 September 2008: The case Bercaru v. Romania; Sentence of 16 December 2008: The case Păunoiu v. Romania (Jurisprudența CEDO, 2008).

Taking into consideration the expedience of the judicial procedure in criminal matters (Ubertis, 1997), the penal cases must be solved in a short period of time maintaining high quality and fairness standards. The author Giulio Ubertis has appreciated the essential quality of the penal procedure is provided by the *acceleration of penal trial*. In this regard, the acceleration of penal trial will consist in a considerable simplification of the procedure during the investigation phase when the defendant uses the right to solve the penal conflict by *guilty plea*, which will lead to the admission of guilt agreement.

### *Renouncing to the Right to Silence*

The right to silence is the principle of penal trial, regulated in criminal matters as a rule. Referring to the special procedure it appears as an exception due to the fact that the defendant understands to renounce to this fundamental right and admits the guilt.

Doctrine has pointed out the right to silence is "*one of the most complex guarantees that exists in penal procedure, generating several particular problems still very controversial*" (Pușcașu, 2010). In these circumstances, the defendant's right to silence during the penal trial must be viewed in connection with his *right not to self-incriminate* (Pușcașu, 2010). The European Court of Strasbourg admitted that both the right to silence and the right not to self-incriminate are "*general standards recognized unanimously which define the notion of fair trial regulated in article 6*" (Pușcașu, 2010). The idea is based on the argument that in accordance with the European Court of Justice' vision, the *ratio iure* of the right not to self-incriminate, *lato sensu*, supposes the defendant's protection against the judicial authorities' abuse as well as the fair solving the penal cases through avoiding possible judicial errors that could appear as a consequence of the defendant's coercion (Pușcașu, 2010).

If the defendant would like to use of the special procedure he can take advantage of the means of renouncing to the right to silence. In these circumstances, the defendant voluntarily creates the judicial framework of the admission of guilt agreement. As a consequence, the defendant' renunciation to the right to silence is the legal basis for initiating the special procedure of the admission of guilt agreement.

### *Right to Defense*

The right to defense during the admission of guilt agreement procedure appears as a function of the fundamental right of penal trial. This function is

achieved by the advocate whose main duty is that of advising defendant. The advocate must analyze the entire circumstances of committing offence as well as the evidence gathered by the judicial bodies in such a manner if signing guilt agreement is not the defendant's best judicial way it will not be signed. In other words, the advocate will advise the defendant to choose the most appropriate and favorable way of solving penal trial.

However, if the guilt agreement is viewed as the most beneficial legal situation, it will be proposed to defendant. Otherwise, the defendant will be advised to follow the ordinary procedure.

A particular situation arose in cases in which the defendant is accused of having committed more than one offence in a set of circumstances. One of these are punished by more than 15 years imprisonment and, for this reason it does not meet the legal criteria provided by the Code of penal procedure on article 480 (1) thereof.

The legal solution regulated by Code is that of dividing penal cases and creating another case having as object this offence. For the other ones, punishable at the most of 15 years imprisonment to which defendant agrees to plead guilty, the attorney will proceed in accordance with article 483 Code of penal procedure and send the case to the court of law. In this context, the admission of guilt agreement does not create a favorable judicial situation for defendant regarding the reduction of punishment due to the fact that there is another case disjointed.

### **Special Procedure of the Admission of Guilt Agreement – Points of View upon a Romanian Approach**

In order to elaborate an overview on the legal provisions which regulate the legal institution of the admission of guilt agreement in the Romanian Code of penal procedure, a few accurate points of view regarding the simplified procedure – a particular view upon a Romanian pattern will be presented as follows.

As a rule, the special procedure of the admission of guilt agreement can intervene for one unitary offence only, which has a medium degree of social danger or for many offences committed. Procedural speaking, the defendant can admit the guilt for one offence, for certain of them or for all offences.

The defendant who admits the guilt must be listened according to the offence that is to be admitted. The victim will also be interrogated as well as the civil party and civil responsible party, if they attend the court of first instance session. Their presence has been imposed by the Constitutional Court Decision no. 235 of 7 April 2015, which has stated that “*the legislative solution provided by article 484 (2) Code of penal procedure which excludes the victim, the civil party and the civil*

*responsible party from the court of first instance's hearing session is unconstitutional*”. The main Court's argument focuses on the idea of an unequal treatment created between the defendant and civil responsible party regarding the guaranteeing right to appeal the sentence of both admittance or rejection of the admission of guilt agreement, an inequality which is unjustified as much time as the entire participants in the penal trial have the same procedural quality of parties.

