Legislative, theoretical and legal practice aspects relating to the plea bargaining agreement

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Abstract: *Enacted as a special procedure to ensure the celerity of criminal proceedings, to restore the confidence of consumers in the act of justice and to contribute to reduce the costs of criminal cases falling under the conditions of substance and form of this institution, the plea agreement has a fundamental role in ensuring the simplification of the first two phases of the process - the prosecution and trial. This paper is a review of the provisions in force concerning the addressed institution (taking into account the latest changes operated through the Emergency Government's Ordinance 18/2016), which presents the appreciated doctrinal opinions as essential in connection with the subject matter, content, holders, negotiation itself and the procedures in front of the Court. We did not omit the aspects of comparative law on the matter but also we presented solutions from national judicial practice relating to ways for the examination and settlement of the incident causes.*

Keywords: *special procedure; defendant; defender; prosecutor; court.*

Introduction

The rules of the present criminal procedure Code have retained their predominant European-continental character – that are based on the principles of legality and finding out the truth, but, in order to ensure celerity in carrying out procedures, provisions specific to the adversarial procedural system that originated in Anglo-Saxon procedure were insert. As it was correctly valued, the combination of elements from the two major existing criminal procedure systems in the world is a form of convergence of the best compared solutions, keeping however, the fundamental premises of classic European criminal proceedings. In previous years, such an approach represented a trend in modern criminal law, the effect being that today, the most traditional European countries (Germany, Italy or France) have inserted in their criminal procedure provisions originating in criminal proceedings of adversarial type [1].

Rules of adversarial type with the biggest impact on the recipients of the Romanian criminal procedure law are those relating to the negotiated justice, taking into account the conceptual incompatibility between the latter and the rules arising from the application of the principles of legality and finding out the truth (principles which require the elimination of any other criteria for determining culpability and application of punishment other than those established by law). In this respect, in the current criminal legislation two institutions were introduced in which judgment is being conducted with the circumvention of the specific classical rules, respectively the judicial investigation in the case of recognition of accusations (art. 377 of the CPC) and plea bargaining agreement (art. 478-488. CPC). The provisions in question do not affect the right to a fair trial or the presumption of innocence since in the jurisprudence of the European Court of human rights it was held that the right guaranteed by article 6 of the Convention is not an absolute right, but one in which the party can validly waive [2].

1. Definition. Benefits and disadvantages

The procedure of plea bargaining agreement is defined as a special procedure, which derogates from the common law rules that apply to certain offences and consists in the understanding between the defendant and the prosecutor, in which the first admits to have committed the offence imposed to his task, accepting the

legal classification of the offense as well as the application of criminal sanctions, and the latter agrees with the application of punishment in some way, amount and form of acceptable execution for the defendant [3].

The most important advantages of introducing the institution is the *economic* advantage, because the traditional model of the criminal process is a complex one, which becomes costly both in terms of time and money. Moreover, the plea bargaining agreement procedure not only reduces the duration of trial case but will simplify the activity within the prosecution [4].

Another advantage of the plea bargaining agreement procedure is the *relieving of* law *courts* through the settlement of certain types of criminal cases in which there is no genuine dispute according to the abbreviated procedure of the agreement. Often, in cases with obvious evidence, the only dispute between the Prosecutor and the Defender is regarding the penalty, and in accordance with the legal provisions governing the plea bargaining agreement procedure, this penalty can be negotiated without the Court administering unnecessarily samplers that have no connection with the subject-matter of the dispute. Now the judges have the necessary time and space to address other causes requiring their attention, in order to increase the quality of the justice act [5].

Also among the benefits provided for by the plea bargaining agreement we include *avoiding social stigma, minimizing the judiciary expenditure incurred by the indicted.*

The psychological element can be seen as both an advantage and a disadvantage. The advantage lies in the positive effect that the recourse to such an agreement produces at the level of consciousness of the defendant; by participating in the decision on the penalty, he retains in this way his dignity, thus giving new meaning to the respect for law and criminal institutions. The doctrine included also the opinion that in such cases, the defendant's participation in the decision-making process is more illusory, in conditions in which most of the times he doesn't have specialty training [6].

