THE PLEA BARGAIN AGREEMENT

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Abstract

Alongside major changes in Romanian criminal law, the plea bargain agreement gave a new approach on the mechanisms of criminal procedure in national law, thus creating a series of problems and divergent interpretations of the content and limits of this mechanism in solving criminal litigation.

What motivated us in our scientific analysis was the novelty of the issues that arose both in the doctrine and interpretation of the legal provisions and in the practice of prosecution offices and national courts, the high impact that the new proceedings can have on criminal policy and the need for clear and efficient provisions that can ensure legal certainty.

Our paper is divided in four major parts: the nature and object of the agreement, the conditions of plea bargain, the prosecutorial phase, court validation and appeal procedure, in each of these sections taking into account the legal provisions, analyzing working hypothesis, identifying probable issues and problems and providing our opinion on possible solutions.

Our findings prove the fact that the novelty aspect of this procedure determined a number of gaps in the law, aspects that can dramatically influence the result of the criminal case and the guarantees that the parties have in criminal law. Moreover it will underline the unclear provisions that make the new law inapplicable in certain cases and leave a number of situations without any lawful solution.

Keywords: *plea bargain, minor offences, admissibility conditions, admission of guilt, superior prosecutor's approval, changing legal qualification, individualizing the penalty, notifying the court, court assessment, invalidating the plea bargain.*

1. Introduction

I. Introductory remarks. The plea bargain agreement is a special procedure which is new in the criminal legislation in Romania, being regulated in Title IV of the Special Part of the Criminal Procedure Code adopted by Law 135/2010 as subsequently amended and completed by Law 255/2013. The relevant provisions are given by article 478-488 of the Criminal Procedure Code.

According to the recitals of the Criminal Procedure Code, introducing this special procedure targeted to reduce the duration of the case trial, to simplify the activity within the criminal prosecution stage and to save money and human resources within the legal procedures.

The Romanian lawmaker was inspired by the French and German criminal law systems, but the procedure exists – in similar ways – also in other European countries.

II. The nature and object of the agreement.

The plea bargain agreement appears as a procedure which is derogating from the common law procedure applicable to certain small crimes, having as main feature the possibility granted to the defendant to participate in the decision making process and to negotiate the penalty which is going to be applied to him.

This special procedure is not confused with the one of arraignment acknowledgement stated by article 374, paragraph 4, articles 375 and 377 of the Criminal Procedure Code, whereas there are several differences between these two.

- while arraignment acknowledgement can occur only during the trial, the plea bargain agreement is only concluded during the criminal prosecution stage;
- the plea bargain agreement involves a negotiation carried between the prosecutor and the defendant in regard to the individualizing the penalty (the penalty's type, quantum, type of enforcement, waiving the application of the penalty or delaying its application), whereas the result engages the obligation of the judge under certain conditions. The arraignment acknowledgement does not have such feature, and the judge has the exclusive task of individualizing the penalty in the case in which he orders a conviction solution.
- the admissibility conditions of the two procedures are different (for example, under the aspect of the cases in which they can occur, the plea bargain agreement is more restrictive, being allowed only for the crimes for which the law provides the punishment with prison for more than 7 years, while the arraignment acknowledgement is excluded only in the case of crimes which are punishable with life in prison);
- although both procedures are abbreviated procedures, the trial is much shorter in the case of the plea bargain agreement. Therefore, in case of the arraignment acknowledgement, though the criminal

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trial is simplified, the documentary evidence is allowed (article 375, paragraph 2 and article 377, paragraphs 1-2 of the Criminal Procedure Code); at the time when the judge solves the arraignment acknowledgement, there are no evidence administered. The trial in the case of the arraignment acknowledgement has a stage reserved for debates and for the last word of the defendant, a situation which the plea bargain agreement solving does not provide for.