Doctrine has highlighted the procedure involves two phases. One of these is developed in the investigation phase, while the second one in the judgment. The first phase imposes the judicial activity must take place at the judicial bodies' office, where the district attorney keeps all information regarding the offence committed including the evidence gathered (Oroveanu-Hantiu, 1999).

On this way, the result of the special procedure of the admission of guilt agreement means the judicial basis for simplifying the penal trial in the investigation phase (Chiavario and Delmas-Marty, 2001). The approval of procedure by the judge as well as the defendant's charge shall be pronounced under the reserve of the legal procedure checked by the judge (article 485 (1/a) Code of penal procedure), while the second phase occurs.

Considering that the penal justice in Romania is applied through the division of the three penal trial functions: *The investigation, the judgment and the defense* (Magherescu, 2006a) and also considering the regulating provisions of the national and international laws regarding the presumption of innocence (“*...the charge shall be established through final judge's decision*”) makes us believe that indeed the intervention of the law court shall either approve the agreement concluded between the accusation and defense or shall reject it. The justification of the decision of the agreement's approval or rejection shall have as basis, on the one hand, the sole opinion of the magistrate, as well as the set of evidence contained by the penal case. On the other hand, it must take into account the fulfillment of the Code provisions stipulated at article 480-482 thereof.

Rejecting agreement, the court of law shall be able to refer back the case to the attorney in order to continue the penal investigation within the ordinary procedure, pursuant to article 485 (1/b) of the Romanian Code of penal procedure (as it was modified by the Emergency Governmental Ordinance no. 18/2016). Unfortunately, this is one of the deficiencies of the Romanian Code into force, namely the fact that the referral of the case back to the attorney for the continuation of the penal investigation infringes most of the times the principle of solving penal cases in a reasonable time. It could be viewed as one of the transition period gaps (Benedek, 2006b) also met in the Romanian Code of penal procedure.

The manner in which the law court appreciates the defendant's admission of guilt when it shall proceed to the case settlement in accordance with the ordinary

procedure will remain in the specialists' attention. In this circumstance, shall the law court be completely objective at the moment of pronouncing sentence?

### *The Conditions of Establishing the Procedure of the Admission of Guilt Agreement*

The Code of penal procedure regulates conditions the admission of guilt agreement has to meet in order to be validated by the court of law. Otherwise, infringing one of these would degenerate in its rejection pronounced by court.

In order for the guilt admission to be initiated the defendant must agree with the accusation the attorney draws up against him and with the offence juridical integration the investigation bodies state in the accusation act, as a general condition. The admission of guilt agreement must be based upon the guilt admittance on the entire offences the investigation bodies formulated the accusation on.

First of all, the admission of guilt agreement can be signed when the judicial bodies gathered enough evidence which confirm the offence exists and was committed by the defendant.

Secondly, another condition as general rule refers to the fact that the case attorney and defendant must agree upon the guilt agreement's object.

### *The moment of Signing the Guilt Agreement*

*De facto*, the moment is determined by the fact that the attorney is bringing a charge against defendant more particularly after its communication to defendant, in accordance with article 478 (1) Code of penal procedure.

The moment may also be partially determined by the development of the factors of accusation, which leads either to its formulation with all the legal consequences it produces or they may also lead to its denial with the consequences as well. (Magherescu, 2006b)

The court of law's jurisprudence in criminal matters states that if the defendant is signing the guilt agreement until the attorney is bringing the charge against him the guilt agreement will be rejected by the court of law. In other words, the perpetrator is not entitled to be part of the admission of guilt agreement.

Regarding the moment the defendant can sign the admission of guilt agreement it can be available till the attorney draws up the indictment at the end of the investigation phase.

### *The Offence Character*

Another legal condition regulated by the Code of penal procedure is related to the offence character. Due to the fundamental reasons, it is obviously not for all the offences and serious crimes the defendant can sign a guilt agreement with the attorney. The Code imposes the offences limits in the offences punishment. In this

regard, article 480 (1) thereof regulates that "*The admission of guilt agreement can be signed only for offences the penal law provides the fine punishment or at the most 15 years imprisonment*".

A simplification of the penal procedure in some cases that have as object of investigation the offences punishable up to 15 years imprisonment is given by the offence character. As a consequence, the serious crimes punishable by more than 15 years imprisonment, including the life imprisonment, cannot be solved within the procedure of the admission of guilt agreement.

