PRE-TRIAL AGREEMENT ON COOPERATION IN RUSSIA AND ABROAD

DOI: https://doi.org/10.24115/S2446-622020217Extra-A794p.204-209

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ABSTRACT
The article presents the results of a comparative legal analysis of the institute of pre-trial cooperation agreements in the criminal procedure legislation of foreign states. It is concluded that the specifics of the conclusion of this agreement and its subsequent implementation depend on the type of legal system and the nature of national criminal procedure legislation of each country. By its nature, the Russian institute of pre-trial cooperation agreement is similar to a number of conciliation procedures of the continental legal system, but it has distinctive features due to the peculiarities of domestic legislation.

Keywords: Pre-trial cooperation agreement. Plea deal. Admission of guilt. Assistance to the investigation. Special procedure of criminal proceedings.

ACORDO PRÉ-TRIAL SOBRE COOPERAÇÃO NA RÚSSIA E NO EXTERIOR

ACUERDO PREVIO AL JUICIO SOBRE COOPERACIÓN EN RUSIA Y EN EL EXTRANJERO

RESUMO
O artigo apresenta os resultados de uma análise jurídica comparada do instituto de acordos de cooperação pré-julgamento na legislação processual penal de Estados estrangeiros. Conclui-se que as especificidades da celebração deste acordo e da sua subsequente implementação dependem do tipo de sistema jurídico e da natureza da legislação processual penal nacional de cada país. Por sua natureza, o instituto russo de acordo de cooperação pré-julgamento é semelhante a uma série de procedimentos de conciliação do sistema jurídico continental, mas possui características distintas devido às peculiaridades da legislação nacional.


RESUMEN
El artículo presenta los resultados de un análisis jurídico comparado del establecimiento de acuerdos de cooperación preventiva en la legislación procesal penal de Estados extranjeros. Se concluye que los detalles de la celebración de este acuerdo y su posterior implementación dependen del tipo de ordenamiento jurídico y la naturaleza de la legislación procesal penal nacional de cada país. Por su naturaleza, el instituto ruso de acuerdos de cooperación previa al juicio es similar a una serie de procedimientos de conciliación del sistema legal continental, pero tiene características distintivas debido a las peculiaridades de la legislación nacional.

INTRODUCTION
Recently, there has been a tendency in Russia to optimize and simplify criminal proceedings, as well as to introduce conciliation procedures. One type of such procedure is a pre-trial cooperation agreement. Various foreign authors have dealt with the doctrinal problems of implementing the so-called "plea deals". Supporters of this institution (B. Stephanos, F. Isterbuk, P. Scott) emphasize its prospects and the need for further improvement (ALSCHULER, 1983; BIBAS, 2003; SHIPLEY, 1987). They justify their position by the need to reduce the burden on judges and achieve procedural savings in the consideration of criminal cases (JENIA, 2009). Opponents of such agreements (T. Lynch, M. Kinsley) strongly criticize it, believing that "plea deals" contradict the principle of the presumption of innocence (BRYAN, 2003; LUCIAN, 2012; LYNCH, 2003). As noted by scholars in the field of Russian constitutional law, lawmakers is an instrument of the idea of justice (KUKSIN et al., 2016), and "the presumption of innocence is a guide that determines the content and nature of procedural activity, permeating all stages and institutions of criminal justice" (MIRONUK et al., 2017).

However, the differentiation of criminal proceedings and conciliation procedures presuppose the achievement of a compromise, some concessions and restrictions, including in terms of the implementation of some principles (voluntary admission of guilt, assistance to the investigation in exchange for a more lenient sentence and speeding up the criminal case consideration procedure). Such legislative decisions do not contradict the international legal norm, according to which every accused person has a guarantee to be tried without undue delay (https://www.echr.coe.int). It seems that a detailed study of the institute of pre-trial cooperation agreement will allow making a conclusion that it is different in nature from the "agreements" common in the countries of the Anglo-Saxon and continental systems of law, the analysis of which will help to identify the features inherent in the Russian institute of pre-trial cooperation agreement.

