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Controversies related to plea bargaining in the new Romanian Code of Criminal Procedure

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Abstract:

In the New Romanian Code of Criminal Procedure (hereinafter the NCPP), the pleading guilty procedure on the one hand borrows the features of the formerly consecrated proceedings, on the other hand, gains new dimensions which actually turn it into a special, self-governing procedure, which justifies its appellation of "plea bargaining".

More precisely, in the NCPP the pleading guilty procedure shapes out under two forms: as a unilateral statement of the defendant given before the court, as well as a bilateral agreement between the defendant and the prosecutor.

As to the first situation, that of a unilateral statement, it is initially set out in art. 349, 2nd paragraph NCPP. This text is the antechamber of art. 374, 4th paragraph NCPP which also refers to the unilateral statement of the defendant who expresses, before the court, his option for a settlement of the case in summary proceedings. It is to be noticed that in such a hypothesis, the new code preserves the benefit of the penalties' latitude that is reduced to a fourth in case of imprisonment and to a third in case of criminal fines (art. 396, 10th paragraph).

The second situation is actually the sheer novelty in the New Code of Criminal Procedure.

The bilateral plea bargaining (articles 478-488 NCCP) becomes a transaction which is concluded, during the early stage of investigation, solely between the defendant and the prosecutor, with the almost total exclusion of the judge, who may, if the case, censure the bargain..

The plea bargaining procedure, like many other new institutions introduced by the NCCP, has been subject to decisions of unconstitutionality ruled by the Romanian Constitutional Court, and, as a result, the Romanian Government adopted on the 18th of May - Act no. 18/2016 which substantially modifies and completes the structure of the NCCP, among other important laws.

Keywords*: Romanian Code of Criminal Procedure; summary (abbreviated) proceedings; plea bargaining, article 374 parag. (4), article 478; Government's Act no. 18/2016.*

According to the Explanatory Memorandum[1] which prefaces Act no. 135/2010 on the New Code of Criminal Procedure[2], the special procedure of plea bargaining[3]

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[1] The Explanatory Memorandum, section P.1 is available at http://www.cdep.ro/proiecte/2009/400.

[2] The Act was published in the Official Journal no. 486 of July the 15th, 2010.

[3] One must make an important distinction between *plea bargaining*, an expression which designates the procedure of the agreement concluded between the defendant and the prosecutor, and *plea bargain*, which is the legal document (i.e. contract or agreement) signed by the defendant and the prosecutor, as well as the other participants to the procedure.

introduced in the NCCP is an innovative legislative procedure which has borrowed features from the French and German penal systems and adapted them to the specifics of the Romanian judicial system.

The same Memorandum proudly states that the introduction of such procedure into the NCCP implies a radical change of the Romanian criminal trial and brings about several advantages, among which: a less complicated activity of criminal investigation, a reduced length of the trial stage and, above all, an economic advantage, which, to a certain extent, benefits to all parties to the trial, but especially to the state, which has the opportunity to save essential financial and human resources.

In precise terms, in the NCCP the pleading guilty procedure may occur during two distinct stages of the trial, and depending on that it shall have specific features: on the one hand, during the trial stage, when the defendant pleads guilty before the court (art. 374 parag. 4 NCCP), on the other hand, during the earlier investigation stage, when the defendant agrees to enter a plea bargain with the prosecutor and this bargain shall be subject to the control of a court (art. 478-488 NCCP)[4].

The order in which the two procedures shall be analyzed in what follows is the one in which they are settled in the NCCP. The plea bargaining procedure has been provided separately, at the end of the NCCP, in a section dedicated to a series of special procedures (Title VI).

I. Pleading guilty before the court (art. 374 parag. 4 NCCP)

According to art. 349 parag. 2 NCCP, the court can solve the case based only on the evidence supplied during the investigation stage, if the defendant requires this and pleads guilty for all the charges brought against him/her, on condition that the court may consider that the collected evidence allows the search for truth and leads to a fair solution in the case. The offenses which the law punishes with life imprisonment shall not be taken into account in such a procedure.

The first remark to be made at this point is that pleading guilty before the court during the trial stage obviously has certain features that distinguish it from the plea bargaining, a newly introduced procedure under the NCPP, which occurs during the early investigation stage.