### *The Higher Attorney's Approval*

The Code also states expressly the case attorney must obtain the preliminary approval from the higher attorney of the unit the case attorney is belonging to. In this matter Professor Andrei Zarafiu has highlighted "*the attorney's decision to sign the agreement is double conditioned*" (Zarafiu, 2015).

First of all, the attorney's decision is conditioned by establishing the agreement limits issued by the preliminary higher attorney in accordance with article 478 (4) Code of penal procedure. Secondly, its legal effects are also under the higher attorney's supervision.

Nevertheless, jurisprudentially speaking a procedural issue is arisen in practice. In these circumstances, can the case attorney's competences on the agreement be substituted by the higher attorney? In this case, can the higher attorney initiate the guilt agreement? The court of law jurisprudence stated the higher attorney cannot be involved in such procedure. It can neither initiate nor substitute the case attorney. In these situations, the Code provisions are imperatively regulated (Udroiu, 2014).

As a consequence, the admission of guilt agreement can be both initiated and signed by the defendant and case attorney.

### *Legal Assistance*

In order to guarantee the defendant's procedural rights the legislator regulated the compulsory legal assistance provided by advocate.

The defendant's advocate participation in the investigation phase and judgment is also compulsory. The aspect must be discussed differentially for the investigation phase of the penal trial and judgment. For the investigation phase no comments must be highlighted due to the fact that the Code regulation is imperatively. This means that article 480 (2) thereof imposes the defendant's compulsory participation only in the investigation phase.

Referring to the judgment phase, the situation is different. Regarding the issue stated above doctrine is divided into two parts. One of these parts admits the advocate's participation is not compulsory in the judgment phase of penal trial due to the fact that the

penal procedure Code does not stipulate it expressly. The main argument is also based on the idea that basically, when the legislator want to impose a legal demeanor it regulates expressly so. As a consequence, in this circumstances if the legislator had wanted to provide the defendant's advocate compulsory participation in the judgment it would have regulated such provision. Indeed, article 480 (2) thereof regulates that "... *At the time of signing the admission of guilt agreement the legal assistance is compulsory*", but the regulation refers only to the defendant's participation in the investigation phase as the Code provides expressly. This means that, literally speaking, the legislator has had into account the situation established at the time of signing the agreement between the defendant and attorney during the investigation phase. But, the penal trial is not ended at that moment. The penal case will be sent to the trial for the judgment phase. Even if it will not follow the classical procedure, the judgment must imperatively intervene in order for the judge to pronounce the sentence. The main purpose of such proceeding is that of applying punishment by the court of law, the judge being the only one authority invested by law in the procedure of sentencing defendants.

Another opinion expressed regarding the defendant's advocate participation during the investigation phase at the time of signing the guilt agreement is that of the compulsory approach. The authors have argued that not only at the investigation phase the advocate's presence is compulsory, but at the time of judgment as well. The main reason of such legal provision interpretation results from the courts of law's jurisprudence in the matter of the admission of guilt agreement.

On the one hand, infringing this rule is sanctioned by law with the absolute nullity. In such cases, the court of law will reject the guilt agreement to the attorney in order to follow the ordinary procedure. Doctrinaire speaking, the advocate's presence in the investigation phase means a real guarantee of respecting the defendant's fundamental rights, including the defense right, being considered as a guarantee of voluntary feature of the guilt admission.

On the other hand, the jurisprudence emphasizes that if the defendant does not have an advocate in the investigation phase of penal trial, the judicial body has to assign an advocate *ex officio*. In this sense the Court of law of Orsova states by Decision no. 24 of 2 April 2018, the guilt agreement signed by the defendant and attorney is valid due to the fact that although the defendants did not have an advocate chose by themselves the investigation body assigned one for this purpose. However, as it was previously stated the guilt agreement may also meet the entire legal conditions provided by the penal procedure Code in order to be approved by the court of law.

### *The Legal Consequences of the Admission of Guilt Agreement*

The successful application of the legal institution of the admission of guilt agreement in the penal trials in the world makes us believe that in order to revise the Code of penal procedure, the Romanian legislator will find appropriate to improve it in accordance with the new European legal order.

Generally speaking, the special procedure does not affect entirely the defendants' procedural guarantees, in particular their right to defense including the right to silence due to the fact that disregarding these fundamental principles a serious harm will occur on the defendant's legitimate interests during the penal trial, on the one hand and it would lead to the institution inefficiency, on the other hand.