On the other hand, considering that the special procedure of the plea bargaining agreement must be adapted to various situations and conjecture, certain criticism has appeared in the specialty literature.

The correctness and fairness of the institution, as a way of resolving criminal cases is one of the most substantial criticism brought to the negotiated judiciary. This relates to the fact that the accused person is being lured with quantitative advantages, is basically determined to abandon the initiative to support and prove his innocence; also it is called into question the guarantee of the right to a fair trial as long as the company provides the defendant with an incentive in order to surrender his right to trial. Also, the negotiations to conclude an agreement will demean the investigator, Prosecutor and judge, because they will have to bargain with the offender that recognizes his guilt in exchange of reducing the penalty [7].

One of the main critics brought to this institution is the possibility that an innocent man can enter into an agreement for the recognition of guilt to recognize a deed he did not commit just because he does not want to risk to be sent to court and sentenced to a far greater punishment [8]. On the other hand, there is an emotional disadvantage in relation to the victim. This, being excluded from the negotiation process, he no longer benefits from the so-called "therapeutic effect" which consists in the victim’s emotional consumption of revenge, effect assured through the participation of the society in the sentencing of the defendant [9].

2. Object. Background conditions and form

In accordance with article 479 of the CPC, the plea bargaining agreement has as object the recognition of guilt and acceptance of legal classification for which it was set in motion criminal action by the defendant and concerns the nature and amount of the penalty, its form of execution, the type of educational measure, or, where appropriate, waiver of punishment application or postponing the application of the penalty. The text of the law indicates that the legal classification of the offence cannot be subject to negotiation, the defendant and the Prosecutor may negotiate only with respect to the manner and length of punishment, its form of execution. The plea bargaining agreement can be concluded only when recognizing the offence committed with regard to both circumstances and legal classification of the offence; the classification considers on one hand the incrimination rule, and on the other hand, the existence of aggravation or mitigation of punishment, real or personal, legal or juridical, aggravating or attenuating circumstances as they have been retained in the Ordinance for putting in motion the criminal action.

If the defendant has committed several crimes, the Prosecutor must negotiate each sentence in part and, because the law stipulates that the form of execution of the sentence is the object of the agreement it must include the amount of the resulting punishment [10]. Also the main punishment negotiated must be established in a determined amount. As regards the complementary penalties, the agreement must contain their kind, but also the duration where the additional punishment established the prohibition of the exercise of certain rights. Considering that the accessory penalty will always be applied assuming the application of complementary penalty of the prohibition of the exercise of certain rights, it follows that a negotiation over complementary punishment is equivalent with the negotiation of accessory punishment [11].

2.1. ***Substantive conditions on plea agreement.*** The legislature provides in art. 478-480 CPC a number of conditions that must be met in order to conclude the plea bargaining agreement, as follows:

1. *Law applies to the offence or offences covered by the agreement fine or jail punishment of up to 15 years.* Prior to OUG 18/2016 [12], the recognition of guilt could not be completed in the case of any offence, but only in the case of offences for which the law provides for punishment by imprisonment of up to seven years. In the case of other offences, the referral to the Court of law with the ordinary proceedings and indictment completion was mandatory.

2. *Criminal proceedings should be put in motion and from the evidence managed during prosecution it should result sufficient data concerning the existence of the offence for which it was set in motion the criminal action and the guilt of the defendant.* As it was correctly valued, this provision is complemented by the condition of setting in motion a prior criminal action; it is known that this procedural act may not be ordered as stated in art. 309 (1) of the CPC, except when there is evidence which shows that a person has committed an offence and there aren't any of the impediment cases provided for in article 16, paragraph (1) CPC [13]. This requirement aims at the implementation of the plea bargaining agreement the agreement with the principle of finding out the real truth because its conclusion is allowed only where there are sufficient data on the offence committed and the defendant's guilt. Given the importance of the principles of the presumption of innocence and finding out the truth, their application may not be questioned nor in the case of concluding a plea bargaining agreement so the Court will be obliged to reject the agreement if the evidence is not sufficient to eradicate, beyond any reasonable doubt, the doubt with respect to the Commission of the offence by the defendant. Therefore, if the Court considers that the administered evidence does not prove that the existing act was committed by the accused, will reject the plea bargaining agreement, even though the defendant had admitted committing the offence [14].