According to article 479 of the Criminal Procedure Code, the object of the agreement is that the defendant admits the crime he committed and the legal grounds on which the criminal investigation was started. The two aspects do not form an object of negotiation, yet they are elements that the defendant is obliged to comply with in order for the agreement to be admissible.

III. The conditions of the agreement.

The analysis of the legal provisions shows that for the admissibility of the plea bargain agreement requires the compliance with the following conditions:

a) The case must be in the criminal prosecution stage, with the criminal action already started (article 478, paragraph 1 of the Criminal Procedure Code). The suspect cannot sign a plea bargain agreement. If the procedures already reached the trial stage, this special procedure can no longer be used as a resort, but the defendant may still opt for the arraignment acknowledgement, under the conditions of article 374, paragraph 4 of the Criminal Procedure Code. The plea bargain agreement is also possible in the case of reopening the criminal prosecution under the conditions of articles 335, 341 paragraph 6 letter b) or article 341, paragraph 7, item 2, letter b) of the Criminal Procedure Code and after reinitiating the criminal prosecution in case of restitution made by the preliminary chamber judge, under the conditions of article 334 of the Criminal Procedure Code (in all situations, after initiating the criminal proceedings). We also consider that this procedure can be resorted to after a first approval was dismissed by the court and the file was returned to the prosecutor for the purpose of continuing the criminal prosecution, according to the conditions of article 485, paragraph 1, letter b) of the Criminal Procedure Code;

b) The penalty stated by the law for the crime which forms the object of the case is a fine or prison for 7 years at most (article 480, paragraph 1 of the New Criminal Procedure Code).

The meaning of the notion "penalty stated by the law" is the one shown by the article 187 of the Criminal Procedure Code: the penalty stated in the text incriminating the fact committed in its consumed state, without considering the causes for lowering or increasing the penalty.

In light of this condition, no plea bargain agreements can be signed for crimes punished by law with life in prison or with the detention for a special maximum time of imprisonment of 7 years (for example in the case of murder, manslaughter causing the death of two or more persons, strikes or injuries causing death, human trafficking, trafficking minors, rape, armed robbery, bribery, counterfeiting, treason or espionage). The special procedure is admissible though in the case of a considerably larger number of crimes (for example murder at the request of the victim, manslaughter in the types stated by article 192, paragraphs 1-2 of the Criminal Procedure Code, strikes or other types of violence, standard bodily injury, bodily injury by negligence, mistreatment of juveniles, fetal injury, illegal deprivation of liberty, threat, blackmail, standard pandering, crimes that harm homes and private lives, theft, standard robbery, crimes against the patrimony by the misuse of trust, frauds committed by means of IT systems, vandalism, crimes against the accomplishment of justice, bribery, influence trafficking and purchase, work related crimes, document forgery, violation of the regulations upon weapons and munitions, electoral crimes).

In our opinion, conditioning of the plea bargain agreement to the punishment stated by the law for the crime forming the object of the case is objectionable. Considering that the defendant accepts the legal qualification given to the action by the prosecutor and participates to the process of individualizing the crime, we consider that it is natural for the incidence of the special procedure to depend on the limits of punishment resulted from the legal qualification. The relation that the lawmaker made with the "punishment stated by the law", a phrase referring to a consumed action, ignores the fact that during the legal qualification the prosecutor takes into account that the action either remained an attempt or it was consumed, and that the defendant is a recidivist or not, if there are legal mitigating or aggravating circumstances; whereas, these influence the special penalty limits within which the individualization takes place. Thus, the admissibility of the procedure gets to be determined by the abstract level of the social danger of that action and not by the concrete dangerousness that the perpetrator shows, whereas this generates certain inequities. For example, a defendant who committed a simple robbery crime during a post-execution relapse may sign a plea bargain agreement though – as an effect of article 43, paragraph 5 of the Criminal Procedure Code – the limits within which the punishment is negotiated are of 3 years and respectively 10 years and 6 months. Instead, because the special maximum punishment stated by the law exceeds 7 years of prison, a plea bargain agreement cannot be signed by the one committing an attempt of armed robbery in the version stated by article 229, article 3 of the Criminal Procedure Code or an attempt of armed robbery stated by article 234, paragraph 1 of the Criminal Procedure Code, though in both situations, the negotiation of the punishment would be done within the special limits cut to half, meaning a minimum of 1 year and 6 months and a maximum of 5

years of prison.