METHODOLOGY
The following methods of scientific research were used in the work: dialectical, formal-logical, the method of system analysis, comparison, generalization. The special methods include formal legal and comparative legal.

DISCUSSION AND RESULTS
The consistently high level of crime and the disappointing statistics of its detection dictate the need to constantly improve the crime investigation methods. The most important tool for combating crime, including organized crime, is the institution of a pre-trial cooperation agreement, introduced under No. 147-FZ in the Criminal Procedure Code of the Russian Federation on June 29, 2009 (CRIMINAL CODE OF THE RUSSIAN FEDERATION, 1996). It is possible to fully assess the advantages and disadvantages of the mechanism for concluding and implementing a pre-trial cooperation agreement in Russian criminal proceedings only by comparing similar institutions legalized in foreign countries.

From a practical point of view, the essence of a pre-trial agreement is a kind of confirmation of the active remorse of a guilty person, as a result of which, the punishment may not exceed half of the maximum term or the amount of the most severe type of punishment stipulated by the relevant article of the Criminal Code of the Russian Federation. However, the pre-trial agreement does not constitute immunity from criminal prosecution, but only serves as a basis for commuting the sentence. This is the fundamental difference between the Russian institute of pre-trial cooperation agreement and a similar institute implemented in the United States and Great Britain. The legislation of the Anglo-American legal system considers it as a kind of "plea deal", which implies the possibility of some kind of bargaining between the accused and the prosecution represented by the prosecutor.

Such a transaction allows for the agreement of the amount of charge, qualification and possible punishment of the accused, while the prosecution is exempt from proving the guilt of a person who accepted the terms and conditions of the agreement. Compensation for damage to the victim may be one of the conditions for concluding an agreement in the USA, in contrast to Russian and English legislation (CRIMINAL PROCEDURE CODE OF THE RUSSIAN FEDERATION, 2001; TURNER, 2006). Despite the fact that the institution of a pre-trial agreement on cooperation has proven its effectiveness within the framework of the US criminal process, its implementation in domestic legal proceedings is impossible in this for since it contradicts the fundamental principles of the Russian criminal process.

With the full replication of the mechanism for concluding a pre-trial agreement on cooperation in Russian law from the American colleagues, the mandatory requirement of proof of the charge disappears. This requirement is conditioned by the idea of establishing objective truth in a criminal case. Although this category is absent in
the current Criminal Procedure Code of the Russian Federation, it can be traced in modern criminal proceedings historically. In particular, the existence of the category of objective truth in the domestic criminal process is evidenced by Part 4 of Article 302 of the Criminal Procedure Code of the Russian Federation, which states that: "a guilty verdict cannot be based on assumptions and is decided only on the condition that the defendant's guilt in committing a crime is confirmed during the trial by the totality of the evidence examined by the court" (CRIMINAL PROCEDURE CODE OF THE RUSSIAN FEDERATION, 2001). This rule is also maintained in the special procedure of judicial proceedings with regard to the conclusion of the pre-trial agreement on cooperation. In this case, it consists in imposing on the court the obligation to issue a guilty verdict only if the charge with which the defendant has agreed is justified and confirmed by the totality of the evidence collected in the criminal case, although their research and evaluation are not carried out in the usual manner (Part 7 of Article 316 of the CRIMINAL PROCEDURE CODE OF THE RUSSIAN FEDERATION).

The institution of the agreement on cooperation, common in the countries of the continental system of law (Italy, France, Germany, etc.) is closer in nature to the Russian legislation, the emergence of which was a forced step within the framework of following the trend to accelerate and achieve the economy of the criminal process. For example, in Germany, such a type of conciliation procedure as an agreement on cooperation in serious and especially serious crimes is identical to the Russian one. The agreement subject is the assistance of the accused in solving the crime, exposing the accomplices. The conditions are directly stipulated in the law (reducing the amount of punishment within the norms of the Criminal Code of the Russian Federation and excluding "accompanying" elements from the indictment).