3. *The defendant is a major or minor natural person or a legal person.* Under art. 478 para. (6) CPC if he defendant is a minor, he can benefit from this institution, with the approval of the legal representative.

4. *The defendant to be assisted by a defender chosen or appointed ex officio.* Legal assistance is mandatory throughout the negotiations, even up to the moment of signing; the Defender's role including is to explain to the defendant what the procedure of plea bargaining agreement entails, its advantages and disadvantages. Failure to comply with this provision shall entail the absolute nullity of the legal act.

5. *The defendant should expressly admit the commotion of the crime and accept the legal classification for which it was put in motion criminal proceedings.* The recognition of committing the offence must result from an explicit statement of the accused. He must accept the legal classification as established by the prosecution.

6. *The understanding between the prosecutor and the defendant regarding the manner, the amount of the penalty, the form of execution, wavering or postponing the application of the penalty.* The law stipulates that the object of negotiation can be: *the kinds of punishment* (of course in cases where the incident text of the regulations provides for two alternative punishments, otherwise the kinds of punishment cannot be negotiated), *the amount of the penalty* (within certain limits), *the form of execution* (which may lead to the suspension of enforcement of a sentence in the forms and the cases permitted by law), *waiver of applying the penalty* or *postpone the application of the penalty*, respectively *the kinds of educational measure*.

7. The prior written consent of the hierarchically superior prosecutor through which he sets the limits within which the agreement is to be concluded.

8. *The agreement thus concluded is to be countersigned by the hierarchically superior prosecutor.* Following the agreement of the Prosecutor on the case with the defendant with regard to the initiation of this

proceedings, the Prosecutor on the case shall submit to the hierarchically superior prosecutor a report in which he proposes the limits for concluding the agreement. The procedure will carry on even if the prosecutor on the case does not propose the limits of the negotiation but only requests the hierarchically superior prosecutor to detail the boundaries between which he can negotiate with the defendant. Based on the written notification of hierarchically superior prosecutor (notice containing the limits of punishment between which the Prosecutor and defendant can negotiate the penalty and the manner of its execution), the Prosecutor on the case can proceed to the conclusion of the agreement. After the conclusion of the agreement, it is again required the approval of the hierarchically superior prosecutor, which will be mentioned in the agreement. This formality is required by the provisions of art. 478 para. (2) CPC, according to which the effects of the plea bargaining agreement are subjected to the approval of the hierarchically superior prosecutor and the effects of the agreement are actually the nature and quantum of the sentence, the method of its execution, the educational measure that are subjected to confirmation by the Court [15].

The last two conditions are seen by other authors as legal conditions of form [16].

2.2. ***Form requirements on plea agreement.*** Under art. 481 para. (1) CPC, the plea bargaining agreement shall be made in *written form*. If there are multiple defendants, of which only some have concluded the plea bargaining agreement for the rest of defendants the Prosecutor will notify with indictment the judge of preliminary chamber of the competent court. For the defendants who have concluded the plea bargaining agreement the competent Court will directly be notified and it is obvious that in this case it is necessary to disjoin case.

Another form condition is that the plea bargaining agreement must contain the elements necessary for the identification of the accused, the legal description of the offence, its legal classification, aspects which are contained in the indictment. In addition, the plea bargaining agreement must contain the express statement of the defendant in which he acknowledges committing the deed and accepts the legal classification for which it was put in motion criminal proceedings, as well as the kind, amount, form of execution of the sentence, the form of the educational measure, the wavering of the sentence or postponing the application of the penalty in respect to which it was reached an agreement. If the agreement relates to more than one offence, the prosecutor and defendant must establish the punishment for every crime and not just the resultant penalty, since the Court must verify whether the principle of legality of each offence in part is respected [17].

3. The holders and the content of the plea bargaining agreement

3.1. ***Holders of the plea bargaining agreement.*** According to the Criminal Procedure Code, the holders of the agreement are the *defendant* and *Prosecutor*. Because the law does not distinguish, the defendant as natural or legal person can conclude a plea bargaining agreements.