The immediate distinguishing feature consists of the fact that, at trial there is a *unilateral statement* of the defendant before the court, by which he pleads guilty to the accounts listed in the indictment and requires that the judgment be based only on the evidence supplied during the investigation stage.

Therefore, during this stage of the trial, there is no bilateral agreement between the defendant and the prosecutor.

The initiative to benefit from summary (abbreviated) proceedings belongs only to the defendant, the court having no possibility to act of its own motion *(ex officio)* with regard to that, if it envisages that the conditions of summary proceedings are fulfilled.

However, as a mark of its active role, the court shall inform the defendant that he may require summary proceedings, *i.e.* his case shall be judged based only on evidence adduced during the investigation stage, when certain legal requirements are met. These requirements are provided under art. 374 parag. 4 NCCP.

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[4] Magdalena Roibu, *On a Different Kind of Compromise in the New Code of Criminal Procedure (Despre un alt fel de compromis în NCPP)*, Analele Universității București, supliment 2014, p. 345.

The contents of art. 374 parag. 4 NCCP have actually been amended by the recent Government's Act no. 18/2016[5], so that in its current form, the article reads: " When the public action has not been initiated for an offense punished by life imprisonment, the presiding judge shall inform the defendant as to his/her possibility to request that the judgment be based only on the evidence supplied during the investigation stage, on the documents presented by the parties and the victim[6], if the defendant pleads guilty for all the counts of offenses against him".

The unilateral statement of the defendant is not enough by itself, but must be validated by the court which has to be convinced that the case can be judged in summary proceedings if the court considers that the evidence supplied so far (during the investigation) may allow the search for truth and a fair settlement of the case. The court's control is the common ground of both procedures in which the defendant pleads guilty, both during the investigation and the trial stage.

Thus, during the trial stage the defendant's pleading guilty generates effects only if the court has validated this procedure which is subject to the condition that truth has to be searched for.

At trial, everything gravitates towards the search for truth principle, which is actually specific to inquisitorial systems, and still survives in the NCCP, despite the fact that the new code aims at being more open to adversarial systems, from where it took its inspiration.

Moreover, neither of the two justice systems - the French or the German - has provided for such principle. Anyway, only the search for truth may be possible in lawsuits, since the discovery of truth, be it a judicial truth, is a quasi-impossible mission, even for Romanian criminal courts, therefore it is highly doubtful that it functions in practice.

Guiding itself by this principle, if the court considers that the truth cannot be discovered only based on the evidence supplied during the investigation stage it shall dismiss the request of the defendant who solicited summary proceedings.

Another distinctive feature of the pleading guilty procedure before the court is that summary proceedings may be used for most offenses, except for those which the law punishes by life imprisonment. In case of plea bargaining, this agreement between the defendant and the prosecutor can be used only for those offenses that are punished by a fine and up to 15 years of imprisonment. This new maximum latitude of penalties (15 years) has been recently introduced in the NCCP, as a result of the adoption of Government's Act no. 18/2016 (see above).

Before this recent amendment, the maximum latitude of the offenses for which a plea bargain could be concluded used to be 7 years of imprisonment, which restricted a lot the access to the procedure.

As concerns the latitude of penalties, this feature singularizes the pleading guilty procedure before the court from the plea bargaining procedure. Yet, the two procedures keep something in common, namely the immediate effects that they generate for the defendant – a similar and substantial decrease in the limits of the penalty applied.

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[5] The Act was published in the Official Journal no. 389 of May the 23rd 2016.

[6] In the approach of the NCCP the victim (also called "injured person") is no longer a party to a criminal trial. If the victim chooses to participate to the trial in order to be compensated for the loss generated by the offense, whether financial or moral, he/she must make an official statement to that end, and thus he/she becomes a *civil party*.

Thus, in case the defendant chooses to plead guilty for all counts against him/her and accordingly makes a statement before the court, he shall benefit (automatically) from a decrease in the latitude of penalties, namely by a third in case of imprisonment and by a fourth, in case of a fine (art. 396 parag. 10 NCCP). If the defendant enters a plea bargain with the prosecutor during the early stage of the investigation, he presently benefits from the same decrease, following the introduction of a new paragraph into the contents of art. 480 NCCP – namely paragraph 4, inexistent before the amendment, which clearly states that "The defendant shall benefit from a decrease by a third in the limits of penalties provided by the law in case of imprisonment, and by a fourth in the limits of penalties provided by the law in case of fines. In case of minor offenders, the court shall take these elements into account upon ruling an educational sanction; in case of custodial educational sanctions, the limits of the periods for which such measures are ordered shall be decreased by a third".