In *lex ferenda*, we consider that this condition should be reformulated as follows: *"The plea bargain agreement may be signed only if the penalty resulted from the legal qualification given to the action and accepted by the defendant is a fine or prison for 7 years at most".*

When it is intended to negotiate a solution for waiving the application of the penalty, the condition stated by article 80, paragraph 2, letter d) of the Criminal Procedure Code must be met, such as the crime to be sanctioned by law with a penalty of maximum 5 years of prison. If the negotiated solution is delaying the application of the penalty, considering the provisions of article 83, paragraph 2 of the Criminal Procedure Code, the penalty stated by the law for the crime forming the object of the case must be prison for 7 years at most.

c) The defendant must admit that he committed the crime and he must accept the legal qualification for which the criminal proceedings were initiated (article 482, letter g) of the Criminal Procedure Code). The acknowledgement must be shown in an express statement of the defendant, such as there will be no need for the prosecutor to deduce or interpret it.

It is debatable in our opinion if the acknowledgement must target the legal qualification given to the crime by the resolution for starting the criminal proceedings. We consider that in fact the reference is made to the legal qualification at the time of the acknowledgement statement, which, after changing the legal qualification (article 311 of the Criminal Procedure Code) can be another than the initial one. Still, related to the qualification at the time of the acknowledgement, the condition upon the penalty limits must also be considered.

In order to sign the agreement, the defendant is obliged to accept the legal quantification given by the prosecutor to the act committed even if that qualification is a wrong one. The legal qualification does not form the object of the negotiation; it is accepted or not by the defendant. We believe though that nothing stops the defendant, before the initiation of the special procedure, to ask the prosecutor personally or by defender, to change the legal qualification when it is considered that it is not the correct one.

We believe that the acknowledgement statement can be made by the defendant personally or by an authentic document.

The provisions of article 483 paragraph 2 of the Criminal Procedure Code show that when the defendant is prosecuted for a complex of offenses, the acknowledgement and the acceptance may be stated only regarding some of the acts. We consequently notice that in this special procedure, the law does not impose that the acknowledgement include all the acts, as requested in the case of the arraignment acknowledgement, during the trial (article 374, paragraph 4 of the Criminal Procedure Code).

An issue raised is related to whether the acknowledgement statement given by the defendant in order to conclude the agreement is revocable or not. We believe that at least until the agreement is solved by the first court, the defendant must have the right to withdraw his acknowledgement statement given during the criminal prosecution. However, it is hard to imagine how the court could issue a conviction solution based on an agreement which was withdrawn and which is not acknowledged anymore by the defendant, after a procedure which was lacked contradictory nature and immediacy, without administering again the evidence submitted during the criminal prosecution and without debates.

d) Enough data must exist regarding the existence of the act based on which the criminal proceedings were initiated and related to the guiltiness of the defendant;

The conditions imposed by the lawmaker is logical in relation to the procedural moment when the plea bargain agreement appears as an option, respectively after the initiation of the criminal proceedings.

e) the prosecutor and the defendant must reach a consensus regarding the type and quantum of the penalty and regarding the way the penalty will be executed or, depending on the case, if the penalty will be waived or delayed;

The simple acknowledgement of the act under the legal quantification given by the prosecutor does not lead automatically to the conclusion of the agreement because the defendant may have a divergent opinion regarding the penalty or regarding the way it will be executed. For example, though he admits that he committed the crime, the defendant proposes waiving the application of the penalty and the prosecutor does not accept this solution.