Considering provisions of both the European Convention on Human Rights and the European Court of Strasbourg jurisprudence, it is regrettable that the Romanian legislator did not understand to stipulate in the penal procedure Code the legal standards that devote such guarantees implemented in the matter of the admission of guilt agreement.

The legislator had also in view the fact that there were several cases against Romania pending on the European Court of Human Rights during the 90's. These cases had as object the penal trial provisions that do not include completely the guarantees required by the European Convention on Human Rights, Romania is part of. Adopting the new Code of penal procedure of Romania the gradual compatibility of the home legislation in criminal matters with the European one was assured. It is regrettable that from the Code preamble it was not addressed the community standards the harmonization was assured with. It is a serious flaw of the fact that everybody should be aware (especially the practitioners) that the European integration of Romania has started a long time ago and, for this reason, it is the time for the legislator to direct its attention upon the legislation into force in order to modify it.

In other words, the simplification of the procedure in penal cases will lead to the improvement of the penal justice quality, which is the most desirable aspect and at the same time, it would determine the parameters of respecting the procedural form.

Nevertheless, the main advantage of the simplified procedure is given by the fact that the judicial bodies renounce to the penal cases' casual analysis instead of imposing the standardizing judicial activity in the investigation phase.

However, excepting the major advantages the special procedure implementation in the Romanian Code of penal procedure has, the admission of guilt agreement must be analyzed from the point of view of the dangers it

has on *the fundamental human rights*. Therefore, the special procedure prevents the victim from exercising the procedure constitutional rights, it limits the access to justice and violates the defendant's right not to self-incriminate (Pușcașu, 2010). Also, it is a serious threat for those who do not have sufficient judicial knowledge, because, almost always, in order to avoid a long and expensive trial, the defendants would rather admit small offences they did not commit, in order to obtain a reduced punishment by means of negotiation.

### **Practical Issue and Research Survey**

The current research focuses on both theoretical and practical aspects the admission of guilt agreement is featured with. The research survey has been carried out in purpose to emphasize the level of the special procedure impact upon the Romanian society generally speaking as well as upon the judicial system in criminal matters. Conducting such research, it has been started from carrying out a research survey which consists in multiple choice questions answered by the specialists in criminal matters, both theorists and practitioners. The similar research survey has been conducted both immediately after the new Code of penal procedure entrance into force more specifically after the 1<sup>st</sup> of February 2014, while the lawyers were less confident with the new special procedure and after a five-year period of time, in 2019. This means that the research survey was in the experts' attention during the five-year observation period. Its relevance consists in the fact that the practitioners are currently more inured to the procedure of the admission of guilt agreement as a simplified one. For the current research survey, the parties' rights, in particular the defendant's ones during the penal procedure of the admission of guilt agreement as well as the legal mechanisms of guaranteeing such rights have been pointed out in accordance both with the European Convention on Human Rights and the EU rules.

The questionnaires comprise a number of questions adequate to the special procedure of the admission of guilt agreement and related to the particularities of the home rules of penal procedure. They were referred to the legal notions and institutions of the simplified procedure, being differently designed in accordance with the specific features of the Romanian entire judicial system. Moreover, the questions were also drawn up alongside with the factors which make the rapid settlement of the penal trials heavier as well as with the reasonable time the penal trials must be solved in.

### *Analysis and Discussion*

The research survey conducted among specialists in criminal matters has been synthesized in the two questionnaires whose interpretation is provided below.

### *Case 1*

In 2014, the special procedure of the admission of guilt agreement has been just implemented in the home penal justice system of Romania. Taking into consideration this aspect, the specialists in criminal matters were not so accustomed with its consequences produced both for the defendant and its defense, on the one hand and for the accusation, on the other hand. However, since 2006 it is obviously a trend in such direction was outlined among practitioners who were congested with several cases they were invested with. As a consequence, the idea of a new special procedure more efficient one has been arisen. Doctrine also stated its opinions regarding the implementation of the admission of guilt agreement procedure in the home procedure legislation.

From a technical point of view, some specific remarks must be highlighted. In this matter, certain indicators have been reported to the most relevant aspects on the research results.

Related to the questionnaire no. 1 a number of 186 participants completed the survey.

They have proceeded from the judiciary as well as from the academic area. Most of them cumulate the university title with the lawyer profession. A number of 132 participants were practitioners.