It is to be noticed that a further novelty introduced by Government's Act no. 18/2016 is that even minor offenders can presently conclude a plea bargain with the prosecutor as regards the educational sanctions ordered against them, while before the amendment, the NCCP clearly stated that minor offenders could not do that. Accordingly, they shall benefit from a decrease in the latitude of the educational custodial sanctions.

From the perspective of the more relaxed (maximum) latitude of penalties in case of offenses for which the summary proceedings are accepted by the law (all offenses, except for those punishable by life imprisonment), it becomes clear that the pleading guilty procedure before the court turns out to be more advantageous than plea bargaining.

Moreover, during the trial stage, the defendant can bring before the court any document that mitigates his position at trial (e.g. he has a steady employment, he paid some or all of the damages to the victim), in addition to the evidence supplied during the investigation, an action which cannot be performed if he/she enters a plea bargain with the prosecutor.

There have been debates in the doctrine[7] related to whether the summary proceedings might be in contradiction with art. 6 parag. 3 d)[8] of the European Convention on Human Rights (hereinafter the European Convention or simply the Convention), due to the fact that it represents an abbreviated type of justice, where the defendant waives many of his/her procedural safeguards.

Most authors have shown that the procedure does not violate said European provisions. We deal in fact with a relative type of right, and the defendant may at any time waive this right before an impartial judge and have his/her case be judged in a summary proceeding.

This idea is also supported by the European Court of Human Rights (hereinafter the ECHR), which stated that the defendant has the possibility to opt out of the right guaranteed by article 6 parag. 3 d) of the Convention and, therefore, cannot claim that his right has been violated, if the national court bases its conviction on the statement

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[7] Andreea Uzlău, *Plea Bargaining – a New Criminal Procedure Institution*, article available in English at www.juridicaljournal.univagora.ro.

[8] Art. 6 parag. 3 d) – Right to a fair trial - "Everyone charged with a criminal offense has the minimum following rights: to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him".

given during the criminal investigation stage by a witness of the prosecution (including witnesses with protected identity), whose hearing the accused has waived[9].

II. Plea bargaining amendments (art. 478-488 NCCP)

This procedure has been significantly amended, as a result of the entry into force of Government's Act no. 18/2016.

The first serious amendment concerns the category of persons who can conclude a plea bargain with the prosecutor. Thus, the contents of art. 478 parag. 6 NCCP have changed, so that currently even minor offenders can enter a plea bargain. Initially this category of offenders was excluded from the procedure. The only condition that the new code imposes on them is that the bargain be concluded with the consent of the legal representative of the minors.

This reconfiguration of the former art. 478 NCCP is welcome since it clears off the discrimination that used to exist in respect with minor offenders who were left out of the plea bargaining.

It is important that they be able to bargain with the prosecutor, even if they are no longer sentenced to penalties, but only to educational sanctions as the NCCP provides, because even educational measures (especially the custodial ones) should be mitigated. In case of custodial educational sanctions, the period for which they are ordered shall be decreased by a third (see below comment on art. 480).

Another element of novelty regards the object of the plea bargaining, set out in art. 479 NCCP, pursuant to which the plea bargain shall be concluded on condition that the defendant admits the commission of the offense and accepts the charge(s) against him, the nature and latitude of the penalty, as well as the type of sentencing, and respectively, the nature of the educational sanction, or, if the case may be, the waiver of penalty or the postponement of applying the penalty.

Perhaps the most advantageous amendment of the plea bargaining procedure consists of the fact that the maximum latitude of the penalties for the offenses which enable the conclusion of a plea bargain have been extended from the initial maximum of 7 years of imprisonment to 15 years of imprisonment. Therefore, the present requirements are that a defendant shall be able to bargain with the prosecutor only if his/her criminal act is punishable under the law by a fine, up to 15 years of imprisonment.