IV. The procedure of the agreement.

The owners of this guilt acknowledgement are the prosecutor and the defendant. The initiative may belong to any of them, whereas the defendant must be informed by the legal authority on the right to sign an agreement (article 108, paragraph 4 of the Criminal Procedure Code). When the case is being instrumented by the criminal prosecution authority, the agreement can only be signed by the prosecutor who supervises the file. In such situation, the criminal prosecution authority will make justified proposals (article 286, paragraph 4 of the Criminal Procedure Code).

While perfecting the agreement, the injured person plays no part. The law does not even state the obligation of the prosecutor of consulting the injured party.

Though he has initiative in this special procedure, the prosecutor is obliged to comply with the previous and written approval of the superior prosecutor who fixes the limits of the agreement (article 478, paragraph 4 of the Criminal Procedure

Code). It is noticed that the superior prosecutor cannot forbid the initiation of this procedure, whereas his attributions are circumscribed under the law exclusively to setting the limits of negotiating with the defendant. According to article 478, paragraph 2 of the Criminal Procedure Code and the effects of the plea bargain agreement are submitted to the approval of the superior prosecutor.

An issue raised is whether the superior prosecutor may or not refuse the second approval in the situation in which the approval is concluded within the limits for which he granted the initial approval (legal qualification, type of the penalty, quantum of the penalty, the way the penalty will be executed etc.). It could be argued that the effects of the approval cannot be invalidated so long as they fall within the limits of the initial previous approval, but only if they exceed them. We believe though that since the second approval targets the effects of the approval and these effects include the informing of the court, the attributions of the superior prosecutor at the issuance of this approval should be symmetrical with the ones at the verification of the legality and validity of the indictment document. Consequently, we consider that the superior prosecutor could refuse the approval of the agreement's effects under the conditions, for example, where the new interpretation of the documentary evidence in the file, he considers that there are no sufficient data resulted upon the existence of the crime or of the conditions needed to engage the criminal liability.

The law states that minor defendants cannot conclude plea bargain agreements (article 478, paragraph 6 of the Criminal Procedure Code). Though this provision was sometimes criticized, we consider that the impossibility of concluding a plea bargain agreement by a minor defendant is resulted from the specific features of negotiation, which regard – according to article 479 of the Criminal Procedure Code – "the type and quantum of *the penalty* (authors' note)"; yet, according to the Criminal Code, minors are not applied penalties, but correctional measures.

Based on the same argument, we consider that the plea bargain agreements cannot be concluded also by adult defendants for facts committed while being minors. This is because, according to article 134 paragraph 1 of the Criminal Procedure Code, the provisions of Title V of the General Part of the Criminal Code regarding minority is applied to adults who at the date of committing the crime were between 14 and 18 years old, which means that they also shall be applied only correctional measures and not penalties.

