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**PRACTICAL APPLICATION OF PLEA BARGAINING  
FOR THE TYPE AND THE SEVERITY OF THE CRIMINAL  
SANCTIONS IN THE FIRST YEAR OF THE APPLICATION  
OF THE NEW LAW ON CRIMINAL PROCEDURE**

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## **CONTENT**

Instead of Introduction.....	4
Subject and aim of the Analysis.....	4
Methodological framework used in the preparation of the Analysis.....	5
<b>I. PLEA BARGAINING IN THE DOMESTIC CRIMINAL SYSTEM.....</b>	<b>5</b>
1. Why plea bargaining? .....	5
2. Plea bargaining – a new procedural justice principle in the domestic criminal justice system.....	7
2.1. Bylaws on the application of the bargaining principle.....	14
3. Negotiation sregarding the type and severity of the crimin sanction through numbers and facts.....	21
3.1. Plea agreements concluded in the territory of the higher public prosecutor’s offices according to the structure of the criminal acts.....	23
3.2. Type and severity of criminal sanctions agreed in the plea negotiation process.....	31
3.3 Final considerations and recommendations.....	39
4. Comparative considerations with regard to the application of plea bargaining in other countries .....	40

## Instead of Introduction

The analysis of the practical application of plea bargaining regarding the type and severity of the criminal sanction, according to the Law on Criminal Procedure of 2010 (LCP), represents a joint contribution of the Association of Public Prosecutors and the Rule of Law Unit of OSCE Mission to Skopje towards the process of establishing a standardized criminal policy and practice in our criminal justice system. The very analysis processes data which refer to plea agreements made in the four appeal districts: Bitola, Gostivar, Skopje and Shtip, in the period from 1st of December until 31st of March 2015.

The traditional criminal procedure law and judicial practice, being distinctive of the European countries, have been opposed to the contractual justice, i.e. consensual justice on the grounds of the determination that the penal reaction is rigorously established on the basis of law and that it does not know about dialogue, compromise, nor agreement, having in mind the fact that the principal aim is protection of the fundamental social values.<sup>1</sup>

The new solutions envisaged in LCP, which essentially reform the procedural acting, are basically Anglo-Saxon principles with a long tradition in the common law states, of course, through their adjustment to the European judicial practice.

## Subject and aim of the Analysis

The application of the principle of plea bargaining in terms of public prosecutors' practical acting represents subject of this Analysis. By means of a statistical and analytical presentation of data processed, the authors intend to provide initial picture of:

- The practical application of plea bargaining;
- Standardization in the process of acting with respect to plea bargaining in the territory of the four Higher Public Prosecutor's Offices; and
- The criminal policy in cases adjudicated on the basis of a plea agreement made by the public prosecutor and the defendant.

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<sup>1</sup> Françoise Tulkens, *Negotiated Justice, European Criminal Procedures*, (ed. Dalmans-Marty/Spencer), Cambridge University Press, 2002., page.643

## **Methodological framework used in the preparation of the Analysis**

Having in mind that the Analysis is principally directed towards the public prosecutors' practical acting, the team of authors working on this study come from the rank of public prosecutors from all acting instances. During the study a few methodological approaches were used in direction of providing appropriate data regarding the application of this new criminal justice principle:

- Statistically processing and crossing the data on the total number of persons against whom criminal charges were pressed during 2013, 2014 and 2015 with the number of rejected criminal charges and the number of persons for whom the criminal procedures continued and resulted in adjudication on the basis of a draft plea agreement.
- Analysis of all plea agreements made between the public prosecutor and the defendant in the territory of the four Higher Public Prosecutor's Offices in the period from 1<sup>st</sup> of December 2013 until 31<sup>st</sup> of March 2015;
- Individual statistical processing of data on plea agreements made in the basic public prosecutor's offices, as well as a summary presentation of the data on the level of higher public prosecutor's offices;
- Analysis and statistical processing of the criminal policy and the types of criminal acts on which plea agreements were made in the period from 1<sup>st</sup> of December 2013 until 31<sup>st</sup> of March 2015;
- Consultations and discussions with judges, attorneys and prosecutors who have had experience in plea bargaining.

## **I. PLEA BARGAINING IN THE DOMESTIC CRIMINAL SYSTEM**

### ***1. Why plea bargaining?***

The contemporary aspects of criminal justice are characterized by dynamic development and reforming in several directions, aimed at making the criminal justice equally accessible to all citizens and exercisable as soon as possible. These endeavours lead to constant search for various solutions in direction of accelerating the criminal procedure. A more simplified acting is a precondition for accelerating the criminal procedure. The comparative experiences tell us that the majority of states most often adopt principles that have already been established by other states, thus mixing the traditional principles of the Anglo-Saxon legal tradition in the legal systems with European continental tradition. This trend in the contemporary tendencies of criminal justice, and thus in the criminal procedure law, results

principally from the lengthiness of criminal proceedings, their complexity, as well as the increased number of cases the courts act on<sup>2</sup>.

For a long time one has been able to come across accusations in the criminal procedure literature that the mixed criminal procedure is characterized by slowness, accentuated formality, inflexibility and, as a result of all this, inefficiency. The Law on Criminal Procedure<sup>3</sup> (LCP) of 2010 contains provisions which for the first time in our criminal procedure legislation regulate the possibility of plea bargaining between the public prosecutor and the defendant, envisage a different status of admission of guilt in the phase of control of the indictment and during the main hearing in regular proceedings, as well as during the hearing in shortened proceedings compared to the up-to-now practice where the defendant could make an admission of guilt in front of the court<sup>4</sup>.

As indicated in the explication of LCP, the efforts put in direction of making the penal acting be efficient and economic has led to a string of studies and analyses of the cost effectiveness and the advantages that are characteristic of the plea bargaining, being considered as a market mechanism for improvement of the quality of criminal prosecution by means of which the costs in the criminal procedure are reduced. By means of the forms of a possible plea bargaining (or plea agreement) between the public prosecutor and the defendant or the so called agreed justice, by broadening the limits of opportunity of the public prosecutor in misdemeanour cases, by respecting the position of the damaged party, his opinion and his accord with any deviation from the regular flow of the criminal procedure, by providing indemnity as a possibility of not launching a criminal procedure, i.e. by resolving disputes via mediation, by inserting short and efficient time limits for undertaking concrete procedural actions, as well as by accepting various forms of accelerated procedures, one should significantly contribute to overcoming the key problems that refer to the lengthiness and complexity of the criminal procedure as well as to increasing the efficiency of courts by quickly dealing with the ever-increasing inflow of criminal cases.

The implementation of plea bargaining as a new criminal justice principle in the domestic criminal procedure finds its base even in the recommendations of EU and the Council of Europe that refer to acceleration of the criminal procedure and simplification of the criminal justice, as well as find in got her forms of resolving criminal

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<sup>2</sup> Comparative examination of the solutions for accelerating and simplifying the criminal procedure, Nanev/Misovski/Buzarovska, Macedonian review of the criminal justice and criminology no.1/2008

<sup>3</sup> Official Gazette no.150/2010 and 100/2012

<sup>4</sup> Buzarovska, G. Plea bargaining: Guidebook for practitioners (Gordana Buzarovska, Michael G. Karnavas, David Re), Skopje, OSCE Mission to Skopje, 2010



cases.<sup>5</sup>

## ***2. Plea bargaining – a new procedural justice principle in the domestic criminal justice system***

By accepting the assertion that efficient criminal justice can be partially provided even via procedures that allow for decriminalization, depenalization, alternative forms of criminal prosecution and simplification of the criminal procedure, a distinction should be made between the plea bargaining as a relation between the perpetrator (in the capacity of suspect or defendant and obligatorily his defense attorney) and the public prosecutor as authorised plaintiff, being an alternative to court proceedings, and the negotiations for indemnity purposes that can occur between the perpetrator and the damaged party and managed by a third unconcerned person (mediator), having characteristics of an alternative to prosecution.

The plea bargaining, as regulated in LCP of 2010, represents an entirely new principle in our criminal procedure that is similar to the plea bargaining applied in many other states, but, however, it is not entirely the same. By means of this principle the parties – the public prosecutor and the suspect, i.e. the defendant and his defence attorney make an agreement on the type and severity of the criminal sanction compared to other systems where a plea agreement can be made even on the legal qualification of the essence of crime or originating from the undertaken criminal actions and the type and severity of criminal sanction.

Although in our criminal system plea bargaining refers to the type and severity of criminal sanction, most of the provisions of LCP and CC lead us to the conclusion that the admission of guilt made by the suspect basically represents a precondition for plea bargaining.

There are differences in the possibilities of making admission of guilt, i.e. making admission in different stadiums of actions undertaken as soon as the investigation procedure has been completed. The admission of guilt represents a precondition for reaching an agreement between the parties in the control phase of the indictment, but not in the investigation procedure.<sup>6</sup> The provisions of Articles 483-490 of LCP, which do not obligatorily demand an admission of guilt made by the suspect, are indirectly applied in the investigation procedure.

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<sup>5</sup> Recommendation no. R(87)18 of the Committee of Ministers of the Council of Europe (adopted in 1987) concerning the Simplification of the Criminal Justice, which contains concrete proposals about the forms of accelerated and simplified procedures, Recommendation no. R(95)12 of the Committee of Ministers of the Council of Europe (adopted in 1995) on the Management of Criminal Justice.

<sup>6</sup> Buzarovska, G. Plea bargaining: Guidebook for practitioners (Gordana Buzarovska, Michael G. Karnavas, David Re), Skopje, OSCE Mission in Skopje, 2010

Nevertheless, even despite the fact that no admission of guilt is unequivocally made in the phase of the investigation procedure, the admission of guilt is assumed from the very initiation of the plea bargain procedure.

Additional "inconsistency" in relation to the admission of guilt represents the provision of paragraph 1, item 1 of Article 40 of the Criminal Code regarding penalty mitigation which envisages that the court can mitigate the penalty when it „pronounces it on the basis of a plea draft agreement concluded between the public prosecutor and the defendant“.

It can be unequivocally concluded from LCP that subjects in the negotiation concerning the type and severity of criminal sanction are the public prosecutor from one side and the defendant and his defence attorney from another. In any case the subjects in the plea bargaining are parties, and if the suspect or the defendant has a defence attorney (chosen or assigned), then the defence attorney should participate in the negotiation regarding the type and severity of criminal sanction. In case the suspect or the defendant has a defence attorney, the very negotiation regarding the type and severity of criminal sanction takes place between the defence attorney and the prosecutor, but the defence attorney is obliged to inform the defendant about the course and theme of the negotiations. In this phase the court does not participate in the very negotiation procedure regarding the type and severity of criminal sanction that takes place between the parties concerned.

Before the start of the first examination, the defendant shall be informed about the right to make an agreement with the public prosecutor on the type and severity of criminal sanction, being in accordance with Articles 489 to 496 of the Law on Criminal Procedure<sup>7</sup>.

Any side can initiate negotiations regarding the type and severity of criminal sanction.

One of the conditions for accepting an agreement on the type and severity of criminal sanction is the existence of sufficient evidence of defendant's guilt, so when negotiations are started it is assumed that the public prosecutor possesses sufficient evidence of defendant's guilt. The negotiation refers to the type and severity of criminal-justice sanctions, in other words the sanctions that would be pronounced to the defendant for the criminal act he is charged with.

For his admission of guilt the public prosecutor can offer to the defendant pronouncing a more mitigated sanction, which does not exclude the possibility of pronouncing a penalty being under the

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<sup>7</sup> Article 206, paragraph 6 of the Law on Criminal Procedure, Official Gazette no.150/2010 and 100/2012

legally envisaged minimum. In the process of reaching a plea agreement, the prosecutor must act within the obligatory regulations of the Criminal Code regarding the type<sup>8</sup> and aim<sup>9</sup> of criminal sanction, the conditions for their pronouncing, the penalties that can be pronounced for certain criminal acts and the mitigation limits of the legally prescribed penalties<sup>10</sup>. In the negotiation process the prosecutor cannot offer pronouncing a penalty to the defendant being under the level of the less severe penalty that can be pronounced for a certain criminal act according to the Criminal Code provisions concerning more mitigated penalties, nor he can propose pronouncing a suspended sentence for a criminal act for which this measure cannot be pronounced according to the Criminal Code. This is the framework that should be respected by the defence attorney, i.e. the defendant, in the process of reaching a plea agreement on the type and severity of criminal sanction.