Among them, the men have an important weight, they being represented by a number of 124 respondents, while the women were only 62.

Another indicator was led to the age. Among all participants, most of them were by age between 31 and 40 years old. More specifically, 61 participants belong to this age limits. Among them, 22 women and 39 men answered to the questionnaires.

Participants with the age between 41 and 50 years old completed the survey in a number of 47 respondents, 17 women and 30 men. Participants over 51 years old were 21 respondents. Women filled in a number of 6 questionnaires and men a number of 15 questionnaires.

The other 57 questionnaires have been answered by the participants with the age up to 30 years old, 17 participants were women and 40 were men.

### *Discussion*

Regarding the first questionnaire, the respondents were asked to state their opinion about the incidental factors which infringe the principle of solving penal cases in a reasonable time. Most of them answered the defendants' rights of defense are excessively. Then, another opinion provided that there is a huge work level of the judicial bodies which influences in a negative manner the judicial activity in criminal matters. Finally, another part of respondents expressed the investigation bodies' long excessive time activity.

Related also to the reasonable time of penal trial, the most part of the respondents admits the penal cases are solved in a long time period, more particular longer than twelve months. A few ones answered in certain less



complicated cases the penal trial is solved up to twelve months period of time. This aspect refers to the ordinary procedure of penal trial. This is a serious drawback the justice in criminal matters in Romania is confronted with. As a consequence, the legislator reacted and implemented the special procedure of the admission of guilt agreement in Code of penal procedure.

The regulation of the negotiation of accusation in Code has been viewed as the only one measure of simplifying penal procedure. It was a unanimous opinion admitted by respondents.

From the point of view of the offence character, the respondents considered the special procedure is advantageous for cases having as object offences punishable by at the most three years imprisonment. However, most of them proposed the offences punishable up to 5 years imprisonment to be solved with the admission of guilt agreement instead of the current regulation.

Regarding the legal advantages the special procedure has the respondents considered the main advantage consists in the reduction of costs of the justice administration in criminal matters as well as simplified procedure and solving cases in a reasonable time, as it has been already pointed out above. They also agreed the advantages are stated for the defendant as well. This means that the Code of penal procedure regulates a reduction of applying punishment in cases in which the defendant admits the guilt and signs an agreement with the attorney.

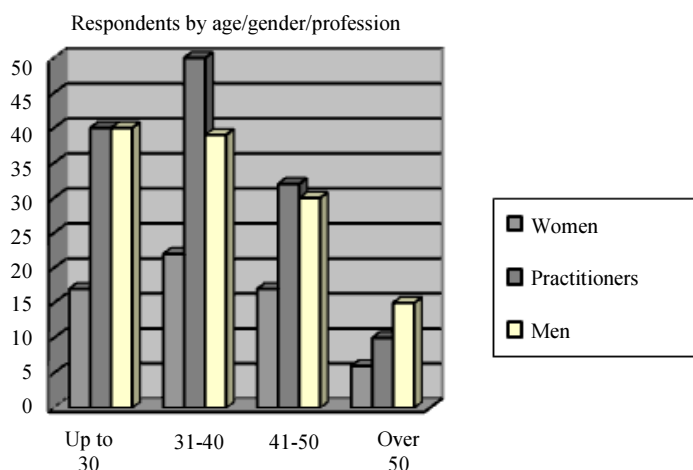
In spite of these advantages the special procedure provides the majority of respondents appreciated several provisions must be modified in order to improve the procedure efficiency. This argument was also strengthened by the Constitutional Court's decisions of unconstitutionality of several Code regulations including some related to the special procedure of the admission of guilt agreement.

The respondents proposed some modifications which occur both in the investigation and judgment phases of penal trial. They refer to the legal entities to be part in the admission of guilt agreement procedure and on the minors. Other opinions were expressed on the issue of the defendant's rights and its advocate participation in the judgment as well.

Regarding the efficiency of the admission of guilt agreement procedure in the Romanian legal system, the respondents suggested the French or Italian pattern is more suitable than the American one, taking into consideration the specificity of the Romanian penal procedural law entirely.

The overall socio-professional feature of the first survey report discussed in accordance with the respondents' points of view on the special procedure of the admission of guilt agreement as it is regulated in the Code of penal procedure of Romania is provided in the Fig. 1.

A synthesis regarding the research carried out in the matter on the admission of guilt agreement and on its results can be observed in the Table 1.