According to the legislation of the Federal Republic of Germany, the subject cannot be a guilty verdict, as well as the types of punishment (BEULK, 2010). Such a "deal" does not release the prosecutor from the obligation to prove all the circumstances of the case, including those confirming the guilt of the person. The court shall assess the information provided by the accused within the framework of cooperation, its nature, scope and significance for the detection and prevention of other crimes (HARDINGHAUS, 2015). Similar requirements are stipulated in the legislation of other European states. There are only some differences in the subject matter of the agreement, the procedure and conditions for its conclusion, due to the peculiarities of national legislation and the varieties of such agreements.

However, in France, Italy, Spain and Portugal, the "plea deals" and "punitive agreements" have received more detailed legislative consolidation, which are similar to the Russian institution of a special procedure for making a court decision in agreement with the indictment (Chapter 40 of the Criminal Procedure Code of the Russian Federation), which is not the subject of this study. The distinctive differences between the cooperation agreements of most countries of the continental system of law from the Anglo-American are: the absence of a negotiation process ("bargaining") between the parties regarding the scope of the charge and the qualification of the act; the prosecutor's duty to provide evidence of the prosecution, confirming the confession of the accused, establishment by the court of the actual circumstances of the case and the person's guilt; approval of the agreement, taking into account the nature of assistance to the investigation; imposition of a more lenient sentence, but within the limits established by the national legislation for persons who assisted the investigation.

Let's turn to a comparative legal analysis of the legislation of some CIS countries, which provide for the possibility of concluding a pre-trial cooperation agreement. The Criminal Procedure Code of the Republic of Kazakhstan establishes conciliation procedures that have similar features to the domestic institute of pre-trial cooperation agreements. Thus, Part 1 and Part 6 Article 36 of the Criminal Procedure Code of the Republic of Kazakhstan grants the criminal prosecution authority and the court the right to terminate criminal prosecution with the release of a person from criminal liability in case of compliance with the terms of and conditions the procedural agreement on cooperation (Article 67 of the Criminal Code of the Republic of Kazakhstan and clause 2 of Part 1 of Article 612 of the Criminal Procedure Code of the Republic of Kazakhstan) (https://online.zakon.kz).

The Russian legislation does not provide for such a preference for the accused. In any case, the accused shall appear before the court in a special order of the court session, and only the court decides on the sentence mitigation, considering the nature and limits of the accused's assistance to the investigation, the importance of cooperation for the detection and investigation of the crime, the severity of the crime committed. Also, unlike Kazakhstan, Russian legislation does not provide for the possibility of concluding an agreement with convicted persons and the victim's consent for the application of a special procedure stipulated in Chapter 401 of the Criminal Procedure Code of the Russian Federation. And the conclusion of a pre-trial agreement on cooperation under the Criminal Procedure Code of the Republic of Kazakhstan does not entail a reduction in the trial, as in Russia.
On the contrary, a full-fledged stage of the judicial investigation is carried out with the study of all the evidence in the criminal case. It should be noted that the termination of a criminal case is still a right, but not an obligation of the court. The situation is different in Armenia, where the decision on the possibility of correcting a suspect or accused without applying punishment is made exclusively by the prosecutor and is implemented under his/her decision. This is due to the fact that the Criminal Procedure Code of Armenia only provides for such grounds for conciliation procedures as exemption from criminal liability with regard to active repentance and reconciliation with the victim (Articles 72 and 73 of the Criminal Code of the Republic of Armenia (https://www.legislationonline.org); clause 1 of Part 1 of Article 37 and clause 3 of Part 1 of Article 37 of the Criminal Procedure Code of the Republic of Armenia (https://www.legislationonline.org)). The procedural legislation of Armenia does not provide for a pre-trial agreement on cooperation, which excludes the conduct of criminal proceedings in a special order.