The final aim of the negotiation process is reaching an agreement, a contract in a written form composed by the prosecutor, the defendant and his defence attorney. When procedural actions are undertaken in connection with this procedural principle the presence of the defence attorney is obligatory, in other words the defendant must have a defence attorney. The participation of the court in the negotiation phase is entirely excluded. The procedural activities of the court begin as soon as the draft agreement has been concluded in a legal form and submitted for consideration.

The type and severity of the criminal justice sanction is subject of the agreement, and if the suspect is consentient, then subject of the agreement can be an associated action for damages of the damaged party as well. During the negotiation process an agreement can be reached for pronouncing a sentence that will be under the legal minimum by applying the penalty mitigation provision, for example, pronouncing a fine instead of a prison sentence or a more lenient kind of criminal justice sanction, for example, suspended sentence instead of a prison sentence or fine. The parties should precisely determine the criminal justice sanctions, for example, a prison time of up to six months or a fine in exactly determined amount in denars. If in the negotiation process the penal framework of the established judicial practice is taken into account, then the risk of having an agreement rejected by the court is reduced. The prosecutor can offer a sentence that is under the legal minimum by applying the provisions of the Law on Determining the Type and Meting Out the Sentence<sup>11</sup> in order to mitigate the sentence, or the favourable variant, pronouncing a more lenient type of criminal justice sanctions.

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<sup>8</sup> Article 33 of the Criminal Code

<sup>9</sup> Article 32 of the Criminal Code

<sup>10</sup> Article 41 of the Criminal Code

<sup>11</sup> Official Gazette no.199/2014

Two cases of determining a sanction in the plea bargain procedure, in which the public prosecutor and the defendant negotiate, are given in chapter four of this Law<sup>12</sup>. If the public prosecutor and the defendant negotiate an agreement during the investigation procedure or the shortened procedure and if no indictment proposal has been filed, then no sentence can be agreed that would be less than 50% of the sentence that shall be pronounced by applying the provisions of this Law in regular court proceedings. If the negotiation process between the public prosecutor and the defendant takes place in the assessment phase of the indictment, then no sentence can be agreed that would be less than 60% of the sentence that shall be pronounced by applying the provisions of this Law in regular court proceedings. Hence, in a procedure of this kind the public prosecutor, the defendant and his defence attorney would need to go through the process of determining the sentence that would be pronounced by the court during the main hearing, which means filling-in the work sheets, being an integral part of the Law, so that they can anticipate with a higher likelihood what sentence would be pronounced to the defendant during the main hearing and appropriately take advantage of the opportunity provided by the Law on Determining the Type and Meting Out the Sentence in order to mitigate the sentence in the negotiation process.

The measures of security can be subject of the agreement and they are one part of the criminal justice sanctions prescribed by the criminal material law. Of course, the parties and the defence attorney must respect the provisions of the material law in the process of composing the plea agreement, in other words they must not stray from the Criminal Code and the Law on Determining the Type and Meting Out the Sentence. As we have previously said, an agreement cannot be made for a sentence or another criminal justice sanction that is not envisaged in the Criminal Code or a sentence that cannot be pronounced by applying the legal penalty mitigation provisions. Such a draft agreement should be proclaimed as illegal, contrary to the principles of legality and contrary to the public interest. If the whole indictment is subject to a plea bargain, then a regular criminal procedure that goes through all phases of the criminal procedure should be avoided.

The draft agreement has to contain the following elements:

1. data regarding the participants in the proceedings: the public prosecutor, the suspect and his defence attorney;
2. description and legal qualification of the criminal acts. If the proceedings comprise several criminal acts, then the agreement can refer to some of them and thus concluded on one part of the criminal acts;

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<sup>12</sup> Article 20 of the Law on Determining the Type and Meting Out the Sentence, Official Gazette no.199/2014

3. the proposed criminal sanction according to type and severity. The main sentence, the alternate sentence, the security measures, the alternative measures or the other measures envisaged by the criminal code can be included therein;
4. the kind and extent of the associated action for damages and the way of its realisation. This is only applicable if the suspect has given consent that the associated action for damages can be subject of the agreement;
5. a statement of the suspect in which he declares that he conscientiously and willingly accepts the agreement and the consequences that arise therefrom;
6. a statement of the public prosecutor and the suspect declaring that they renounce the appeal right if the court passes a verdict accepting the draft agreement;
7. cost of the proceedings
8. signature of the public prosecutor, the suspect and his defence attorney; and
9. date and place of conclusion of the plea draft agreement.

By analysing the data and the acts through which the public prosecutor files the draft agreement to a judge of preliminary proceedings, being in accordance with Article 483 of LCP, it can be noted that there is a different practice. Namely, one part of the prosecutor's offices file only the draft agreement (with the necessary elements envisaged in Article 485 of LCP) signed by the public prosecutor, the suspect and his defence attorney. Other public prosecutor's offices submit data with which the draft agreement has been concluded, a description of criminal acts, a legal qualification and in continuation they provide explanation without presenting a list of evidence. Third public prosecutor's offices provide data about who the signatory of the concluded draft agreement is, a description of criminal acts, a legal qualification and in continuation they present a list of evidence.

Because of standardization purposes of the practice, it is of high importance that the following be pointed out:

- The public prosecutor delivers the draft agreement (prepared with the content envisaged in Article 485 of LCP) that is signed by him, the suspect and his defence attorney. This legal provision does not prescribe any obligation for the public prosecutor to submit an explanation.
- It is incumbent on the public prosecutor (Article 483, paragraph 2 of LCP) to submit the draft agreement accompanied by all evidence (meaning that he is under obligation to submit a list of evidence together with the evidence) and to present a written statement signed by the damaged party in relation to the kind

and extent of the associated action for damages only if that action is subject of the agreement pursuant to Article 484 of LCP. Otherwise, such statement of the damaged party should not be submitted.

After receiving the draft agreement, the judge of the preliminary proceedings shall schedule a hearing within three days in order to assess it; the judge invites the parties to the hearing and it is incumbent on him to examine if the draft agreement has been willingly submitted, whether the suspect is aware of the legal consequences resulting from its acceptance, the consequences connected with the associated action for damages and the cost of the proceedings.

During the hearing the public prosecutor, the suspect and his defence attorney must not submit a request for determining a criminal sanction that differs from the criminal sanction contained in the plea draft agreement. If they submit such a request, it shall be considered that they have renounced the draft agreement and the judge of the preliminary proceedings shall make a decision to reject the very draft agreement. Until a decision is made the parties have the right to renounce the draft agreement, whereas the acceptance of the draft agreement means that they have renounced the right to appeal the decision made on the basis thereof.

If the judge of the preliminary proceedings determines that the evidence collected in relation to the facts being of importance for selection and measuring the criminal sanction do not justify the proposed criminal sanction or if during the hearing the public prosecutor, the suspect and his defence attorney submit a request for determining a criminal sanction that differs from the criminal sanction contained in the draft agreement, he shall make a decision to reject the draft agreement and deliver the case files to the public prosecutor.

If the judge of the preliminary proceedings accepts the draft agreement, he shall pass a verdict by which he must not pronounce a criminal sanction being different from the criminal sanction contained in the draft agreement. The verdict contains the elements of a convicting verdict, such as:

- which criminal act the defendant is pronounced guilty for, by indicating the facts and circumstances that are characteristic of the criminal act, as well as those on which depends the application of a certain provision of the Criminal Code;
- the legal name of the criminal act and which provisions of the Criminal Code have been applied;
- what sentence has been pronounced to the defendant;
- a decision on security measures, property and proceeds confiscation and confiscation of objects;

- a decision to calculate the time spent in custody or the prison sentence already served
- a decision concerning the criminal proceedings cost

If the defendant has been fined, then the time limit for payment of the fine should be indicated in the verdict, as well as the way of replacing the fine in case the fine cannot be collected through forced collection.

The verdict shall be published forthwith, prepared in a written form within three days of its publication and it shall be delivered with no delays to the public prosecutor, the defendant and his defence attorney, as well as to the damaged party who can realise his associated action for damages in a litigation procedure.

In this part it is important that some questions arising in connection with the plea bargaining be pointed out:

How would one act if there are more defendants, and no plea agreement has been made with all of them?

It can be said that in the process of negotiating a plea agreement when there are more co-perpetrators, in the procedure that has continued for the other co-perpetrators and where the public prosecutor negotiates a plea agreement only with one of the co-perpetrators or one part of them, the defendant who has made a plea agreement can appear in the capacity of a witness, and the verdict that has been passed on the basis of the plea agreement shall not be presented as evidence. This situation is very similar to the situations that used to arise during the application of the previous Law on Criminal Procedure; at that time we had situations in which the verdict would become effective in the part concerning one defendant and cancelled for the other co-perpetrators, so in case of a retrial the co-perpetrator for whom the verdict was effective could be examined in the capacity of a witness.

- » *How would one act if there are more defendants willing to make a plea agreement?*

In this case the draft agreement shall be concluded with each defendant.

- » *Can the defendant make admission of guilt and negotiate an agreement for the criminal sanction as to a certain paragraph of the criminal act he has been charged with at the beginning of the main hearing before the start of the evidentiary procedure or he must cumulatively make admission of guilt for commission of all paragraphs of the same criminal act he has been charged with?*

In this phase there is no legal possibility that the defendant can negotiate an agreement for criminal sanction. Until completing the



phase of confirming the indictment, the defendant can negotiate with regard to the type and severity of the criminal sanction. After confirming the indictment, the defendant can only make admission of guilt. In terms of procedure this means that the court shall skip the evidentiary procedure and shall approach the process of measuring the sentence. The court can measure a more lenient sanction to the defendant.

The defendant should essentially make admission in relation to the description of the criminal act as defined in the indictment, not to the right qualification of the act. If it occurs that the defendant has requested to only make admission as to one part of the elements of the criminal act, irrespective of whether that is the basic or qualificatory element, that approach shall not be considered as admission of guilt and the court should continue with the course of the criminal procedure.

### ***2.1 Bylaws on the application of the bargaining principle***

When the LCP was adopted and the plea bargaining principle (negotiation on the type and the severity of the criminal sanction) was established, no legal obligation to adopt bylaws facilitating the application of this principle was envisaged in the law. However, a need for additional regulation has arisen since the entering into force of the LCP and the beginning of its application, in other words a need to standardize the actions of public prosecutors, both in the sense of application of the provisions of the law and in the sense of the procedure conducted in the public prosecutor's office that has not been normatively regulated to the full extent.

Article 6 of the Law on the Public Prosecutor's Office<sup>13</sup> indicates the basic principle of hierarchy and subordination according to which the public prosecutor's office is established; Article 25, paragraph 1 of the same Law envisages that the State Public Prosecutor "[...] has the right to issue obligatory general instructions, in writing, to the higher public prosecutor, the basic public prosecutor in charge of prosecution of persons involved in organized crime and corruption and to the basic public prosecutor [...]"; and paragraph 3 of the same article indicates that the instructions refer to the undertaking of certain measures and activities, which, inter alia, aim at a more efficient detection and prosecution of criminal acts and their perpetrators and at a more efficient application of the laws. The above provisions represent legal basis for adoption of obligatory Instruction regulating and standardizing the actions undertaken by public prosecutors in connection with the legal institute - adjudication on the basis of a plea agreement concluded by the public prosecutor and the defendant. The Instruction, as a bylaw, was adopted on November 8, 2013 and refers public prosecutors to take part in the procedure of negotiation

<sup>13</sup> Official Gazette no.150/2007 and 111/2008



and plea bargaining, upon their own initiative or following a proposal by the defendant or his defence attorney, for all cases for which they will have assessed that the plea draft agreement will more effectively and more efficiently achieve the objective of the conducting of the criminal procedure, especially when one or more of the following conditions will be met:

- the defendant will make an admission of guilt for commission of all or of some of the criminal acts of the indictment;
- the admission of guilt will allow for detection of other criminal acts or perpetrators of criminal acts, being subject of the plea negotiation, or will ease the proving of other criminal acts and other perpetrators' guilt;
- the damaged parties and the victims will be spared, i.e. protected from negative implications in case of public presentation of their statements at the hearing;
- in cases when the defendant is consentient and accepts an associated action for damages brought;
- the cost of the criminal procedure will be decreased and the defendant accepts to remunerate the cost incurred.