The suspect does not have the possibility of concluding such an agreement, and the hierarchically superior prosecutor is not among the plea bargaining agreement holders [but also has an important role in the conclusion of the agreement in accordance with article 478 para. (2) and (4) CPC]. Thus, although the Prosecutor on the case is the holder of the plea bargaining agreement the hierarchically superior prosecutor is the one who draws the limits agreement, and subsequently approves its effects. The violation of the initial limits of preliminary consent established by the hierarchically superior prosecutor, may be covered by the agreement he latter gives on the agreement, in which case he could not be imputed the plea bargaining agreement. On the other hand, the absence of the approval constitutes an impediment for its admission, because it depends on the regularity of referral [18].

With regard to the accused person, natural person, the possibility is recognized to both the major defendant and the minor defendant, but with the consent of their legal representative.

The injured party and the civil side have no role in the conclusion of the plea bargaining agreement. The Prosecutor of the case does not have the obligation to consult them with regard to the conclusion of a plea bargaining agreement or regarding the individualization of the sanction that is to be applied to the accused. However, taking into account the Decision of the Constitutional Court No. 235 of 7 April 2015 [19] as well as the changes occurred through Ordinance No. 18/2016, although the civil and injured person, will

not be involved in the procedure of concluding a plea bargaining agreement, they will be cited in the Court of law and they will be able to formulate exceptions and drought conclusions.

3.2. ***Content of the plea bargaining agreement.*** Under art. 482, plea bargaining agreement includes:

- date and place of conclusion;
- names, first names and the status of those between whom the agreement is concluded;
- data concerning the person of the defendant, referred to in art. 107 para. (1);
- a description of the offence that forms the subject of the agreement;
- legal classification of the offence and the penalty prescribed by law;
- evidence and means of evidence;
- statement of the defendant through which he acknowledges committing the deed and accepts the legal classification for which criminal proceedings are put in motion;
- the nature and amount, execution form of the punishment as well as the form of the educative measure or solution of wavering the application of punishment or postponing the application of the penalty regarding which the Prosecutor and defendant reached an agreement;
- the signatures of the Prosecutor, the defendant and the lawyer.

4. The actual negotiation and form of plea bargaining agreement

The plea bargaining agreement is a form of negotiation through which we arrive at an agreement on the settlement of accusations brought against the defendant without a full criminal trial and by guaranteeing all the rights provided by law. As a rule, any initiative of negotiating can be triggered only after putting in motion the criminal action. In this regard, according to art. 479 CPC, for the culprit the main condition for conclusion of a plea bargaining agreement is the recognition of the offence he is charged with, but also the legal classification given to them by criminal prosecution bodies. If the defendant does not totally recognize the charge or charges the negotiation cannot begin.

Since the Prosecutor had agreed to open negotiations, it is his responsibility to reduce the consequences of the sanctions of the regime that may be applied to the defendant either on the amount or way of the penalty or its means of execution.

Unlike the legislation of other countries (for example, U.S.A. law), Romanian law does not provide the possibility for the bodies of the State to recourse to other concessions than those listed above. The Prosecutor is not allowed to reduce the number of charges or their seriousness through his consent on a lighter legal classification, resulting the fact that in our law the object of the negotiation is strictly limited and delimited from those provided for in art. 479 CPC.

According to art. 480, paragraph (4) CPC the defendant shall receive reduction by a third of the limits of the punishment prescribed by law in case of prison sentence and one-fourth reduction of the limits of the punishment prescribed by law in the case of fine punishment. For juvenile defendants these aspects will be taken into account when choosing the educational measure; in the case of educational measures involving deprivation of liberty, the limits within which these measures are taken shall be reduced by one-third.

The aspects negotiated by the defendant and the prosecutor will be contained in a written agreement.

5. The procedure before the Court of law

Under art. 483 para. 1 CPC, after the conclusion of the plea bargaining agreement, the Prosecutor notifies the Court that has the competence to judge the case and sends it the agreement, together with the prosecution file.