This change is very much in accordance with the source dispositions of the plea bargaining, namely the US Code of Criminal Procedure provisions[10], according to which even federal offenses i.e. the most serious offenses punishable by 20 years of imprisonment can be subject to a plea bargain.

This extension of the maximum latitude of penalties allows a greater participation to the plea bargaining procedure and encourages defendants to seek to have their cases negotiated out of court.

Despite these important amendments, there is still one element that has survived from the former configuration, which hinders the flow of the procedure, namely its double check, both by the senior prosecutor, as well as, subsequent to its conclusion in a

[9] ECHR, the case of *Brandstetter v. Austria* (28.08.1991), paragraph 46 and the following, available in English at http://hudoc.echr.coe.int/eng?i=001-57683.

[10] See U.S. Code – Title 18 – Crimes and Criminal Procedure, available at. www.law.cornell.edu/uscode/text.

final form, by the court. This might considerably change the initial form under which the bargain was concluded.

Regardless of such possible obstacles, another important amendment is to be saluted, namely that in its current form, the plea bargaining brings a certain benefit for the defendant, i.e. a decrease in the latitude of penalties. Before the amendment, this decrease used to be an act of prosecutorial discretion and was completely uncertain. Additionally, when the plea bargain was finally filed before the court, the court could exercise its own discretional power against the bargain. Therefore, no decrease of the penalties' limits was certain to operate.

Now art. 480 has been completed with a new paragraph, parag. 4 which expressly states that: "The defendant shall benefit from a decrease by a third in the latitude of the penalty in case of imprisonment and by a fourth in the latitude of the penalty in case of a fine. For minor offenders, these elements shall be taken into account upon ruling an educational sanction; in case of educational custodial sanctions, the limits of the periods for which such sanctions are ruled, shall be decreased by a third".

If the plea bargain is successfully concluded, the agreement is subject to the control of the court. Thus, art. 483 NCCP relating to the referral to the court has remained unchanged.

The amendment emerges at art. 484 NCCP related to the procedure before the court which checks the plea bargain that has been substantially reconfigured.

Thus, parag. 1 stipulates that if the plea bargain lacks one of the formal requirements provided under art. 482, or if the conditions set out at art. 483 were disregarded, the court shall order that these dysfunctionalities be corrected in a term of at most 5 days and refers the file back to the head of the prosecution office where the plea bargain was concluded.

Furthermore, parag. 2 successfully completes the contents of the former legal text with an essential mention, establishing that at the date set for the proceedings, there shall be summoned to appear in court the defendant, the other parties as well as *the victim*.

This last mention is extremely important, since in its previous version, the contents of art. 484 totally ignored the victim, who was left out of the proceedings of plea bargain control before the court. Following a Decision of unconstitutionality passed by the Romanian Constitutional Court[11], and a as a result of the recent entry into force of Government's Act no. 18/2016, the victim (the injured party, according to Romanian procedural terminology) is now part of the plea bargaining procedure, with full rights, a situation which brings the victim closer to the legal standing of the parties.

The introduction of the victim in the procedure before the court respects the principle of the right to a fair trial provided by art. 6 of the European Convention, more precisely the safeguards related to the rule of contradictory debates and the equality of arms.

The court shall rule on the plea bargain by a sentence, in open court (before the amendments, the procedure used to be non-contradictory), after listening to the prosecutor, hearing the defendant as well as, if present, the other parties and the victim.

The solutions that the court may rule, following this check-up procedure, have also been amended (art. 485 NCCP). Thus, after a thorough examination of the plea bargain, the court shall:

[11] Decision no. 235/2015, published in the Official Journal no. 364 of May 26th 2015.

a) allow the plea bargain and rule the solution which led to the conclusion of the agreement, if the conditions provided by articles 480-482 are fulfilled, namely those related to all the charges imposed on the defendant which were subject to the agreement;

b) dismiss the plea bargain and refers the file back to the prosecutor in order to continue the investigation if the conditions provided by articles 480-482 are not fulfilled or if the court considers that the solution which led to an agreement between the prosecutor and the defendant is illegal or too lenient judging by the seriousness of the offense or the potential danger represented by the offender.

Once the victim has been introduced in the procedure, the whole content of the plea bargaining has been amended so that even the victim can file an appeal against the sentence of the court.