LCP does not envisage any limitations as to which criminal acts can be subject to a plea negotiation. By rule, plea negotiation is possible for any criminal act. However, having in mind that it is the beginning of the application of an entirely new procedural justice principle, it was considered that in the beginning, for certain types of criminal acts, the plea negotiation should be more carefully approached. For those reasons the Instruction recommends that the public prosecutors, in principle, should not accept plea negotiations and bargaining requests in cases of:

- especially severe crimes where the victims have been severely traumatized, or deprived of life, and the criminal act has disturbed and horrified the public;
- severe form of financial crime committed – criminal acts such as malpractice, corruption and other acts similar to them, especially if perpetrated by officials assigned to managerial functions who have thus gained significant property benefit, i.e. have caused significant damage to the community;
- cases in which the public prosecutor possess evidence with which the proving is utterly simple and it is expected that the main hearing will end quickly, and the defendant as a side in the negotiation process requests significant decrease in the prescribed criminal sanction;
- criminal acts perpetrated against children, i.e. minors.

The Instruction obliges public prosecutors to apply the plea bargaining procedure in the official premises of the public prosecutor's office, and in particular situations in the remand prison and similar. Before initiating a plea bargaining procedure the public prosecutor acting on the concrete criminal case is obliged to inform the public prosecutor of the basic public prosecutor's office about the initiation of a plea bargaining procedure and about the proposal given by the defendant or his defence attorney.

The public prosecutor shall prepare an official note of the beginning and the course of the negotiation in which he shall explain the negotiation reasons and the negotiation items (the offer made by the public prosecutor and the offer made by the defendant and his defence attorney should especially be indicated).

As to the criminal acts for which a fine or imprisonment of up to 3 years is prescribed, the public prosecutor independently conducts the negotiations in the basic public prosecutor's office and signs the draft agreement concluded with the defendant.

As to the criminal acts for which imprisonment of up to 5 years is prescribed, the public prosecutor conducts the negotiations in the basic public prosecutor's office and the public prosecutor of the basic public prosecutor's office signs the agreement.

As to the criminal acts for which imprisonment of up to 10 years is prescribed, the public prosecutor of the basic public prosecutor's office signs the agreement upon previously obtained consent from the higher public prosecutor.

As to the criminal acts that fall under the jurisdiction of the BPPO for Prosecution of Organised crime and Corruption and for which imprisonment of at least 4 years, or at least 8 years or life imprisonment is prescribed, the agreement shall be signed by the Public Prosecutor of the BPPO for Prosecution of Organised crime and Corruption, i.e. the public prosecutor of the public prosecutor's office upon previously obtained consent from the State Public Prosecutor.

If the plea bargaining procedure fails, irrespective of the reasons, (rejection of the conditions offered by the public prosecutor or the defendant and his defence attorney in the negotiation procedure and similar) the public prosecutor participating in the negotiation process shall prepare an official note and inform thereof the public prosecutor of the public prosecutor's office, the public prosecutor of BPPO for Prosecution of Organised crime and Corruption and the other hierarchically structured prosecutors in the cases of item 7<sup>14</sup>

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<sup>14</sup> Item 7 of the obligatory Instructions stipulates: "As to the criminal acts for which imprisonment of up to 10 years is prescribed, the public prosecutor of the basic public prosecutor's office signs the agreement upon previously obtained consent from the higher public prosecutor."

and item 8<sup>15</sup> of this Instruction.

The obligatory Instruction was applied as of 1st December 2013, i.e. since the beginning of the application of LCP.

Having in mind the increased number of plea bargaining procedures, as well as considering the established practice, on November 25, 2015, the State Public Prosecutor enacted new obligatory Instruction. The most evident improvement with the new obligatory Instruction is the possibility for the public prosecutors to be able to conclude draft agreements for all criminal acts, including the criminal acts that were limited by the first obligatory Instruction. The process of negotiating and bargaining between the public prosecutor and the suspects (defendants) with the new obligatory Instruction was regulated as follows:

- As to the criminal acts for which fine or imprisonment of up to 5 years is prescribed, the public prosecutor in the basic public prosecution office independently conducts the negotiations and signs the proposed plea agreement concluded with the defendant.
- As to the criminal acts for which imprisonment of up to 10 years is prescribed, the public prosecutor of the basic public prosecutor's office leads the negotiations and signs the agreement upon previously obtained consent from the public prosecutor of the basic public prosecution office.
- As to the criminal acts for which imprisonment over 10 years is prescribed, excluding the crimes envisioned within item 8<sup>16</sup> of this Instruction, the agreement shall be signed by the public prosecutor in the basic public prosecution office upon a previously obtained consent from the public prosecutor of the higher public prosecution office.
- As to criminal acts with in the competence of the BPPO prosecuting organized crime and corruption for which imprisonment of over 10 years is prescribed; for financial crimes (crimes related to malpractice, corruption) committed by elected or appointed

<sup>15</sup> Item 8 of the obligatory Instruction stipulates: "As to the criminal acts that fall under the jurisdiction of the Basic Public Prosecutor's Office Prosecuting Organized Crime and Corruption and for criminal acts for which imprisonment of at least 4 years, or at least 8 years or life imprisonment is prescribed, the agreement shall be signed by the Public Prosecutor of the Basic Public Prosecutor's Office Prosecuting Organized Crime and Corruption, i.e. of the Basic Public Prosecutor's Office upon previously obtained consent of the Public Prosecutor of the Republic of Macedonia."

<sup>16</sup> Item 8 of the new obligatory Instruction, enacted on 25.11.2015 stipulates: "As to criminal acts that fall under the jurisdiction of the Basic Public Prosecutor's Office Prosecuting Organized Crime and Corruption and for criminal acts for which imprisonment of more than 10 years;  
-As to criminal acts of committed financial crime (crimes related to malpractice, corruption) committed by elected or appointed officials (officials holding managerial positions) and for criminal acts of special public interest which fall with in the competence of the BPPO Prosecuting Organized Crime and Corruption; and  
-As to criminal actions for which life imprisonment may be pronounced the agreement shall be signed by the public prosecutor in the Basic Public Prosecutor's Office Prosecuting Organized Crime and Corruption, i.e. in the Basic Public Prosecutor's Office upon previously obtained written consent of the Public Prosecutor of the Republic of Macedonia."

officials (officials holding managerial positions) and for criminal acts of special public interest which fall within the competence of the BPPO prosecuting organized crime and corruption and for criminal acts for which life imprisonment may be pronounced, the agreement shall be signed by the Public Prosecutor in the BPPO prosecuting organized crime and corruption upon a previously obtained consent from the State Public Prosecutor.

Even though the obligatory Instruction did achieve its objective in terms of standardization of the actions by the public prosecutors regarding the principle of adjudication based on plea agreements concluded between the public prosecutor and the defendant, the adoption of additional general instructions clarifying further the complete process of procedure initiation and development which could result in a plea proposal between the public prosecutor and the suspect would be of significant benefit to the public prosecutors. Such general instructions would contain additional guidelines in the following sense:

- before making a decision to start negotiations, the public prosecutor shall examine the evidence, all circumstances and consequences from the plea negotiations; he shall especially pay attention to whether the plea negotiations for the case of concern are in accordance with the law, i.e. whether the conditions of the obligatory Guidelines on conducting plea negotiations with the defendant have been met;
- if the proposal for plea negotiations and bargaining comes from the defendant or his defence attorney, and the public prosecutor considers that there is no possibility for agreement negotiation in the concrete case, given the circumstances under which the criminal act had been committed or in cases in which the prosecutor has not received consent from his superior prosecutors, when such consent was necessary, he shall notify the defendant and his defence attorney in writing.
- if the public prosecutor considers that he can commence negotiation procedure for plea bargaining, upon his initiative or upon the initiative of the defendant or the defendant's defence attorney, he shall prepare an official note in which he will explain the negotiation reasons and the type and severity of the criminal sanction proposed by the defendant or his defence attorney and the criminal sanction the public prosecutor considers that should be pronounced, i.e. for which he will sign a draft agreement;
- the public prosecutor shall submit the official note to his superior prosecutors so that he can obtain consent in accordance with the obligatory Guidelines;
- in criminal cases in which the measure of custody has been pronounced and in other urgent cases, the consent can be

requested by the public prosecutor of the basic public prosecutor's office by phone, for which an official note shall be prepared that will be an integral part of the request for consent;

- when the public prosecutor obtains the necessary consent in writing or by phone, he shall inform the defendant, i.e. his defence attorney that he agrees to initiate plea negotiation and bargaining procedure;
- a short official note or minutes shall be prepared as to the course of the plea bargaining and the proposals made by the defendant or his defence attorney, and it shall be signed by the public prosecutor, the defendant and his defence attorney;
- if the defendant does not have a defence attorney and if he cannot afford one, the public prosecutor shall request the previous procedure judge to assign to the defendant an ex officio defence attorney to represent his interest in the proceedings;
- the criminal sanction agreed between the public prosecutor and the defendant should neither be below the legally determined framework concerning the concrete criminal act, nor below the penalty mitigation limits<sup>17</sup>;
- according to Article 53 of LCP, the public prosecutor should notify the victim of his intention to start negotiations so that any negative reactions by the victim with respect to the signing the draft agreement are avoided; If the victim as a damaged party, or the damaged party does not start an associated action for damages, the public prosecutor should submit their signed statements to the court along with the draft agreement;
- If the victim as a damaged party or the damaged party starts an associated action for damages, the damages claim can be subject to negotiation to the extent indicated by him, provided that the defendant has given consent to fully or partially compensate the damages;
- The opposing victim or damaged party cannot prevent the public prosecutor from signing the draft agreement with the defendant;
- the draft agreement cannot change the consequences of the legal provisions on confiscation of proceeds acquired through criminal activity and on confiscation of objects. Hence, the draft agreement should always contain confiscation of proceeds, or confiscation of objects;
- during the whole course of plea negotiations and bargaining the public prosecutor should not change his opinion, he should adhere to the agreed, he should establish mutual trust with the defendant and his defence attorney and he must not abuse that trust if the other side adheres the agreed.

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<sup>17</sup> See Article 2 of the Law on Amendments to CC, Official Gazette no.28/2014.

Such additional guidance would ensure additional protection for all parties involved in the bargaining procedure.

The measurement of the type and severity of the criminal sanction, or the process of offering and accepting a proposal by the defendant or the defence attorney, is done following a relatively free assessment made by a public prosecutor acting on a concrete criminal case. Why a relatively free assessment? Because the CC, the Rulebook on the Manner of Measuring Sentences and, finally, the Law on Determining the Type and Meting Out of the Sentence set the basic limits in which the sanctions, i.e. sentences can move.

» ***Instead of a conclusion:***

The obligatory guidelines should perhaps regulate the actions by the public prosecutor in the event the plea negotiation fails and the court, following a hearing, gives a sentence he is unsatisfied with, i.e. instructions should be provided for actions in an appeal procedure in terms of specifying what variations from the given proposals would be satisfactory for the public prosecutor.

The obligatory guidelines and instructions, available to the public prosecutor, are means of unification and better regulation of certain procedures. At this moment, that has been more or less achieved in the public prosecutors' daily actions.

In any case, certain period of time should pass from the practical application of the plea bargaining and the regulation on sentencing related issues before one can think about further regulation of any certain deficiencies.

### ***3. Negotiation regarding the type and severity of the criminal sanction through numbers and facts***

In order to get a full picture of the application of plea bargaining in practice, the following should be taken into account:

- The average number of rejected criminal charges for the current year, and
- The total number of persons (natural and legal) against whom criminal charges were pressed in all basic prosecutor's offices per year.