The defendant may conclude a plea bargain agreement also in the case of committing a crime after becoming an adult, if his action is concurrent with a crime committed while he was a minor. Obviously the approval will only concern the crime committed during the time when he was an adult and it can be concluded only under the conditions of admissibility. Out of the hypotheses stated by article 129 paragraph 2 of the Criminal Procedure Code, the plea bargain agreement is excluded only in the hypothesis stated under letter c) which states that the penalty applied for the crime committed as adult is life in prison (which means that the crime is punished by law with a penalty imposing imprisonment for longer than 7 years). It was sometimes considered that the agreement is not possible also in the hypothesis stated by article 129, paragraph 1, letter d) of the Criminal Procedure Code, because in this case only the liberty deprivation correctional measure is executed. We observe however that no legal text impedes the defendant to perfect an agreement in this case, regarding the crime committed after becoming an adult. We can neither state that the defendant could not have an interest in this regard (in considering the circumstance that the penalty for the fine which is going to be applied is going to be executed), because – at least in the case of crimes for which law states as penalty alternatively imprisonment and fines – he cannot know previously whether after the regular trial procedure he will be sanctioned with a fine and not with prison for the crime committed as an adult. Yet the two hypotheses are different; if the defendant would be sanctioned with prison for the act committed as an adult, the provisions of article 129, paragraph 2, letter b) of the Criminal Procedure Code would be applicable, so the increased penalty with prison would apply to him for a period equal with at least a fourth of the duration of the correctional measure, or from the rest of the penalty which remained unexecuted at the date of committing the crime after becoming the legal adult age, which means that his situation would be much harder, whereas the liberty deprivation penalties are much harsher than correctional measures. Consequently, for the crime committed as an adult, the defendant would be interested in concluding a plea bargain agreement in the hope that he will be applied only a fine and so he will know that for the crime he committed while he was a minor he will be applied a correctional imprisonment measure, increased with 6 months at most, that he will execute. It can also be noticed that by concluding an agreement and obtaining a fine for the crime committed as adult, the defendant will know that the correctional measure that he will execute can be increased by at most 6 months, yet if he does not conclude an agreement and he is applied an imprisonment penalty, he cannot control the penalty's increase percentage, whereas the provisions of article 129, paragraph 2, letter b) of the Criminal Procedure Code refers only to the minimum of this percentage.

When in the case more defendants are being prosecuted, a plea bargain agreement can be concluded with all of the defendants or only with a part of them. The provisions of article 478, paragraph 5 of the Criminal Procedure Code show that if several defendants wish to resort to the special procedure, each of them will conclude a separate agreement. The provision is amended though by article 485, paragraph

2 of the Criminal Procedure Code, according to which "the court can approve *the plea bargain agreement only regarding some of the defendants* (authors' note)". This contradiction of the law should be corrected; in our opinion, at least in theory, the possibility to conclude one single agreement for all the defendants should not be excluded, since this would not harm the presumption of innocence for the defendants who did not wish to conclude an agreement, as stated by article 478, paragraph 5 of the Criminal Procedure Code, nor would it harm the presumption of innocence for the defendants who concluded the agreement, for the acts that they did not admit to. We believe that it is essential for the negotiation process for the penalty to be carried out separately with each defendant (having thus a personal nature), while recording the results of all negotiations in one single agreement, a fact which would not impede the procedure. Also, there is no obstacle for the situation where several agreements were concluded in the same case, for the court to be notified upon all of them, where the competence is going to be determined according to article 44 of the Criminal Procedure Code.

Yet, even if all the defendants admit all the acts that they are accused of, separate agreements will be concluded if the acknowledgement statements are submitted at different times. If a defendant admits at the same time on several acts, a single agreement will be concluded on all of them. It is possible though that the acknowledgement of each act to come at different times, which requires by the nature of things the conclusion of different agreements.

The negotiation between the prosecutor and the defendant is carried in relation to the following aspects:

a) The type and quantum of the penalty. Since the law does not distinguish it, both the main penalty and the complementary ones are targeted.

The main penalty cannot be something else but a fine or imprisonment, because in the case of crimes for which the law provides life in prison, the approval is not admissible. Also, the provisions upon the possibility of applying the penalty of life in prison is not applicable in the hypothesis stated by article 39, paragraph 2 of the Criminal Procedure Code, since a condition for this hypothesis is that for one of the concurrent crimes, the penalty stated by the law shall be imprisonment for 20 years or more.