**Fig. 1:** The graphic disposing the women, men, practitioners indicators report by age among the total number of participants conducting the first research survey of multiple choice questions

**Table 1:** Frequency distribution of the respondents' knowledge on the admission of guilt agreement

Age/ gender	Up to 30 years old	31-40 years old	41-50 years old	over 51 years old	Total final
Women	17	22	17	6	62
Men	40	39	30	15	124
Total	57	61	47	21	186

### Case 2

Regarding the second questionnaire on the admission of guilt agreement, the research survey procedure has been simplified due to the fact that it was completed by participants after a five-year period of time from the special procedure implementation in the Romanian Code of penal procedure.

Thus, the participants are currently familiarized with the procedure of the admission of guilt agreement both from a theoretical and jurisprudence in the matter points of view.

Both practitioners and theorists answered to the 228 questionnaires, containing multiple choice questions on the practical aspects of the special penal procedure of the admission of guilt agreement.

Moreover, the consequences which result from the admission of guilt agreement regarding the reducing penalties the Code of penal procedure regulates in cases in which the defendant pleads guilty have been taken into account while drafting the second questionnaire.

A number of 188 participants completed the second research survey, while also being practitioners in criminal matters.

By group of age, the participants up to 30 years old were 38 respondents, women 12 and men 26.

Participants at the age between 31 and 40 were 52 respondents, women 8 and men 44.

Between the age of 41 and 50 years old, a number of 66 participants filled in the questionnaires, 25 women and 41 men.

Finally, at the age over the 51 years old, the

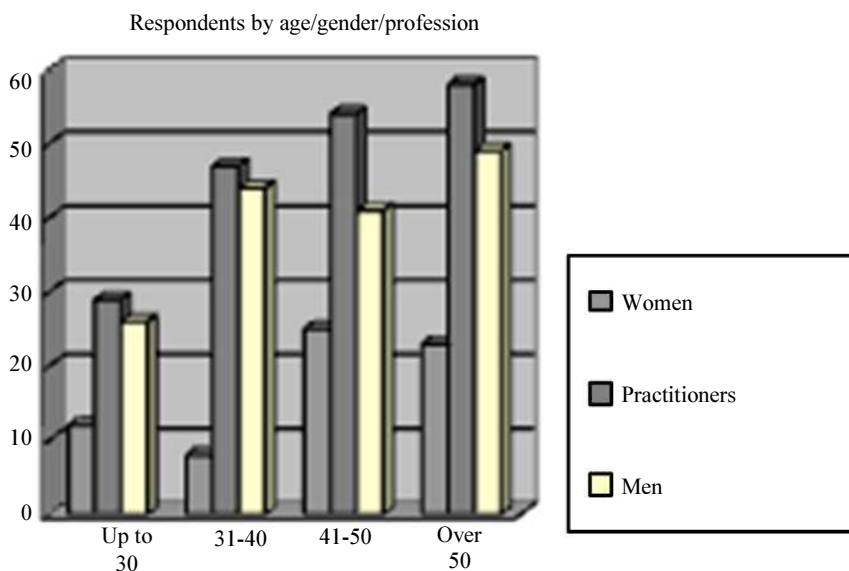
questionnaires were filled in by a number of 72 participants, 23 were women and 49 men.

### Discussion

The second questionnaire has been focused on a series of questions the respondents answered to. They led to the defendant's right to silence, defendant's right to guilty plea contradictory to its right to silence, the cases in which the defendant retracts its confession, the main principles the special procedure is based on.

Regarding the first indicator, the respondents remarked the defendant's right to silence is fully respected by the Romanian legislation harmonized to the European and international ones. From this point of view there is no difficult situation it can occur during the special procedure in the investigation phase. Moreover, most of them stated the regulation of the defendant's right to guilty plea is contradictory to his right to silence, but it occurs only at the defendant's demand. In these consequences, its rights are not infringed.

A particular attention requires in cases in which the defendant retract his guilt agreement in front of the court of first instance. The respondents stated that maintaining the admission of guilt agreement by the court of law is possible in cases in which the defendant retracts its confession in the judgment, due to the fact that it has been valid expressed in the investigation phase in front of the attorney. Although it is not stipulated expressly by Code, the situation in which the defendant retracts his confession can occur in practice.