Namely, when acting on the criminal charges, the public prosecutor is legally entitled to reject a criminal charge in case of existence of some of the legal grounds<sup>18</sup>. Thus, the number of persons against whom the criminal procedure continued (i.e. for those for whom no decision is made to reject the criminal charge) is different in relation to the number of persons against whom criminal charges were pressed.

<sup>18</sup> See Article 288, paragraph 1 of LCP, Official Gazette, no.150/2010 and 100/2012

Understandingly, this analysis refers to the cases in which the criminal charge was not rejected, the criminal procedure continued and ended with a verdict rendered by a competent basic court on the basis of a draft agreement. Table 1 below provides a general presentation of statistical data regarding the number of concluded plea agreements and rejected criminal charges in the first 16 months of the implementation of the new LCP.

	Higher PPO Bitola	Higher PPO Gostivar	Higher PPO Skopje	Higher PPO Shtip	Total
<b>Number of persons against whom criminal charges are pressed</b>	8.480	5.218	14.855	8.271	36.824
<b>Persons against whom the criminal procedure is continued</b>	3.816	2.188	11.885	5.717	23.606
<b>Concluded plea deals(per person)</b>	62	3	199	81	345
<b>Average % of rejected criminal charges</b>	45%	42%	20%	32%	34.75%

Table 1

By analyzing the data on plea agreements made in the territory of the four higher public prosecutor's offices, it can be concluded that during the above-mentioned period the criminal procedure (in phase of an investigation procedure or submitted indictment) continued against 23.606 persons in total. Of that number the district basic prosecutors made plea draft agreements with 345 persons or 1.46% of the persons against whom a criminal procedure had been conducted. All plea draft agreements were accepted by the competent courts and verdicts were passed according to Article 483 of LCP.

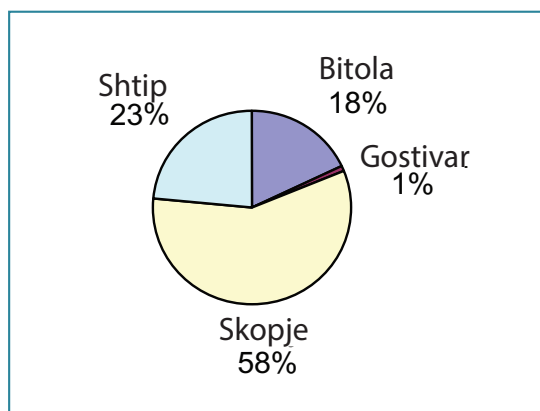
The public prosecutor's offices in the territory of HPPO Skopje concluded most plea agreements - with 199 persons, whereas the public prosecutor's offices in the territory of HPPO Gostivar concluded fewest plea agreements - with only 3 persons. The higher public prosecutor's offices in Bitola and Shtip have a relatively close proportion with 62 and 81 persons with whom they concluded plea agreements.

The data regarding the number of rejected criminal charges are taken from the annual reports on the performance of the public prosecutor's offices in December 2013 and 2014. The average of rejected criminal charges from the previous period is taken as orientation data for 2015, being the period of preparation of the very Analysis.



Depending on the territory of the higher public prosecutor's offices the number of persons whose criminal charges are rejected varies. Thus, in 2014<sup>19</sup> the basic public prosecutor's offices from the territories of the higher public prosecutor's offices in Bitola and Gostivar had 56,20% and 56,72%. In the territory of the Higher Public Prosecutor's Office Shtip this percentage is 37,42 of all persons against whom criminal charges were pressed, whereas this percentage is lowest in the prosecutor's offices in the territory of the Higher Public Prosecutor's Office Skopje, being 19,54%.

The orientation data about the number of persons whose criminal charges were rejected during 2015 is also different in the basic public prosecutor's offices in the territory of each higher public prosecutor's office. By average, the basic prosecutor's offices in the territory of the Higher Public Prosecutor's Office Bitola have the highest percentage of about 42-45% followed by the territory of the Higher Public Prosecutor's Office Gostivar with about 40-42%, the territory of the Higher Public Prosecutor's Office Shtip with about 30-32% of persons against whom charges were brought and, at the end, the territory of the Higher Public Prosecutor's Office Skopje with the lowest percentage of persons whose charges were rejected, being about 19-20% of the total number of persons against whom charges had been brought. Picture 1 shows the percentage of plea agreements concluded in the territory of the four higher public prosecutor's offices.



Picture 1

<sup>19</sup> The high number of criminal charges rejected in this period is due to the high number of charges brought by the Health Insurance Fund for the criminal act Use of Documents with False Content of Article 380 of CC. In mean while, the perpetrators were meanwhile granted a pardon by the Law Amending the Law on Health Insurance – Official Gazette, no.98/15.

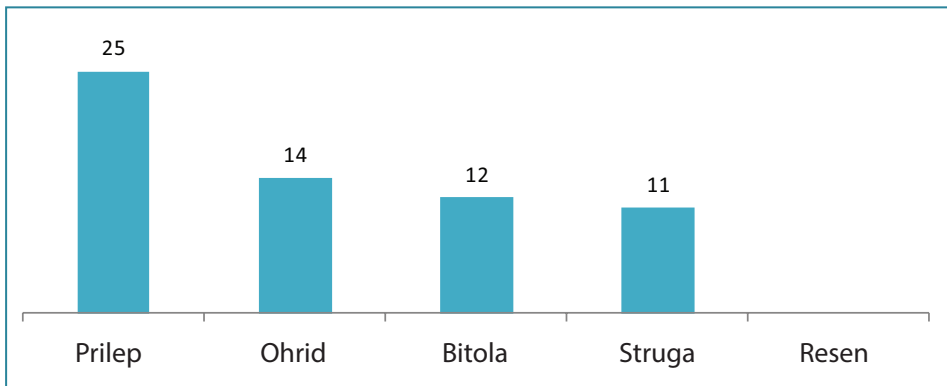


### 3.1 Plea agreements concluded in the territory of the higher public prosecutor's offices according to the structure of the criminal acts

#### » Higher Public Prosecutor's Office Bitola

In the period from December 1, 2013 until March 31, 2015 in the territory of the HPPO Bitola, as presented above, the district basic public prosecutor's offices concluded plea agreements with 62 persons in total. The Basic Public Prosecutor's Office Prilep concluded fewest agreements - with 25 persons, and the Public Prosecutor's Office Resen did not conclude any plea agreement in that period.

Picture 2 below shows the situation in the district prosecutor's offices according to the number of persons a plea agreement is concluded with.



Picture 2

Picture 2 below shows the situation in the district prosecutor's offices according to the number of persons a plea agreement is concluded with.

Criminal acts by article of CC	BPPO Bitola	BPPO Prilep	BPPO Ohrid	BPPO Struga	BPPO Struga	Total
Article 131		1				1
Article 157-a			2			2
Article 157-a	3	3				6
Article 235		4				4
Article 236		9				9
Article 237				1		1
Article 239	1					1
Article 244-a	1			1		2
Article 247		1				1
Article 268	1					1

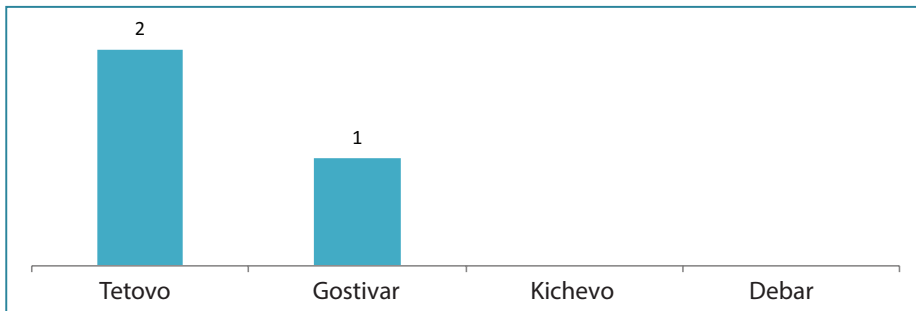
Article 277		1			1
Article 278				3	3
Article 279		1			1
Article 285	1				1
Article 286			12		12
Article 300	1	1		3	5
Article 358	1				1
Article 366	1				1
Article 377		1			1
Article 378		1		1	2
Article 382				1	1
Article 383		2			2
Article 396	2			1	3

Table 2

The analysed data indicate that the public prosecutors concluded **most** plea agreements on the criminal act of Article 286 of CC – **Violation of the right deriving from reported or protected invention and integrated circuit topography** with 12 suspects (defendants) in total. All 12 agreements are concluded by BPPO Ohrid. The basic public prosecutors concluded plea agreements with 9 persons on the criminal act Burglary of Article 236 of CC, with 6 persons on the criminal act of Article 215 of CC – Unauthorized production and release for trade of narcotics, psychotropic substances and precursors, and with 4 persons a plea agreement is concluded on the criminal act-Theft of Article 235 of CC. As to the remaining criminal acts that are presented in table 2, the basic public prosecutor’s offices concluded 1-3 plea agreements.

» **Higher Public Prosecutor’s Office Gostivar**

The district basic public prosecutor’s offices from this territory have the lowest number of plea agreements concluded, with only 3 persons; two plea agreements are concluded in BPPO Tetovo and one in BPPO Gostivar.



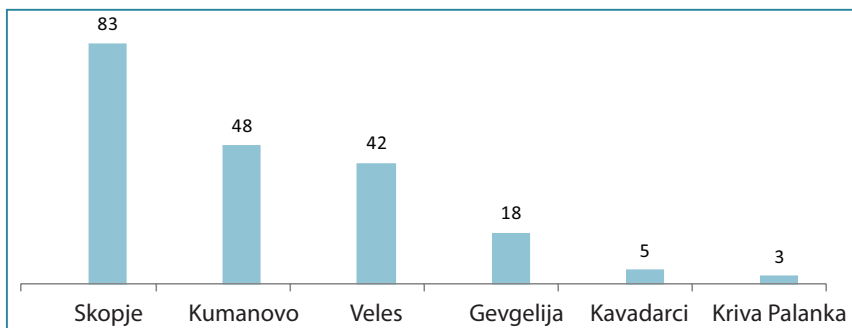
Picture 3

As it is displayed on picture 3, the Basic Public Prosecutor's Offices in Kichevo and Debar did not apply the plea bargain principle during the period analysed.

In relation to the structure of the criminal acts on which the three plea agreements are concluded in the territory of this higher public prosecutor's office, a plea agreement is concluded with each of the three suspects (defendants) on the following criminal acts: Unauthorised production and putting into circulation of narcotic drugs, psychotropic substances and precursors of Article 215 of CC, Theft of Article 235 of CC and Violence of Article 386 of CC.

### » **Higher Public Prosecutor's Office Skopje**

The basic public prosecutor's offices from the territory of the Higher Public Prosecutor's Office Skopje have the highest number of concluded plea agreements, with 199 persons in total. This number does not include the data that refer to plea agreements concluded by BPPO Prosecuting Organised Crime and Corruption. These are given in a special subheading in the text below. Picture 4 below represents the number of concluded plea agreements by persons in each basic public prosecutor's office.



Picture 4

As expected, BPPO Skopje as the largest prosecutor's office in the state has the highest number of plea agreements concluded – with 83 persons in total, and BPPO Kriva Palanka has the lowest number of plea agreements concluded – with 3 persons. The structure of the criminal acts on which plea agreements are concluded by persons is given in table 3.