By the decision 25/2014, the Supreme Court of Cassation and Justice – the panel for solving criminal law matters decided that in the application of the provisions of article 480-485 of the Criminal Procedure Code, the prosecutor cannot apply in the criminal prosecution stage, in the plea bargain agreement procedure, the provisions of article 396, paragraph 10 of the Criminal Procedure Code, with direct consequences on lowering the penalty limits stated by the law for the crime committed. Nothing impedes though within the negotiation that the prosecutor and the defendant convene upon a penalty which will not exceed two thirds of the special maximum stated by the law (such limitation could be also indicated by the previous approval of the superior prosecutor). The aspect seems natural to us at least in the case where the defendant completely admits to his actions. If the prosecutor would not negotiate the penalty under the special maximum reduced by a third (or in the case of a fine by a fourth of the penalty), the defendant would not be motivated to conclude the plea bargain agreement, knowing that he can resort during the first instance trial to the arraignment acknowledgement procedure, and the lowering would become compulsory based on article 396, paragraph 10 of the Criminal Procedure Code.

The analysis upon the provisions of article 479 and article 492, letter h) of the Criminal Procedure Code, we note that the safety measures don't form an object of the negotiation, whereas their situation is not mentioned however in the contents of the plea bargain agreement. The court notified of the agreement is obliged though to issue a decision upon it, because – according to article 487, letter a) of the Criminal Procedure Code – the decision must also include the observations stated under article 404 of the Criminal procedure Code and this includes the observations upon the safety measures.

These conditions raise the question related to how the court could decide upon the safety measures. For example, how could the special seizure measure (article 112 of the Criminal Code) apply so long as the assets targeted are not indicated in the agreement? How will the court take a safety measure which is not imperative (for example hospitalization – article 110 of the Criminal Procedure Code), if the prosecutor and the defendant did not negotiate and if they did not reach an agreement over it and, moreover, the procedure before the court is not contradictory? If the prosecutor would request taking such measure and the defendant would oppose it, logically the procedure should include ordering and performing a psychiatric medical-legal expertise and the judge should grant the defendant the right to formulate conclusions. We opine that this problem should be clarified by the lawmaker.

b) The way how the penalty is executed, waiving the application of the penalty or delaying the application of the penalty.

In regard to the way in which the penalty is executed, the prosecutor and the defendant will negotiate also upon the possibility of suspending the execution of the penalty under supervision, under the conditions stated by article 91 and by the following articles of the Criminal Procedure Code.

While perfecting the agreement, the legal assistance of the defendant is compulsory. In lack of an opposing provision, we consider that the legal assistance is not compulsory before the court which will solve the agreement (except for the hypotheses stated by article 90 of the Criminal Procedure Code)

The agreement reached by the prosecutor and the

defendant must have a written shape and its content will be the one stated by article 482 of the Criminal Procedure Code (we consider that this agreement must also include observations upon the preventive and precautionary measures).

The action of notifying the court is the plea bargain agreement.

If an agreement is concluded upon some of the actions or only with some of the defendants and for the other actions or defendants the indictment is made, the court will be notified in separate documents. In such a situation the case must be separated. It was estimated with reason that in such situations application difficulties will appear. In the cases with several crimes and several defendants, the notification of the court can reach to be made by an indictment document for some of the defendants and by a plea bargain agreement for the others. It is possible that for the same defendant that the notification will be done by an indictment document for some of the crimes and by a plea bargain agreement for other crimes. The situation could get even more complicated: for example, if there are several defendants and only some of them sign agreements on different dates, the notification of the court will be done by indictment document for some of them and by plea bargain agreements for the others, yet also for the others a notification will be sent by plea bargain agreements in successive moments, at the time of concluding each of those agreements. It is hard to presume if the court or courts were informed on different dates, whether the cases concerning the agreements could be united, whereas the celerity of the procedure makes it improbable to meet the conditions stated by article 44 of the Criminal Procedure Code. If we add to it the possibility that a part of the ones notified by indictment will resort to the arraignment acknowledgement procedure, a new separation will be applied during the trial stage, which means that we will have during the same trial an excessive fragmentation of the file, and negative consequences upon the validity and legality of the solution will be probable.

Additionally, when the same defendant is investigated for several concurrent crimes, if for some of them a plea bargain agreement is concluded, being approved by the court, and for the others he is sent to trial and definitively convicted, the merge of the penalties will always be done in the procedure stated by article 585 of the Criminal Procedure Code.