Within the framework of this study, the procedural legislation of the Republic of Moldova is quite interesting for us. The Criminal Procedure Code does not explicitly provide for the possibility of concluding a pre-trial cooperation agreement, but it establishes a plea agreement that contains the features inherent in a cooperation agreement. They include the conditions established in clause 1 of Part 1 of Article 505 of the Criminal Procedure Code of the Republic of Moldova for initiating and concluding a plea agreement: “the desire of the accused or the defendant to assist in the prosecution or accusation of other persons”, provided that there is active repentance (https://online.zakon.kz). The victim's opinion does not matter. The decision on the conclusion of a plea agreement is within the competence of the prosecutor (at the stage of criminal prosecution) and the court (at the stage of consideration of the criminal case).

A comparative legal analysis of Chapters 40.1 of the Criminal Procedure Code of the Russian Federation, 49.1 of the Criminal Procedure Code of the Republic of Belarus (https://online.zakon.kz) and 35 of the Criminal Procedure Code of Ukraine allows making a conclusion that the conditions for concluding a pre-trial agreement on cooperation are almost similar. They include the mandatory declaration of guilt on the part of the suspect or accused. A significant difference of the agreement between the prosecutor and the accused under the Criminal Procedure Code of Ukraine is its approval by the court using the sentence, and the application of punishment agreed by the parties to the accused. It should be noted that not all CIS member states provide for a pre-trial cooperation agreement. For example, the legislation of Azerbaijan, Tajikistan and Turkmenistan recognizes as the basis of conciliation procedures the exemption from criminal liability with regard to active repentance and reconciliation with the victim (https://online.zakon.kz; KORNAKOVA et al., 2020), there is no detailed procedural regulation of the institution of a pre-trial cooperation agreement. Although such agreements are concluded in practice, the persons concerned do not receive guarantees of punishment mitigation, considering the nature and degree of assistance to the investigation. Thus, the legislation of Russia and the countries of the former USSR have a similar system in terms of the presence of mechanisms having the features of conciliation procedures, their types and peculiarities of legal regulation.

CONCLUSIONS

Summing up the research conducted within the framework of this article, it is worth noting that the institution of a pre-trial cooperation agreement is not recognized in all states. The Russian institute of pre-trial cooperation agreements is similar in nature to the institute of “agreements” of European states and the states of the post-Soviet space, as well as is characterized by the following significant features, which should include: 1) intersectoral nature of the institution, which combines compliance with the requirements of criminal legislation and criminal procedure legislation; 2) bilateral nature of the conciliation procedure; 3) the court has the authority to approve the agreement while observing the procedural form of its conclusion and implementation; 3) guilt confirmation by evidence collected in accordance with the procedure established by law; 4) good faith in the performance of obligations to assist in the disclosure of a crime; 5) the lack of the parties' right to agree on the content of the charge and the qualification of the act; 4) simplification of the trial stage by reducing the judicial investigation.

Despite the convincing arguments of experts in the field of criminal procedure law, it should be noted that the institution of a pre-trial cooperation agreement is still an effective tool for improving the quality of crime investigation (KUPRYASHINA et al., 2019). In this regard, the legislator should be particularly careful when adopting the experience of foreign countries, since not every tool for implementing a pre-trial cooperation agreement is suitable for the Russian legal system, and a reasonable balance should be observed between the interests of all participants in the criminal process.
REFERENCES


KUPRYYASHINA, E.A.; LYAHKOVA, A.I.; LUKYANCHIKOVA, E.F.; SHUMLIN, S.F.; NOVIKOVA, E.A. Agreements in criminal processes: problems of application and development. Humanities & Social Sciences Reviews, 7(3): 511-
515, 2019.


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Received in: 29 Feb. 2021