Criminal acts by article of CC	BPPO Skopje	BPPO Kumanovo	BPPO Veles	BPPO Gevgelija	BPPO Kavadarci	BPPO Kriva Palanka	Total
Article 130	1	1					2
Article 131	8		1				9
Article 140	2			3			5
Article 144		1					1
Article 161		1					1
Article 215	24	9	4				37
Article 216	7		2				9
Article 223		3					3
Article 228		1					1
Article 235		2	1				3
Article 236	4	3					7
Article 237	4	2					6
Article 239		1					1
Article 242	1						1
Article 244-a			7				7
Article 247		1					1
Article 251	1						1
Article 259				1			1
Article 261	2						2
Article 268			2				2
Article 278		2	1			2	5
Article 279	2						2
Article 285	2		16				18
Article 288		1					1
Article 292		1					1
Article 297				1			1
Article 300	1	1	1		1		4
Article 353	3	3					6
Article 353-B			2	2			4
Article 354			1				1
Article 357	2						2
Article 358	2			1			3
Article 365		2					2
Article 378	4	4		4			12
Article 380		1			2		3
Article 382	1					1	2
Article 383	1			2	2		5
Article 386		3					3
Article 389		1					1
Article 396	9	2	4				15
Article 402				4			4
Criminal acts from the Law on Foreign Exchange Operations, Article 54		2					2
Criminal acts from the Excise Law, Article 60	2						2

Table 3

Viewing the structure of criminal acts on which the basic prosecutor's offices made plea agreements, it can be said that a most diverse opus can be seen in BPPO Skopje, BPPO Kumanovo and BPPO Veles. Namely, most of the plea agreements, concluded with 37 persons, refer to the criminal act - **Unauthorized production and release for**

**trade of narcotics, psychotropic substances and precursors** of Article 215 of CC. Individually, these three basic public prosecutor's offices have the highest number of plea agreements concluded on this criminal act.

Unauthorised manufacture, possession, intermediation and trafficking in weapons or explosive materials of Article 396 of CC is the next criminal act on which these three prosecutor's offices concluded plea agreements (with 15 suspects (defendants) in total).

It is interesting that BPPO Skopje concluded eight plea agreements on the criminal act of Article 131 - Severe bodily injury, and apart from BPPO Veles, where there is only one plea agreement on this act, no other public prosecutor's office from the territory of the Higher Public Prosecutor's Office Skopje made a plea agreement on this criminal act.

The data presented in the table above show that the criminal act Violation of industrial property rights and unauthorized use of another's company of Article 285 of CC is the next crime having highest frequency when concluding plea agreements in this territory, with 18 suspects (defendants) who accepted such an agreement (16 persons in BPPO Veles and 2 in BPPO Skopje), as well as the criminal act of Article 378 of CC, Counterfeiting a document, with 12 persons who accepted a plea deal.

Bearing in mind that BPPO Kavadarci and BPPO Kriva Palanka have up to five plea agreements concluded, they most often concluded plea agreements on the criminal act of Article 278 of CC -Smuggling, then Use of Documents with False Content of Article 380 of CC and Attack upon an official person, when performing security activities of Article 383 of CC. BPPO Gevgelija is positioned in the middle with 17 persons in total and this prosecutor's office concluded plea agreements with them on various criminal acts, of which most often (with 4 persons) on the criminal acts - Counterfeiting a document of Article 378 and Illegal Crossing of State Border of Article 402 of CC.

In the practice of BPPO Skopje and BPPO Kumanovo, in addition to the criminal acts envisaged in CC, there are plea bargains with respect to criminal acts belonging to other laws, i.e. the Law on Foreign Exchange Operations (Article 54<sup>20</sup>) and the Excise Law (Article 60<sup>21</sup>). In comparison with the basic public prosecutor's offices in the territory of the three other higher public prosecutor's offices, only BPPO Skopje and BPPO Kumanovo made plea agreements on criminal acts envisaged by *lex specialis*.

<sup>20</sup> Official Gazette no. 34/2001, 49/2001, 103/2001, 51/2003, 81/2008, 24/2011, 135/2011, 188/2013, 97/2015, 153/2015 and 23/2016.

<sup>21</sup> Official Gazette no.32/2001; 50/2001; 52/2001; 45/2002; 98/2002; 24/2003; 96/2004; 38/2005; 88/2008; 105/2009; 34/2010; 24/2011; 55/2011; 135/2011; 82/2013; 98/2013; 43/2014; 167/2014; 188/2014; 129/2015; 154/2015; 192/2015; 23/2016 and 31/2016.

- Basic Public Prosecutor's Office Prosecuting Organised Crime and Corruption

In the period from December 1, 2013 until March 31, 2015, the Public Prosecutor's Office Prosecuting Organised Crime and Corruption brought 256 criminal charges against 563 persons. One part of the cases against 66 persons were resolved without making a public-prosecutor's decision on initiation of a criminal prosecution (rejected criminal charges, stopping the procedure and having the cases transferred to other competent prosecutor's offices so that they can act on them) and thus 227 cases against 497 persons remained on the work desk of BPPO.

Of these 227 cases against 497 persons, a plea negotiation as a procedural principle regarding the type and severity of criminal sanction was applied to 161 persons in total and thus this prosecutor's office concluded plea agreements with all of them. The criminal prosecution continued against the remaining 336 persons with a public prosecutor's decision (indictment or proposed indictment) because the defendants and their defence attorneys failed to submit an initiative for commencement of a plea bargain procedure or there was no consent to a plea agreement.

On the basis of the previously presented data, it can be concluded that the criminal cases were resolved against 32,4% of the total number of persons charged with a plea agreement.

<b>Criminal acts by article of CC</b>	<b>BPPO Prosecuting Organised Crime and Corruption</b>
Article 215, paragraph 3	11
Article 394	38
Article 316, paragraph 4 in connection with Article 24 and Article 151, paragraph 4 in connection with Article 45	1
Article 353	1
Article 418-a, paragraph 1	1
Article 418-b, paragraph 1	1
Article 418-b, paragraph 2	56
Article 418-b, paragraph 4 in connection with paragraph 2	37
Article 418-c, paragraph 1	1
Article 418-c, paragraph 2	4
Article 418-d, paragraph 3	10
<b>TOTAL</b>	<b>161</b>

Table 4

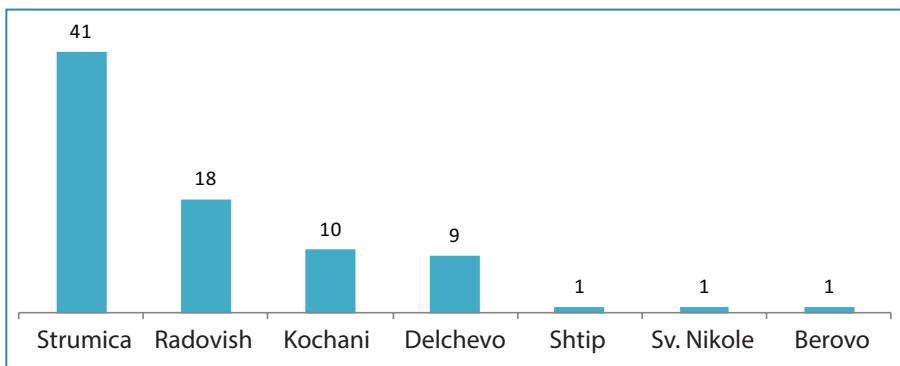
Analyzing the data with regard to the structure of criminal acts on which the basic public prosecutor's office concluded plea agreements, **the highest number**, i.e. plea agreements made with 94 persons in total, refers to the criminal act of Article 418-b of CC - **Smuggling of Migrants**, and here we have plea agreements concluded with 56 persons with respect to paragraph 2, 37 plea agreements with respect to paragraph 4 in connection with paragraph 2, and 1 plea agreement concluded with respect to paragraph 1 of this Article. The next criminal act is Criminal association of Article 394 of CC on which this prosecutor's office concluded plea agreements with 38 persons. These two criminal acts comprise 81,37% of the total opus of plea agreements concluded during the first 16 months of the application of the new LCP.

Generally seen, the number of plea draft agreements concluded in BPPO in charge of prosecution of persons involved in organised crime and corruption is proportional to the number of persons charged with a certain criminal act, so the number of concluded plea draft agreements is highest for those criminal acts that most of the persons are charged with.

#### » **Higher Public Prosecutor's Office Shtip**

During the analysed period the basic public prosecutor's offices from this territory made plea agreements with 81 persons in total. As picture 5 shows below, BPPO Strumica has the highest number of plea agreements concluded. It concluded plea agreements with 41 persons in total, amounting to 50,62% of all plea agreements concluded in this territory.

The Prosecutor's Offices in Radovish, Kochani, Delchevo made plea agreements totalling 45,70%, whereas the Prosecutor's Offices in Shtip, Sveti Nikole and Berovo made plea agreements totalling 3,68%, with one plea agreement concluded by each of them.



Picture 5

The statistics as to the structure of the criminal acts most often subject to conclusion of plea agreements within the territory of the Higher Public Prosecutor's Office Shtip are shown below in table 5.

Criminal acts by article of CC	BPPO Strumica	BPPO Radovish	BPPO Kochani	BPPO Delchevo	BPPO Shtip	BPPO Sveti Nikole	BPPO Berovo	Total
Article 157	8	13						21
Article 166	1							1
Article 215	2		2	1	1			6
Article 235				2				2
Article 236			1	2				3
Article 239	2			1				3
Article 244-a	5		3					8
Article 251				1				1
Article 257			1					1
Article 261			1					1
Article 274-6	2		1					3
Article 278	2							2
Article 278-6		2						2
Article 279	2			1				3
Article 285	2							2
Article 297	1						1	2
Article 300				1				1
Article 345	1							1
Article 353		1						1
Article 353-B		1						1
Article 354	1							1
Article 358	1							1
Article 378	4	1						5
Article 379	2							2
Article 382	1							1
Article 386	3					1		4
Article 396	1		1					2

Table 5

The data regarding the type of criminal acts on which plea agreements were made in the analysed period show that the scope of criminal acts is most diverse in BPPO Strumica. **Most persons** (21), with whom plea agreements were concluded, had been charged with the criminal act **Violation of copyright and related rights** of Article 157 of CC.

The next criminal act, being most often subject to a plea agreement (accepted by 8 suspects, i.e. defendants), is Unlawful constructing of Article 244-a of CC. From the total number of persons with whom plea agreements were concluded, 43,21% of the agreements refer to various criminal acts on which 1 to 5 persons negotiated a plea agreement.

By crossing the data from the territories of all public prosecutor's offices in connection with the structure of the criminal acts on which the prosecutor's offices made most of the plea agreements, the following can be noted:



- Except for the criminal act, Unauthorised production and release for trade of narcotic drugs, psychotropic substances and precursors of Article 215 of CC on which the public prosecutor's offices concluded plea agreements in the territory of all four higher public prosecutor's offices, the structure of criminal acts is different in each territory. Table 6 below shows the most frequent criminal acts on which a plea agreement was concluded by all four higher prosecutor's offices.

HPPO BITOLA (criminal acts subject to most of the agreements)	HPPO BITOLA (criminal acts subject to most of the agreements)	HPPO BITOLA (criminal acts subject to most of the agreements)	HPPO BITOLA (criminal acts subject to most of the agreements)
Article 286 (12 agreements)	<b>Article 215 (1 agreement)</b>	<b>Article 215 (37 agreements)</b>	Article 157 (21 agreements)
Article 236 (9 agreements)	Article 235 (1 agreement)	Article 285 (18 agreements)	Article 244-a (8 agreements)
<b>Article 244-a (8 agreements)</b>	Article 244-a (8 agreements)	Article 396 (15 agreements)	<b>Article 215 (6 agreements)</b>
Article 300 (5 agreements)		Article 378 (12 agreements)	Article 378 (5 agreements)

Table 6

- The plea agreements made on this type of criminal acts lead us to conclude that the public prosecutor collected a lot of legally relevant evidence against the suspect (defendant) and as a result of that the defence-the defendant accepted a plea agreement.

### 3.2. Type and severity of criminal sanctions agreed in the plea negotiation process

At the beginning of the Analysis we indicated that plea agreements were concluded with 345 persons in total in the territory of the whole state in the period from December 1, 2013 until March 31, 2015. Table 7 provides a summary presentation of the criminal sanctions agreed with the defendants (suspects) in the territory of all four higher public prosecutor's offices.