Because through the conclusion of a plea bargaining agreement the defendant has waived the right to invoke the illegal evidences in the course of criminal proceedings the case will no longer go through the stage of preliminary room. The criminal dossier is sent for the Court to ascertain the existence of sufficient data

concerning the defendant's deed and guilt. The Court of law cannot administer new evidences, so the data should come from evidences administered during prosecution [20].

Although during the plea bargaining agreement the defendant admits committing the crime in the method described by the Prosecutor and accepts the legal classification established by him and it is obvious that he tacitly accepts the lawful administration of evidence by the criminal prosecution bodies, the defendant will not be denied the right to invoke the absolute or relative nullity of acts of prosecution or to require the exclusion of evidence in front of the Court of law [21].

The appeal of the court is made separately in a situation in which the agreement is concluded only in respect of some facts or only for some defendants, and for other acts or defendants indictment is ordered, the prosecutor shall submit to the Court only acts of the criminal investigation that relates to facts and persons who have been subject to the plea bargaining agreement.

The defendant who has concluded the plea bargaining agreement, is going to benefit of an extra guarantee in respect of establishing his guilt. Even if the causes shall be brought together, the plea bargaining agreement would retain its particularity. The Court will not aggravate the situation of the defendant, and if it finds any of incidence cases from art. 16 CPC, it will not be able to pronounce acquittal or cessation of the criminal process, but will reject the plea bargaining agreement.

With regard to jurisdiction, the Prosecutor will refer the matter to the personnel and material competent court related to the deed and the person covered by the agreement, regardless of the remaining offences or persons who are the subject of the case. Where the defendant and the civil party concluded a transaction or an agreement, they will be attached to the plea bargaining agreement and will be submitted to the Court to take note of them.

The settlement procedure of the plea bargaining agreement involves the completion of a preliminary stage in which the judge shall verify the compliance with certain conditions provided by law. If plea bargaining agreement is missing any of the particulars referred to in article 482 or if the conditions laid down in article 483 were not respected, the Court shall order the coverage of the omissions within 5 days and notifies in this sense the public prosecutor's Office who issued the agreement.

The Court shall decide on the plea bargain agreement by sentence, in open court, after hearing the Prosecutor, the defendant and his lawyer and, if present, the other parties and injured person.

In order for the agreement to be knowingly concluded the Court must establish whether the defendant fully understands the specifics of the procedure and if he is aware of the consequences of the agreement. During these checks, the Court must determine the intellectual capacity of the accused to fully participate in the procedure for the acceptance of the agreement and to understand its consequences. At the same time he must notice if the defendant was recently subjected to any treatment for an illness that might affect his or her consent, and if he had the possibility to knowingly take a decision with regard to the recognition of guilt.

Under art. 485 CPC, the Court seized with the settlement agreement may admit or reject the plea bargaining agreement.

If the court admits the agreement, it pronounces the solution arrived from the agreement, if the conditions laid down in article 480-482, concerning all the facts retained in the responsibility of the accused, which were the subject of the agreement are met.

The court rejects the plea bargain agreement and sends the dossier to the Prosecutor for further prosecution, if the conditions laid down in article 480-482 concerning all the facts retained in the responsibility of the accused, which were the subject of the agreement, are not met or if it considers that the solution reached by the Prosecutor and the accused is unlawful or unjustifiably mild in relation to the seriousness of the offence or the dangerousness of the offender.

In terms of how to settle the civil side, according to art. 486 CPC, where the Court recognizes the plea bargain agreement and between the sides the agreement concluded in a settlement or mediation concerning the civil action, the Court shall take note of it by sentence. If the Court recognizes the plea bargain agreement and between the parties the agreement did not conclude in a settlement or mediation concerning the civil action, the Court leaves the civil action unresolved. In this situation, the decision through which the plea bargaining agreement was accepted does not have the judged authority on the extent of the injury in the civil court; this means that the judgment in question has the authority of res judicata in civil court regarding the existence of the offence and the guilt. Therefore, if the agreement between the parties of

the criminal case ended in a plea bargain agreement, but no transaction or mediation agreement concerning the civil action has been concluded, the civil court, the civil side of the case solving cannot put in question and cannot not rule through the decision he gives on this side of the criminal aspects (the existence of the offence and guilt), they have already been determined by the sentence that acknowledges the plea bargaining agreement.