At the same time with the plea bargain agreement, the court will also be submitted the criminal prosecution file. If the agreement regards only some of the facts or only some of the defendants, the prosecutor will submit to the court only criminal prosecution documents referring to those acts and persons. If the defendant, the civil party and the civil accountable party have signed a transaction or a mediation agreement regarding the civil claims, this transaction or mediation will also form the object of a notification sent to the court.

The solving of the plea bargain agreement will also be made by the court which will have the competence of judging the case in substance. If the criminal prosecution was done for several defendants or for several crimes for which the competence belongs to different courts depending on the personal or material quality, the agreement will be solved by the court which is competent in relation to the facts or persons it refers to and not in relation to the ones for which an indictment was concluded. This conclusion results from the interpretation of article 483, paragraph 2 of the Criminal Procedure Code, because, so long as the agreement will be accompanied exclusively by those crimes concerning the facts and persons it refers to, the court could not verify its competence in relation to the facts and persons within the indictment, who remain unknown for it.

If the notification of the court by agreement is made only regarding certain facts or defendants, it is possible that it will be followed by a declination of competence ordered by the prosecutor. For example if in the case several defendants are prosecuted and only one or some of them sign an agreement, and the competence was given by their quality, after notifying the court, the prosecutor will request the separation and he will decline his competence for the continuation of the criminal prosecution regarding the other suspects or defendants, because the provisions of article 44, paragraph 2 of the Criminal Procedure Code do not apply during the criminal prosecution stage (article 63, paragraph 2 of the Criminal Procedure Code). For example, if for manslaughter a senator and a person with no special quality are investigated, the criminal prosecution will be done by the General Prosecutor's office attached to the Supreme Court of Cassation and Justice. Only the defendant who is a senator signs a plea bargain agreement and the court is notified upon this agreement. For continuing the criminal prosecution against the defendant with no special quality, first there is a need to order the competence declination to the prosecutor's office attached to the court. This situation could be practically avoided only by taking over the case based on article 325 of the Criminal Procedure Code.

In lack of a contrary provision, the composition of the panel which will solve the agreement is the one stated by the law for the first instance trial.

The special procedure does not know the stage of the preliminary chamber, which means that the task of checking the competence and the lawfulness of notifying the court, the legality of the evidence administration and the other criminal prosecution documents falls under the responsibility of the court. Though the law does not stipulate anything, we appreciate that the court could not decline this activity, because this activity forms the grounds for the validity and legality of the solution it will issue. For example, if the court finds that some evidence were not obtained legally, they must be excluded (article 102 of the Criminal Procedure Code) which can lead to the non-fulfillment of the condition of admissibility of the

agreement stated under article 480, paragraph 2 of the Criminal Procedure Code. Also, the verification of competence is essential, since the material and personal lack of competence are cases of absolute nullity when the trial was done by an inferior court (article 281, paragraph 1, letter b) of the Criminal Procedure Code).

According to article 484, paragraph 1 of the Criminal Procedure Code, if the plea bargain agreement lacks one of the obligatory observations or if the conditions stated under articles 482 and 483 of the Criminal Procedure Code were not complied with, the court orders covering the omissions during 5 days at most and it notifies the head of the prosecution office which issued that agreement. In our opinion the text of the law is vaguely formulated. For example, if the conditions stated by article 483, paragraph 1 of the Criminal Procedure Code upon material competence were not complied with, it is natural that the court must decline its competence, even if it risks a competence conflict, and not notify the prosecutor. Additionally, it is not very clear which those obligatory observations that could be missing are in fact, others than the ones stated under article 482 of the Criminal Procedure Code; probably the lawmaker wanted to refer to the lack of the approvals of the superior prosecutor regarding the limits and effects of the agreement.