HPPO	Alternat. measure	Fine	Prison sentence						PERSONS IN TOTAL
			up to 6 months	from 6 months. to 1 year	1-2 y.	2-3 y.	3-5 y.	over 5 y.	
<b>BITOLA</b>	14	22	16	1	4	3	2		<b>62</b>
<b>GOSTIVAR</b>	2						1		<b>3</b>
<b>SKOPJE</b>	132	29	7	2	8	7	7	7	<b>199</b>
<b>SHTIP</b>	42	29	3	3	2	2			<b>81</b>
<b>TOTAL:</b>	<b>190</b>	<b>80</b>	<b>26</b>	<b>6</b>	<b>14</b>	<b>12</b>	<b>10</b>	<b>7</b>	<b>345</b>

Table 7

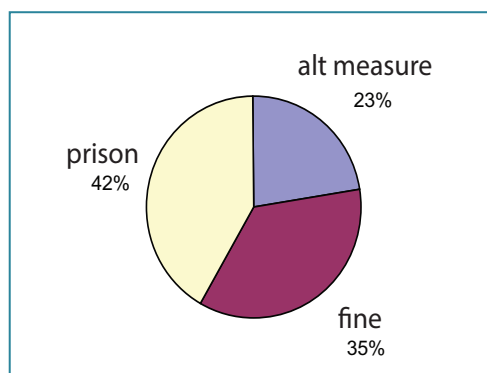
The statistics show that most of the agreed criminal sanctions refer to the alternative measures, i.e. 190 defendants (suspects) in total, being 55%, made an agreement for some kind of alternative measure, - which was a suspended sentence in most of the cases. The fine with 23% and prison sentences with 22% of the total number of persons are equally represented in the plea agreements concluded. As to the prison sentence, 26 defendants (suspects) made a plea agreement to serve 6 months time, and 6 defendants (suspects) to serve time ranging from 6 months to 1 year. Only in the territory of the higher public prosecutor's office Skopje there are plea agreements concluded for a prison sentence of more than five years.

Analysing the criminal policy in the plea negotiation process, it comes out that in most cases the parties in the criminal procedure reached a plea agreement for the alternative measure as a criminal sanction. This goes in favour of the recent surveys of the criminal policy of the courts, according to which in 50% of the convicting verdicts an alternative measure was pronounced<sup>22</sup>.

In direction of a more detailed data analysis, the statistics covering the public prosecutor's offices from the territory of each higher public prosecutor's office are shown in the text below.

#### » **Higher Public Prosecutor's Office Bitola**

In the territory of the Higher Public Prosecutor's Office Bitola, the district basic prosecutor's offices made **most plea agreements for the prison sentence** as a criminal sanction, and **fewest for alternative measures**. Seeing this territory in percents (picture 6), 42% of the criminal sanctions agreed refer to the prison sentence. The fine comprises 35% and the alternative measures 23% of all criminal sanctions agreed with the defendants (suspects).



Слика 6

<sup>22</sup>Report on the performance of the public prosecutor's offices of the Republic of Macedonia in 2014" <http://jorm.gov.mk/wp-content/uploads/2016/03/Izvestaj-na-JORM.pdf>

Table 8 below presents the statistics for each basic public prosecutor's office in this territory.

BPPO	Alternat. measure	Fine	Prison sentence					PERSONS IN TOTAL	
			up to 6 months	from 6 m.to 1 year	1-2 y.	2-3 y.	3-5 y.		over 5 y.
<b>BITOLA</b>	9					2	1		12
<b>PRILEP</b>	2	1	16	1	4	1			25
<b>OHRID</b>		14							14
<b>STRUGA</b>	3	7					1		11
<b>RESEN</b>									
<b>TOTAL:</b>	<b>14</b>	<b>22</b>	<b>16</b>	<b>1</b>	<b>4</b>	<b>3</b>	<b>2</b>		<b>62</b>

Table 8

Examined individually according to the extent of prison sentence, most persons (16) concluded a plea agreement for a prison sentence of up to 6 months and all of the agreements were concluded with BPPO Prilep, whereas no plea agreement was made for a prison sentence of more than 5 years in the territory of this higher public prosecutor's office. In relation to the type of criminal sanction, the fine, being agreed on mostly by BPPO Ohrid (with 14 persons), comes second after the prison sentence, and at the end the alternative measures, prevailing in the plea agreements concluded by BPPO Bitola (agreements concluded with 9 persons in total), come last.

» **Higher Public Prosecutor's Office Gostivar**

The territory of the Higher Public Prosecutor's Office Gostivar has the lowest number of plea agreements concluded, with only three persons. In relation to the type and severity of criminal sanction BPPO Tetovo concluded two plea agreements for alternative measures, whereas BPPO Gostivar concluded one plea agreement for a prison sentence ranging from 3 to 5 years.

BPPO	Alternat. measure	Fine	Prison sentence					PERSONS IN TOTAL	
			up to 6 months	from 6 m.to 1 year	1-2 y.	2-3 y.	3-5 y.		over 5 y.
<b>TETOVO</b>	2								2
<b>GOSTIVAR</b>							1		1
<b>KICHEVO</b>									
<b>DEBAR</b>									
<b>TOTAL:</b>	<b>2</b>						<b>1</b>		<b>3</b>

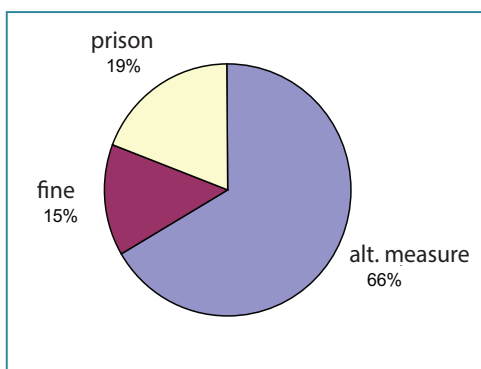
Table 9

» **Higher Public Prosecutor's Office Skopje**

In relation to the type of criminal sanction the public prosecutor's offices in the territory of the Higher Public Prosecutor's Office Skopje **negotiated most plea agreements for alternative measures** - with 132 defendants (suspects) or 66%. Fewest plea agreements are concluded **for the penalty – fine, with 15%** of the total number of persons. Table 10 and picture 7 below show the numbers and percents of plea agreements concluded in the basic public prosecutor's offices in this territory with regard to the type and severity of criminal sanctions.

BPPO	Alternat. measure	Fine	Prison sentence						PERSONS IN TOTAL
			up to 6 months	from 6 m. to 1 y.	1-2 y.	2-3 y.	3-5 y.	over 5 y.	
<b>SKOPJE</b>	57	6		1	6	4	7	2	<b>83</b>
<b>KUMANOVO</b>	39	3		1		3		2	<b>48</b>
<b>VELES</b>	28	10			1			3	<b>42</b>
<b>KAVADARCI</b>	3	1			1				<b>5</b>
<b>GEVGELIJA</b>	3	8	7						<b>18</b>
<b>KRIVA PALANKA</b>	2	1							<b>3</b>
<b>TOTAL:</b>	<b>132</b>	<b>29</b>	<b>7</b>	<b>2</b>	<b>8</b>	<b>7</b>	<b>7</b>	<b>7</b>	<b>199</b>

Table 10



Picture 7

When analysing the data, it can be noted that BPPO Skopje concluded most plea agreements in which they consented to the alternative measure as a sanction - with 57 defendants (suspects), whereas BPPO Kriva Palanka concluded fewest plea agreements as to this criminal sanction - with only 2 persons. The Prosecutor's Offices in Skopje, Kumanovo and Veles make together 93,95% of the total number of persons with whom a plea agreement was concluded by consenting to an alternative measure as a sanction in the whole territory of the Higher Public Prosecutor's Office Skopje.

As a criminal sanction the prison sentence occurs in 19% of all plea agreements concluded in this territory. This penalty is most frequent in the plea agreements concluded by BPPO Skopje, mostly ranging from 3-5 years prison time (plea agreements concluded with 7 persons) and from 1-2 years (plea agreements concluded with 6 persons).

During the period of this analysis the Public Prosecutor's Office Kriva Palanka did not conclude any plea agreement envisaging a prison sentence as a criminal sanction. The Prosecutor's Offices in Skopje, Kumanovo and Veles, with the exception of BPPO Prosecuting Organized Crime and Corruption, are the only ones in the territory of the whole state that concluded plea agreements envisaging a prison sentence of more than 5 years.

The fine, being a form of criminal sanction, is represented in 15% of all plea agreements concluded in the territory of the Higher Public Prosecutor's Office Skopje. The Public Prosecutor's Office Veles concluded most of the plea agreements envisaging a fine as a criminal sanction (10 in total). Then BPPO Gevgelija follows with 8 plea agreements and BPPO Skopje with 6 plea agreements containing such a sanction.

The Prosecutor's Offices in Kavadarci and Kriva Palanka concluded fewest plea agreements envisaging a fine as a criminal sanction (each with 1 person).

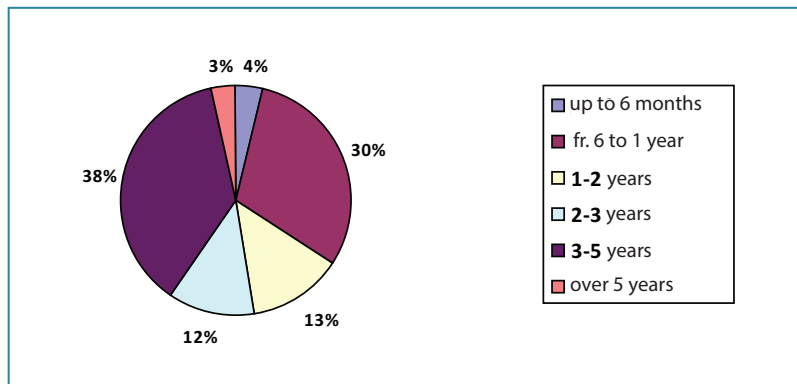
- *Type and severity of the criminal sanctions represented in the plea agreements of the Public Prosecutor's Office Prosecuting Organised Crime and Corruption.*

Acting against 161 persons in total, the Public Prosecutor's Office Prosecuting Organised Crime and Corruption made **plea agreements envisaging an effective prison sentence in 96,20% of cases**. In addition to the prison sentence, the suspended sentence is the only other sanction for which this prosecutor's office made plea agreements - with 6 suspects (defendants) of the total number of persons (see table 11 below).

<b>Type of criminal sanction agreed with BPOPOCC</b>	<b>Severity of criminal sanction agreed with BPOPOCC(Prosecuting Organised Crime and Corruption)</b>	<b>Number of defendants accepting agreement</b>	<b>Total number of defendants by type of criminal sanction</b>
<b>SUSPENDED SENTENCE</b>	1 year and 4 months suspended sentence for 2 years	2	<b>6</b>
	1 year and 6 months suspended sentence for 3 years	1	
	2 years suspended sentence for 5 years	2	
	3 years suspended sentence for 5 years	1	
<b>PRISON SENTENCE</b>	prison sentence of up to 6 months	6	<b>155</b>
	prison sentence of up to 7 months	2	
	prison sentence of up to 8 months	3	
	prison sentence of up to 10 months	23	
	prison sentence of up to 1 year	19	
	prison sentence of up to 1 year and 2 months	2	
	prison sentence of up to 1 year and 4 months	1	
	prison sentence of up to 1 year and 6 months	8	
	prison sentence of up to 1 year and 7 months	3	
	prison sentence of up to 1 year and 10 months	1	
	prison sentence of up to 2 years	5	
	prison sentence of up to 2 years and 2 months	1	
	prison sentence of up to 2 years and 3 months	3	
	prison sentence of up to 2 years and 5 months	2	
	prison sentence of up to 2 years and 6 months	6	
	prison sentence of up to 2 years and 7 months	1	
	prison sentence of up to 3 years	6	
	prison sentence of up to 3 years and 6 months	5	
	prison sentence of up to 4 years	15	
	prison sentence of up to 4 years and 2 months	2	
	prison sentence of up to 4 years and 3 months	4	
prison sentence of up to 4 years and 5 months	1		
prison sentence of up to 4 years and 6 months	18		
prison sentence of up to 5 years	13		
prison sentence of up to 5 years and 6 months	2		
prison sentence of up to 6 years	3		
<b>TOTAL</b>		<b>161</b>	<b>161</b>

Table 11

Picture 8 shows a percentage ratio of prison sentences agreed with BPPO Prosecuting Organized Crime and Corruption during the analysed period.