**Fig. 2:** The graphic disposing the women, men, practitioners indicators report by age among the total number of participants completing the second research survey questionnaire

**Table 2:** Frequency distribution of the respondents' knowledge on the admission of guilt agreement

Age/gender	Up to 30 years old	31-40 years old	41-50 years old	Over 51 years old	Total final
Women	12	8	25	23	68
Men	26	44	41	49	160
Total	38	52	66	72	228

On the judicial bodies' omission of informing defendant on the right of not to self-incriminate the respondents have expressed different solution about the sanction which must occur. Some of them admitted the omission can be sanctioned by relative nullity, while the others agreed the omission must be sanctioned by absolute nullity. Only a few of them considered there is no procedural sanction in these cases.

Another question the respondents were asked to respond was focused on the main principles the special procedure of the admission of guilt agreement must be based on. Most of the respondents considered the main principle is the defendant's right not to self-incriminate. The other ones referred to the guilty plea that is necessary in order for the defendant to obtain a reduction of penalty. However, the significant part of respondents taken into account the defendant's right to a fair trial as being the most important principle the simplified penal procedure must be featured with.

Finally, regarding the advantages the admission of guilt agreement presents for the justice system in criminal matters the respondents were also divided into three parts. One of these answered the main advantage involves solving penal cases with reduced costs. The other ones referred to the special procedure as being advantageous for the efficiency of solving penal cases entirely. The third opinion was formulated on the idea of solving penal cases in a reasonable time.

The socio-professional feature of the second survey report related to the respondents' opinions highlighted on the special procedure of the admission of guilt agreement is provided in the Fig. 2.

Taking into account the above related aspects, the data are summarized below through a synthesis in the Table 2.

## Results

Taking into consideration the research survey results gained during the two activities conducted on the topic of the special penal procedure of the admission of guilt agreement, it is obviously that at present the practitioners are more confident with its legal consequences stated both for the defendants and also for the accusation than they were five years ago.

First of all, most of the participants answered the admission of guilt agreement is an advantageous procedure for the entire penal justice in Romania. It has as the main consequence the reduction of duration of solving the penal cases especially those that have as an object the offences with a low level of social danger.

However, it must be taken into account the special procedure is more advantageous for the defendants who committed serious crimes punishable by a penalty up to 15 years imprisonment.

Secondly, another conclusion of the research surveys states that the defendant's lawyer must imperatively participate in the procedure of the admission of guilt agreement. It is unanimous agreed with the fact that an efficient defense the lawyers carry out for the defendants during such procedure can have as a result the agreement's validation by the court of law. *Per a contrario*, a superficial defense carried out by the advocate will generate the agreement's rejection by the court of law.

A pertinent remark states that in the current regulation, the Code provisions on the defender's rights are very much summarized comparing with the same rights the Code regulates for the ordinary procedure.

Thirdly, the minors' legal situation has created several controversial debates. It has been remarked until 2016 that the minors cannot be part of the admission of guilt agreement due to the special procedure on minors the Code of penal procedure regulated in article 504 – 520 thereof. However, in spite of this argument, the Emergency Governmental Ordinance no. 18/2016 modified the Code and decided the minors can be part of the admission of guilt agreement with their legal representative's consent. This provision eliminated the rules on minors' interdiction to be part in the special procedure.

Finally, the participants' opinions are contradictory regarding the legal entities' right to be part in the admission of guilt agreement. This situation has been created by the fact that the Code neither infringes expressly their participation in the special procedure nor stipulates such situation. For this reason, in doctrine two opinions were stated by specialists in penal procedure law. Most of them, as part of the doctrine, pointed out the affirmative thesis that the legal entities can have this right and be part in the procedure of the admission of guilt agreement (Volonciu *et al.*, 2015; Udrioiu, 2014).

Another opinion, based on the negative thesis, stated that the legal entities cannot be part of such procedure (Zarafiu, 2015). Its upholders properly argue that the Code of penal procedure prohibits their right, but the interdiction can be removed if the special procedure of the legal entities' penal liability will be abrogated from the Code of penal procedure.

Taking into account both theories, it is not possible to ignore one of the most important principle came from the Roman Empire which states "*ubi lex non distinguit*

*nec nos distinguere debemus*". Thus, regarding the minors, it is true the Code regulates expressly they can sign a guilt agreement. Nevertheless, in order to validate the affirmative thesis on the legal entities, it is adequate for the practitioners to apply the logical interpretation rule stated above instead of *the judgment of analogy*.

## Conclusion

As a consequence of the research survey completed by specialists in criminal matters it is obviously that at present, the special procedure has a series of gaps the practitioners are still facing with. The research study contains proposals of *de lege ferenda* which should be taken into account by legislator in the upcoming revision of the Code of penal procedure.