Accordingly, art. 488 NCCP was reshaped and presently states that the prosecutor, the defendant, the other parties, as well as the victim, can file an appeal against the sentence, in a term of 10 days from the day the decision was served upon them. All the provisions related to the procedure of the appeal (art. 409 and the following in the NCCP) apply in the exact terms to the plea bargaining framework.

Similarly with the procedure before the first instance court, the appeal procedure against a plea bargain shall involve the defendant, the other parties and the victim.

It is important to mention the fact that the appeal can be aimed only at the nature and amount of the penalty or the type of sentencing.

The appellate court may rule one of the following decisions (art. 488 parag. 4 NCCP):

a) dismisses the appeal, and upholds the sentence, if the appeal is introduced after the 10 –day term set out by the law, if it is inadmissible or ill-founded;

b) allows the appeal, quashes the sentence by which the plea bargain was confirmed and rules a new decision, according to articles 485-486;

Point b) of parag. 4 has been amended, in order to be symmetrical with the previous dispositions of articles 485-486 to which it refers, since they have been amended as well.

c) allows the appeal, quashes the sentence by which the plea bargain was infirmed and confirms the plea bargain.

III. Concluding remarks

Subsequent to the recent amendments, the plea bargain procedure undoubtedly displays a series of clear advantages, mainly for the defendant. But the benefits it brings are also important for the course of Romanian criminal justice, in general, because the plea bargaining saves the courts from a huge amount of (unnecessary) work.

As Chief Justice Burger of the U.S. Supreme Court once stated referring to the beneficial effects of plea bargaining, "If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities"[12].

[12] The statement was made on the occasion of the U.S. Supreme Court case of *Santobello v. New York*, 404 U.S. (257) 1971 available at http://www.caselaw.lp.findlaw.com.

Nonetheless, due to the manner in which the plea bargaining was settled in the NCCP, it continues to display some issues that have not been solved by recent amendments.

Thus, in case of a defendant who is prosecuted for several counts of offenses, the court shall be referred to by an indictment for some of those offenses and by a plea bargain for the other offenses, even if the offenses are concurrent, while in the end the defendant shall execute the concurrent sentence (*i.e.* in which the period of imprisonment equals the length of the longest sentence, to which an increment may be added). In case of plural offenders, prosecuted for several offenses, things become even more complicated, since several plea bargains shall be concluded and the trial shall be split[13].

Yet another question to be answered in relation to plea bargaining is that of what may happen in practice when, as a result of the control exerted by the court, a plea bargain is dismissed, the file is referred back to the prosecutor who continues the investigation, but in the end he decides not to enter an agreement with the defendant and instead prosecutes him on an indictment? In such a case, can the former plea bargain generate negative effects on the legal situation of the defendant who previously admitted his guilt?

The doctrine[14] has come up with a possible solution to such an issue, namely a completion of the plea bargaining procedure with a legal text which expressly provides that the contents of the former plea bargain cannot be used against the defendant, once the bargains is dismissed by a court.

Such a solution has been set out in the French Code of Criminal Procedure[15], for instance, which, in art. 495-14 clearly states that "When the person has not accepted the sentence or sentences proposed or where the president of the district court or the judge appointed by him has not approved the district prosecutor's proposal, the official report may not be sent to the investigating or trial court or to the public prosecutor, and neither the parties nor the public prosecutor may make use of any statements made or documents given in the course of the procedure".

Such provisions in the French Code of Criminal Procedure are destined to effectively protect the right to the presumption of innocence and the privilege against self-incrimination in case the plea bargain is invalidated, while they represent at the same time a mark of the court's impartiality.

For the future, this might be a good example for a further amendment of the plea bargaining procedure that the Romanian lawmaker should seriously consider.

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[13] Florin Cotoi, Versavia Brutaru, *The Effects of Pleading Guilty in Criminal Law* (Efectele recunoașterii vinovăției în dreptul penal), C.H. Beck Publishing House, Bucharest, 2013, p. 67.

[14] Voicu Puşcaşu, *Negotiating Guilt in Modern Criminal Trials* (Negocierea vinovăției în procesul penal modern), Criminal Law Writings (Caiete de drept penal) no. 1/2010, p. 35.

[15] Available in English at https://www.legifrance.gouv.fr/content/download/1958/13719/version/3/.../Code_34.pdf.