Picture 8

The analysis of the data from this prosecutor's office show that most plea agreements or 38% refer to the prison sentence ranging from 3 to 5 years. The next prison sentence, representing 30% of the agreements concluded with the total number of defendants (suspects), ranges from 6 months to 1 year. Fewest plea agreements are concluded for the prison sentence of more than 5 years time (only 3% of the total number of defendants/suspects).

For the most part, this criminal policy is due to the type of criminal acts, in other words to the fact that this prosecutor's office acts on more serious criminal acts for which the law envisages more severe sanctions.

### » **Higher Public Prosecutor's Office Shtip**

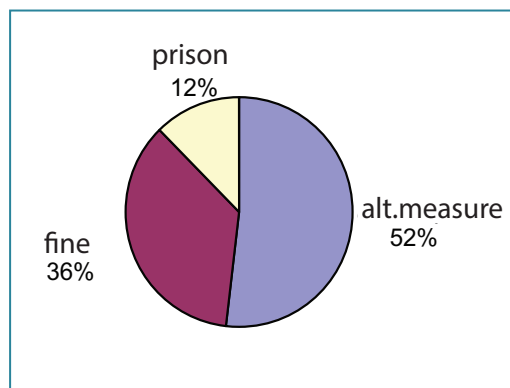
The prosecutor's offices of this higher public prosecutor's territory **made most plea agreements envisaging alternative measures**, i.e. with **42 suspects (defendants)** and fewest plea agreements envisaging the **prison sentence ranging from 2-3 years (with 2 persons)**. As to the prison sentences ranging from 3 to 5 years and over five years, the public prosecutor's offices in the Higher Public Prosecutor's Office Shtip did not make any plea agreement.

Table 12 below provides a more detailed overview of the criminal sanctions for which each public prosecutor's office from this territory concluded a plea agreement.

BPPO	Alternat. measure	Fine	Prison sentence						PERSONS IN TOTAL
			up to 6 m.	fr.6 m to 1 y.	1-2 y.	2-3 y.	3-5 y.	over 5 y.	
<b>STRUMICA</b>	20	15	2	1	2	1			<b>41</b>
<b>SHTIP</b>						1			<b>1</b>
<b>KOCHANI</b>	8		1	1					<b>10</b>
<b>RADOVISH</b>	7	11							<b>18</b>
<b>DELCHEVO</b>	5	3		1					<b>9</b>
<b>SVETI NIKOLE</b>	1								<b>1</b>
<b>BEROVO</b>	1								<b>1</b>
<b>TOTAL:</b>	<b>42</b>	<b>29</b>	<b>3</b>	<b>3</b>	<b>2</b>	<b>2</b>			<b>81</b>

Table 12

Expressed in percents (see picture 9 below), the data show that in the territory of the Higher Public Prosecutor's Office Shtip the public prosecutors made most plea agreements for alternative measures - with 52% of all agreements in total, then for a fine with 36% and fewest for the prison sentence, being present in 12% of the total number of defendants (suspects) with whom a plea agreement was made.



Picture 9

In general, according to the statistical data reviewed in the period from December 1, 2013 until March 31, 2015, the basic public prosecutor's offices displayed a serious approach in the implementation of the plea negotiation regarding the type and severity of the criminal sanction as a newly-implemented procedural justice principle.



### **3.3 Final considerations and recommendations**

- » The basic public prosecutor's offices in the territory of the Higher Public Prosecutor's Office Gostivar should display stronger activity in the application of plea negotiation regarding the type and severity of criminal sanction;
- » According to the volume of case related activities, the basic public prosecutor's offices with extended competence should display stronger activity with respect to the implementation of plea bargaining as well.
- » The basic public prosecutor's offices, having basic competence and acting on criminal acts for which a prison sentence of up to 5 years is prescribed, should show stronger commitment in the application of this principle in the phase of the pre-investigation procedure. In this phase of the procedure the public prosecutors should provide legally relevant evidence. In this way the suspects, being confronted with the evidence presented, would be able to initiate themselves a plea bargain procedure with the public prosecutor.
- » From the insight into the delivered written draft agreements, it can be noted that in practice a different form is used in the preparation of the draft agreements. As to the content, the draft agreements should be prepared in accordance with the legal provision of Article 485 of LCP prescribing the content of the draft-agreement's elements. A sample draft agreement is presented in Annex 1.
- » The public prosecutor submits the draft agreement (prepared with the content as envisaged in Article 485 of LCP) which has been previously signed by him, the suspect and his defence attorney. No explanation should be provided when submitting the draft agreement.
- » It is incumbent on the public prosecutor to deliver a list of evidence together with the very evidence when submitting the draft agreement.
- » When submitting the draft agreement together with all evidence, it is incumbent on the public prosecutor to provide a written statement signed by the damaged party in relation to the kind and extent of the associated action for damages only if that action has been subject to the plea negotiation pursuant to Article 484 of LCP. Other wise, if an associated action for damages has not been subject to the draft agreement, then the damaged party should not submit such a statement.

#### **4. Comparative considerations with regard to the application of plea bargaining in other countries**

According to the original concept adopted in the criminal justice system of the United States of America, the “plea bargaining” principle is a combined “material-procedural pre-court alternative measure consisted of “negotiation” between the public prosecutor and the defendant: the public prosecutor proposes to the defendant to make admission of guilt and to willingly accept certain penalty; if he accepts the proposal, then an agreement shall be concluded, thus skipping the main hearing and the further procedure with regard to legal remedies. The plea agreement is affirmed by the court, which shall pronounce a sentence without holding a main hearing”<sup>23</sup>.

Plea bargaining is defined<sup>24</sup> as a procedure in which the defendant and the prosecutor reach a mutually acceptable solution to the criminal case, which is later approved by the court. There are decisions of the Supreme Court of USA<sup>25</sup> that make the admission of guilt null if the defendant has not been informed about the indictment or if he has been charged with something that is not a criminal act.

This procedural principle is also used in the procedural models in the European continental law. So, the **Italian criminal procedure** envisages a procedural principle of pronouncing a sentence upon the proposal of the parties<sup>26</sup>. On the basis of the parties’ consent to the legal qualification of the criminal act and the type and severity of penalty, a convicting verdict is passed before holding a main hearing by having court’s consent to the essential content of the convicting verdict. In that sense the court is authorised to reject or accept the proposal and it can also pronounce a sentence that is different from the proposed one in case of accepting the proposal. The parties’ proposal can be delivered to the court during the investigation, the preliminary hearing or the main hearing. In all of the indicated cases a verdict shall be passed without holding a main hearing or conducting evidentiary procedure. However, this procedural principle is limited several times because it is conditioned by light criminal acts and phases of criminal procedures in which the parties can submit a sentencing proposal (such proposal can be made after commencing the main hearing in the first instance procedure).

The most important attribute of this principle in the Republic of Italy is the fact that when measuring the sentence, being in accordance with the legal provisions, it is envisaged that the sentence pronounced should be obligatorily reduced by one third<sup>27</sup> with no limitation to

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<sup>23</sup> gen.cit. Kambovski, 2, 2005, page. 28

<sup>24</sup> Definition according to: West’s encyclopedia of American Law

<sup>25</sup> judgments: Henderson against Morgan, 436 U.S.637 (1976), and Bousli against USA, 523 U.S. 614 (1998)

<sup>26</sup> so-called. patteggiamento

<sup>27</sup> Perrodet, page 369; Maffei, page 1059; Cirese, Bericci, page 224 and Ma, page 41

the type of criminal acts according to the severity of the prescribed sentence. This principle can be used for all criminal acts with no limitations; it is determined that the sentence should be reduced to 30 years prison time for criminal acts for which death penalty is prescribed, whereas death penalty by isolation or death penalty for continuous crimes committed is replaced with life imprisonment<sup>28</sup>.

In the **Republic of Serbia** the public prosecutor and the defendant can agree on a sentence in the plea agreement which by rule cannot be under the legal minimum of the sentence for the criminal act the defendant is charged with. However, when that is obviously justified because of the significance of the admission of the defendant for clarification of the criminal act he is charged with, and whose proving would be impossible or rendered significantly more difficult in the absence of such an admission, or for the purpose of preventing, detecting or proving other criminal acts as well as because of the existence of special mitigating circumstances<sup>29</sup>, the public prosecutor and the defendant can reach an agreement for pronouncing a more lenient sentence to the defendant according to the penalty mitigation provisions<sup>30</sup>.

The defendant can accept an obligation in the plea agreement to recompense the proceeds acquired through criminal activity within certain time limit, or to return the object of the criminal act.

**The English procedure** does not know about admission of guilt, it knows about denial of the detrimental consequences (a plea of *nolo contendere*)<sup>31</sup>. Explained in other words, any additional notes that can be presented by the defendant in relation to his admission of guilt automatically lead to denial of the admission of guilt, and on the basis of that the judge schedules a main hearing<sup>32</sup>. So, in the English criminal justice system the defendant can plead guilty or not guilty only in relation to the criminal acts he is charged with in the indictment.

In relation to the plea bargaining procedure it is incumbent on the judge not to interfere in the very procedure, being in accordance with the provisions of the Law on Criminal Justice and the precedent established in the Turner's case (1970) 2 QB 321. So, even if both sides in the procedure approach the judge in order to inform themselves as to the opinion of the judge, the judge must not indicate any kind of solution in relation to the severity of the sentence.

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<sup>28</sup> Article 442, paragraph 2 of LCP of Italy

<sup>29</sup> Article 54, paragraph 2 of the Criminal Code of the Republic Serbia

<sup>30</sup> Article 57 of the Criminal Code of the Republic Serbia

<sup>31</sup> The admission of guilt made by the defendant by postis an interesting one. This kind of admission of guilt is only possible in case tried in front of magistrate courts where the verdict can be passed in the absence of the defendant (Sprack, page 171-173).

<sup>32</sup> gen. cit. Sprack, page 285

Such strict prohibition for judges was introduced by the amendments to the Law on Criminal Justice of 1999 and 2005. In the period before adopting these amendments, there was possibility that the parties could go to the judges' cabinets and ask the judges to determine an average draft-sanction on the basis of the evidence presented<sup>33</sup>.

Furthermore, there can be plea bargaining only on two bases in the English criminal justice system, which are:

- negotiating a plea agreement by making an admission of guilt for the milder criminal act (in other words prequalifying the offence from qualified offence into a basic offence or from basic offence into a milder one); and
- making an admission of guilt for one crime in order that the prosecutor drop charges in relation to other crimes committed.

In the second case the prosecutor only stops providing evidence in relation to the remaining counts of the indictment, so they are formally in the indictment, but no action is taken on them<sup>34</sup>. This practice looks very similar to the American model of plea bargaining about the facts (fact bargaining) where the prosecutor, as a result of the plea agreement made, willingly does not present some evidence being detrimental to the defendant<sup>35</sup>.

In **Germany** the plea negotiation procedure regarding the severity of the sentence represents a direct influence of the accusatory procedure in the German criminal justice system. In the German criminal justice system the informal plea bargaining represents admission of guilt of the defendant and partial presentation of evidence during the main hearing as a result of the plea negotiation taking place between the public prosecutor, the defendant and the judge trying the case.

The procedure is conducted in the course of the main hearing and it is most often initiated by the public prosecutor. According to the verdict of the Federal Constitutional Court<sup>36</sup>, the prosecutor and the defendant are under obligation to apply the following recommendations:

- there cannot be plea negotiation as to the type of the criminal act;
- the admission of guilt has to be affirmed by the court in relation to the authenticity and validity;
- all parties must be actively included in the plea bargaining process;

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<sup>33</sup> see Krapac, page 2. 142

<sup>34</sup> gen. cit. Krapac, page 143

<sup>35</sup> see Krstulovich about this, page 72

<sup>36</sup> BGH, Neue Juristische Wochenschrift (1987) 2662

- the result of the plea bargaining between the parties must be publically displayed in front of the court and noted in a minute book;
- the court can only determine the most severe sanction, but it can also disregard this proposal if there are justified reasons for that and in case it makes such a decision it is under obligation to inform the parties in the proceedings there of.
- the sanction must always be proportional to the defendant's guilt, thereby especially mild sanctions are not permitted; and
- the defendant must not be forced into accepting a plea agreement by being promised a milder sanction, nor a milder sanction should be promised to him as a result of renunciation of his appeal right<sup>37</sup>.