Under art. 488 CPC, the Prosecutor, defendant, the other party and the injured party may appeal within 10 days of receipt. The appeal may concern only the nature and quantum of the sentence or form of its execution and is resolved with the participation of the prosecutor and summoning of the accused.

The Court of appeal delivers one of the following solutions:

• rejects the appeal, maintaining the contested decision, if the appeal is late or inadmissible or unfounded;

• recognizes the appeal, abolishes the sentence through which the recognition of the agreement was admitted only with respect to the nature and the amount of the penalty or its form of execution and delivers a new decision, then the process will continue according to the provisions on the settlement agreement in the first instance without creating for the defendant a worse situation than that arrived through the agreement;

• recognizes the appeal, abolishes the sentence whereby the agreement of recognition was rejected and admits the plea bargaining agreement.

6. Aspects of comparative law, concerning the plea bargaining agreement

Since ancient times, the Anglo-Saxon legal system has accepted that a defendant accused of a crime should be convicted as a result of the recognition of the offence in question.

Thus, the plea bargaining agreement can be concluded in most parts of the U.S. states with respect to any criminal offence, regardless of the penalty. The procedure can start as soon as a person has been placed under indictment, and if the defendant originally pleaded guilty during the deployment of the trial he can conclude an agreement on the recognition of guilt. It should be mentioned the particularity that the agreement concerning the punishment is subject to the control of the courts, and the agreement concerning the deeds solely concludes in the prosecution stage without any intervention of the courts.

As regards the negotiation of accusations, in the United Kingdom and Wales it takes place between the Prosecutor and the defender of the defendant, the aim being to obtain a declaration of guilt on the part of the offender [22].

Unlike the U.S. legal system, where the institution of plea bargaining agreement is applicable even in the situation when crimes of greater severity were committed, the EU restricts the applicability of the institution to a limited number of offences of lesser severity.

Thus, Italy is the first of the European continental countries who introduced at the legislative level the plea bargaining procedure and the possibility to conclude an agreement in this purpose.

According to Italian law, there are two procedural forms of process enshrined with respect of the plea bargaining:

- *procedure of application of the penalty at the request of the parties* – the defendant, based on the documents existing in the case file, without the criminal prosecution being carrying out, he waives the right to dispute the charge and thus the presumption of innocence, in exchange for a reduction in sentence. This procedure applies only in the cases when an offence was committed for which the Italian law provides for imprisonment not exceeding 2 years.

- *the simplified procedure for court or "giudizio abbreviato"* knows two form: *typical simplified form* - what is initiated at the written or verbal request of the accused, this request can be done until the preliminary hearing of the accused, prior to submission of the conclusions of the representative of the Public Prosecutor or the defense, namely atypical simplified form - concerns the replacement of other legal procedures with one abridged without any conditions.

The two procedures can be triggered exclusively at the request of the defendant, and the solutions for both procedures can be conviction or acquittal.

In France, in 2004 came into force a law under which the accused who recognized an offence punishable by a maximum of five years in prison, the Prosecutor may propose one or more punishments, and

in the event of an agreement, it must be approved by a judge in open court. Both the defendant or his defense attorney and the Prosecutor may take the initiative to start this procedure, and the recognition of guilt with respect to the charges is made orally, through a statement given by the accused, or exceptionally in writing.

Also, there is no possibility of actually negotiating the penalty, the defendant being able to just accept or not at the recommendation of the Prosecutor. In all cases, the presence of the chosen or ex officio defender is mandatory.

After hearing the accused and his defense and, where appropriate, the person injured (if he has been identified and is present), the judge delivers the sentence which may decide the admission or rejection of the agreement [23].

Conclusions

From analyzing content regulations in conjunction with the solutions adopted in judicial practice, we appreciate the positive effect of the institution for which means ensuring celerity criminal process and relieving the judicial bodies of the causes of incidents, the practical implications are positive for both litigants and state bodies competent to apply and features on this special criminal procedure.

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