First of all, the research results stated a better understanding of the special procedure mechanism must be identified by practitioners.

Secondly, the research results should be a basis for their analysis and interpretation of the Code provisions. In these circumstances, some concluding points of view can be highlighted.

Assuming the right to admitting guilt, the defendant's intention is to renounce to the investigation bodies' formal procedure aiming at establishing truth on the following aspects: The *de facto* situation; the circumstances the offence was committed in; the defendant's personal circumstances; the purpose of offence; the criminal means used in committing offence; the consequences produced.

All these issues can positively influence solving penal cases, on the one hand and a better organization of the justice in criminal matters generally speaking, on the other hand (Chiavario and Delmas-Marty, 2001).

Referring to the procedure of the admission of guilt agreement, it is impossible to appreciate certainty which procedure of accomplishing a simplification of penal trial is the right one. The one regulated by the legislation of the states that belong to the judicial system of common law, or the one implemented in the states of the continental Europe. Nevertheless, in analyzing the judicial institution of the admission of guilt agreement, in general, the fundamental rules of the penal procedure of every country and the specificity of the judicial bodies' entire activity must be taken into account.

Analyzing the code rules in purpose to improve the penal procedure of the admitting of guilt agreement, the specificity of the judicial penal system in Romania must be taken into account. Moreover, the fundamental rules in criminal proceedings comparing with the principles established in the international and the European documents that were addressed in this work must also be taken into consideration.

Generally, it is very easy to impose to a legislation the legal provisions regulated in other penal procedure

legislation. In spite of this theoretical remark, the syllogism is not desirable especially due to the fact that the majority part of the Romanian politicians focus their attention upon the reform in penal justice.

Thus, in this study, I did not mean to draw lines in developing the judicial activity in criminal matters; these opinions are only points of view expressed at the closest moment which is situated after the adoption of the new Code of penal procedure of Romania.

Moreover, if the European institutions expect from the Romanian authorities to finalize the reform in justice, in particular in criminal matters, the new Code of penal procedure, in the closest perspective of its modification, will surely improve many new judicial institutions and perhaps even the admission of guilt agreement. From this point of view, it can only be better for the Romanian jurists if the legislator will consider it adequate and will modify its legal provisions.

In conclusion, the impact of the admission of guilt agreement upon the Romanian justice system in criminal matters on the one hand depends on the legislator's interest in removing the legal drawbacks and on the other hand on the judicial bodies' involvement in finding solutions in order to be implemented in practice.

### *De Lege Ferenda Proposal*

At the moment, the simplified penal procedure of the admission of guilt agreement in Romania is not completely improved. This means that it has a series of flaws regarding the legal standards that regulate the trial both in the investigation and judgment phases.

The Romanian Code of penal procedure into force regulates the institution of the negotiation of accusation called *the admission of guilt agreement* in article 478-488 thereof. However, the code does not contain stipulations on improving norms for a better implementation of such agreement in practice.

For this reason, certain modifications in the settlement mechanism of the cases referred to trial are necessary.

In the upcoming revision of the Code of penal procedure and carrying on the law reform as well as on the basis of the research conducted, a series of adequate proposals can be advanced in order to contribute to improving the procedure in penal cases. They refer to the judicial bodies' activity that has the responsibility to solve the cases in a short period of time.

I consider *of lege ferenda* that the Code of penal procedure should establish in the chapter "*Admission of guilt agreement*" provisions which must refer to the legal entities' right of being part of the simplified procedure, knowing the fact that the current Code provisions are not clearly and create contradictory points of view both in practice and in doctrine.

Another issue the legislator must take into account refers to the right of the defendant's lawyer. In this case

also the Code does not regulate expressly what exactly the rights the defendant's lawyer has during the admission of guilt agreement. This is because it is well-known in practice the successful result of the negotiation of accusation is based on the lawyer's involvement. It is true the fact that the admission of guilt agreement is not possible in the absence of the defendant's lawyer, but the only one regulation is not enough to ensure the defendant's rights.

A new provision should regulate the rights the defendant's lawyer to initiate the admission of guilt agreement.

Finally, other stipulations must refer to the victims' rights. In this circumstance, their rights during the special procedure of the admission of guilt agreement were totally omitted by legislator.

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### Ethics

There is no ethical issue and conflict of interest related to the paper published.

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