The German practice consists of open negotiations over the type and severity of criminal sanction if the defendant makes admission of guilt for the criminal act during the main hearing<sup>38</sup>, whereat the plea bargaining is noted in a minute book. The defendant, his defence attorney, the prosecutor and the judge are participants in the plea bargaining. In the German model the participation of the judge in the negotiation process concerning the type and severity of sanction is seen as a guarantee for righteous measurement of the sanction, adequate valuation of the admission of guilt of the defendant, and there by as respect for the principle and duty of the court to determine the material truth as well. In Germany plea bargaining takes place only during the main hearing, most often before the start of the evidentiary procedure<sup>39</sup>. Basically the appeal right is unlimited.

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<sup>37</sup> see: Bohlander, 501

<sup>38</sup> Herrmann, page 491

<sup>39</sup> Dubber, page 490

In **France** the plea bargaining<sup>40</sup> is a similar principle to the conditional with drawal from prosecution of the defendant. The difference lies in the fact that in these cases the court is included in the process of assessing the measures that can be pronounced to the defendant by the prosecutor. This principle is most often used for more serious criminal acts<sup>41</sup>, but it can also be used for milder criminal acts<sup>42, 43</sup>. Cumulative fulfilment of two conditions is required so that this principle can be used. The first condition is that there must be an admission of guilt made by the defendant. The second condition is that there must be a criminal act committed which is punishable by imprisonment of up to five years or a fine of at most 3750 euros for more serious criminal acts and a fine of 750 euros for milder criminal acts.

In addition to these conditions, it is required that the perpetrator provide his consent to voluntary fulfilment of the obligations imposed. Characteristic of this system is that there might be negotiations over the kind of obligations that can be imposed on the perpetrator of the criminal act by the prosecutor.

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<sup>40</sup> composition penale

<sup>41</sup> Delites

<sup>42</sup> contraventions

<sup>43</sup> Article 41-2 and 41-3 of LCP of France

## Annex 1

### Sample of Proposed Plea Agreement

**Republic of Macedonia**  
**Basic Public Prosecution Office**  
**KO.No.**  
**Strumica**

**TO**  
**THE BASIC COURT STRUMICA**  
Judge of the preliminary proceedings  
**STRUMICA**

On the basis of Article 39, paragraph 2, indent 8 in connection with Article 483, paragraph 1 of LCP.

The public prosecutor in the Basic Public Prosecutor's Office Strumica\_\_\_\_\_ and the defendant \_\_\_\_\_ from father\_\_\_\_\_ and mother \_\_\_\_\_ born on \_\_\_\_\_ in Strumica, residing at \_\_\_\_\_ house.no\_\_ with personal identification number \_\_\_\_\_, literate, with secondary school completed, employed in \_\_\_\_\_ married, father of two children, Macedonian, citizen of RM, never convicted before, in the presence of his defence attorney \_\_\_\_\_ a lawyer from Strumica\_\_\_\_\_, to day on \_\_\_\_\_, in the premises of the Basic Public Prosecutor's Office Strumicaconcluded:

#### **A PLEA DRAFT AGREEMENT**

**The parties agree that:**

##### **I.**

The suspect, \_\_\_\_\_, in the period of 2011 and 2012, working as \_\_\_\_\_ in Strumica, illegally acquired someone else's movables – money he was entrusted with in connection with his duties as an employee. He committed the act by appropriating the money paid by patients in the name - participation for used health services for which he failed to issue receipts, but however, he recorded them under serial receipt numbers in a way that other health workers were indebted; he failed to deposit the money collected in the treasury of the damaged party \_\_\_\_\_ and instead of that he appropriated it for himself; by doing so he illegally appropriated for himself a sum amounting to 41.57.00 denars in 2011 and in 2012 he illegally appropriated for himself a sum amounting to 57.800.00 denars, - totalling 99.370.00 denars; thus the defendant committed a continued criminal act – EMBEZZLEMENT of Article 239, paragraph 3 in connection with paragraph 1 and Article 45 of CC.



**II**

Concerning the continued criminal act "**Embezzlement**" of Article 239, paragraph 3 in connection with paragraph 1 and Article 45 of CC, the parties in this draft agreement agree that the suspect shall be pronounced an **Alternative measure – Suspended sentence of up to 1 (one) year that will not be executed unless he commits another criminal act in 2 (two) years.**

**III**

The parties agree that the suspect \_\_\_\_\_ shall recompense the damages claim of the damaged party \_\_\_\_\_, which amounts to 99.370.00 denars, within 15(fifteen) days of receiving the verdict rendered on the basis of the Draft Agreement.

**IV**

In the presence of his defence attorney, \_\_\_\_\_, a lawyer from Strumica, the suspect stated that he conscientiously and willingly accepts this agreement and the consequences arising therefrom.

**V**

The public prosecutor in BPPO Strumica \_\_\_\_\_ and the suspect \_\_\_\_\_ state that they renounce the appeal right if a verdict accepting the Draft Agreement is rendered.

**VI**

The parties in this Draft-Agreement agree that the defendant \_\_\_\_\_ shall recompense the cost amounting to 9.000.00 (nine thousand) denars which was made in the criminal proceedings until the adjudication of the case on the basis of the Draft Agreement. The recompense shall be made in the name of reward for expertise performed by the expert \_\_\_\_\_ with license number \_\_\_\_\_.

Date \_\_\_\_\_

Public prosecutor in BPPO

\_\_\_\_\_

Suspect

\_\_\_\_\_

Defence attorney

\_\_\_\_\_



## Annex 2

### Sample Judgment rendered on the basis of a plea agreement concluded between the public prosecutor and the suspect

KPP No. \_\_\_\_\_

#### IN THE NAME OF THE CITIZENS OF THE REPUBLIC OF MACEDONIA

**THE BASIC COURT IN STRUMICA**, as a criminal court of first instance, through the judge of the preliminary proceedings \_\_\_\_\_, in the presence of \_\_\_\_\_ as a minute taker, acting on the draft agreement of PP \_\_\_\_\_ of BPPO Strumica and the defendant \_\_\_\_\_ from v. \_\_\_\_\_ represented by defence attorney \_\_\_\_\_, a lawyer from Strumica, prepared in BPPO Strumica, KO.no. \_\_\_\_ of 31.07.2014, after conducting a main hearing for assessment of the draft agreement in the presence of the Public Prosecutor \_\_\_\_ of BPPO Strumica and the defendant \_\_\_\_\_ represented by \_\_\_\_\_ as his defence attorney, a lawyer from Strumica, on 03.09.2014, in accordance with Article 297, paragraph 2 in connection with Article 490, paragraph 3 of LCP, in the presence of the Public Prosecutor \_\_\_\_\_, the defendant \_\_\_\_\_ and the defence attorney \_\_\_\_\_, a lawyer from Strumica, passed and publically announced the following:

#### VERDICT

#### On the basis of the draft agreement

#### THE DEFENDANT:

\_\_\_\_\_ from father \_\_\_\_\_ and mother \_\_\_\_\_, born on \_\_\_\_\_ in Stumica, residing in v. \_\_\_\_\_, house no. \_\_\_\_\_, married, father of two children, one minor and one of legal age, by occupation \_\_\_\_\_, Macedonian, citizen of the R. Macedonia, with personal identification number \_\_\_\_\_, with average salary amounting to 16.000.00 denars, never convicted before.

#### IS GUILTY

#### BECAUSE:

The defendant \_\_\_\_\_, in the period of 2011 and 2012, working as \_\_\_\_\_, illegally appropriated someone else's movables – money he was entrusted with in connection with his duties as an employee; he committed the act by appropriating the money paid as participation by patients for used health services for which he failed to issue receipts, but however, he recorded them in the ambulance record book under serial receipt numbers in a way that other health workers were indebted; he failed to deposit the money collected in the treasury of the damaged

party \_\_\_\_\_ and instead of that he appropriated the money for himself; by doing that in 2011 he illegally appropriated for himself a sum amounting to 41.57.00 denars and in 2012 he illegally appropriated for himself a sum amounting to 57.800.00 denars, totalling 99.370.00 denars. By committing these acts the defendant committed the criminal act – EMBEZZLEMENT of Article 239, paragraph 3 in connection with paragraph 1 and Article 45 of CC, and pursuant to the Article cited as well as the Articles 404 of LCP in connection with Article 48 and Article 49 of CC. The defendant is:

### PRONOUNCED

**An alternative measure – Suspended sentence of up to 1 (one) year that will not be executed unless he commits another criminal act in 2 (two) years.**

In accordance with Article 404, paragraph 1, item 7 of LCP, the defendant is put under obligation to pay to the damaged party \_\_\_\_\_ the amount of 99.370.00 denars in the name damages as well as to pay the expenses for the expertise performed amounting to 9.000.00 denars to the expert \_\_\_\_\_, with giro account \_\_\_\_\_, Tutunska Banka AD Skopje, within 15 days of receiving the verdict.

In accordance with Article 102, paragraph 2, item 6 of LCP, the defendant is put under obligation to pay a fee amounting to 2.000.00 denars to the court within 15 days of receiving the verdict.

### EXPLANATION

On 04.08.2014 the Public Prosecutor \_\_\_\_\_ of BPPO Strumica and the defendant \_\_\_\_\_, represented by his defence attorney \_\_\_\_\_, a lawyer from Strumica, submitted a plea draft agreement to the judge of the preliminary proceedings.

The public prosecutor attached the following evidence to the draft agreement: statement made by \_\_\_\_\_ under no. \_\_\_\_\_ from 08.07.2014, expert finding and opinion provided by Dipl. Economist \_\_\_\_\_ of 15.05.2014 and a criminal records extract.

The court examined the draft agreement and determined that the very agreement contained the elements envisaged in Article 485 of LCP.

The draft agreement proposes that the judge of the preliminary proceedings find the defendant \_\_\_\_\_ from v. \_\_\_\_\_ guilty for the criminal act "Embezzlement" according to Article 239, paragraph 3 in connection with paragraph 1 and Article 45 of CC as described in the dispositive part of this verdict, and pronounce an alternative measure - Suspended sentence of up to 1-one year that will not be executed unless he commits another criminal act in two years, as well as that the defendant recompense the damage caused to the damaged party \_\_\_\_\_ amounting

to 99.370.00 denars and pay the expenses of the expertise performed by expert \_\_\_\_\_, amounting to 9.000.00 denars.

The judge of the preliminary proceedings determined that the Draft Agreement contains a statement made by the defendant declaring that he conscientiously and willingly accepts the draft agreement and the consequences arising therefrom, a joint statement of the PP of BPPO and the defendant in which they renounce the appeal right if the court accepts the draft agreement and renders a verdict on the basis thereof.

The draft agreement is prepared in the presence of PP \_\_\_\_\_ of BPPO Strumica, the defendant \_\_\_\_\_ and his defence attorney \_\_\_\_\_, a lawyer from Strumica, in BPPO Strumica on 31.07.2014, and the very draft agreement is signed by all of them.

The submitter of the draft agreement and the defence attorney of the defendant, being previously informed in the sense of Article 488 of LCP, provided their opinions about the draft agreement in the course of the hearing hold for assessment of the very draft agreement; in addition to that, during the very hearing the court determined that the draft agreement was voluntarily made and the defendant was aware of the legal consequences arising from its acceptance.

Namely, the defendant informed the court that he renounced the right to appeal the verdict that would be passed on the basis of the draft agreement.

When the court reviewed the evidence submitted by the Public Prosecutor it determined that it was justified to pronounce the proposed alternative measure, the damage and the expenses regarding the expertise were correctly calculated, and thus it made a decision to accept the draft agreement and rendered a judgment as described in the dispositive part of this verdict.

In accordance with Article 102, paragraph 2, item 6 of LCP, the defendant is put under obligation to pay a 2.000.00 denars fee to the court.

From the Basic Court Strumica, KPP. No. \_\_\_\_ of \_\_\_\_\_

Minute taker Judge of the preliminary proceedings

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**NOTE: This decision cannot be appealed.**

**Delivered to:**

**-BPPO Strumica**

**-Defendant**

**-Defence attorney**