The 5 days deadline is decadence and not a recommendation one, such as in the case of noncompliance the solution is to dismiss the agreement based on article 485, paragraph 1, letter b), of the Criminal Procedure Code.

The trial is public. Because the court was notified by agreement, the procedure is not contradictory. The criminal trial, the debates and the last word of the defendant are missing. The law states that the prosecutor, the defendant and his lawyer, as well as the civil party if it is present will be heard. Due to the specifics of the procedure we believe that they will have the exclusive word on the admissibility of the agreement and for the justification of the solution reached by negotiation, including under the aspect of the concordance between the solution proposed and the gravity of the fact and the dangerousness of the criminal.

In light of the law's silence, we consider that the injured person should not be cited or heard.

A question raised is if the court can raise itself the problem of the legal qualification given to the fact and mentioned in the agreement. In lack of contrary provisions, we consider that the court may change the legal qualification, after discussing it with the prosecutor and with the defendant; it is unconceivable that the judge is impeded by a legal qualification convened upon by the defendant and the prosecutor, when it considers that it is wrong. It must be analyzed though what solution will the agreement have in such case. Two situations are possible:

(i) Changing the legal qualification is made due to insufficient evidence regarding a part of the state. For example, this agreement showed the mitigating circumstance of being provoked or another mitigating legal circumstance and the court considered that there are no sufficient data justifying them; or an act composed by two material actions was qualified as a continued crime and the court considers that one of them is not shown by the evidence existing in the case and it changes the legal qualification into the simple form of the crime. In such case, we consider that the agreement should be dismissed based on article 485, paragraph 1, letter b) of the Criminal Procedure Code, for the failure to comply with the condition stated under article 480, paragraph 2 of the Criminal Procedure Code;

(ii) It could happen that the change of the legal qualification appears based on the same factual state, due to the different interpretation of its concordance with the incrimination regulation. For example, though the factual state shown in the agreement remains unchanged, the court considers that the crime is not theft but robbery.

In this second case, more problems arise. For example, the penalty stated by the law in relation to the new legal qualification can be different or it can be the same as for the crime initially shown in the agreement. If the penalty related to the new qualification is different and it equals at most 7 years of prison, it can happen that the concrete penalty reached by agreement is not located within the special limits stated by the law and for the new legal qualification. It is possible that for the new legal qualification a previous complaint is needed from the injured person, a complaint which was not needed for the action shown initially in the agreement. It might also happen that the change of the qualification determines the competence of another court, superior to the one notified by the agreement.

The law is not clear on the solution which will be adopted in such situations. We believe that this should be always dismissed at least for the reason that the negotiation between the prosecutor and the defendant and because the individualization of the punishment was grounded on a different incrimination regulation than the correct one, determining implicitly an erroneous application of the provisions of article 74 of the Criminal Procedure Code. Additionally, article 485, paragraph 1, letter a) of the Criminal procedure code shows that by admitting the agreement, the court will order one of the solutions stated under article 396 paragraph 2-4 of the criminal procedure code, which means that the fact exists and it is a crime; consequently, the judge deliberates also upon the legal qualification.

On the agreement, the court will state one of the following solutions:

a) Admitting the agreement and convicting the defendant, waiving the application of the penalty or delaying the application of the penalty.

Out of the systematic interpretation of the provisions of article 485 of the Criminal Procedure Code, it results that this solution is ordered when the

following conditions are met:

- the court finds that the conditions stated by articles 480-482 of the Criminal Procedure Code regarding all the actions held under the liability of the defendant, forming the object of the agreement are met;
- the solution reached by agreement is not disproportionately gentle related to the gravity of the crime and with the dangerousness of the criminal.

According to article 485 paragraph 1 letter a) of the Criminal Procedure Code, when the agreement is admitted, the court cannot create for the defendant a harder situation than the one stated in the agreement. We therefore deduce that the judge is compelled as a maximum limit by the solution convened upon by the prosecutor and the defendant in regard to the type and quantum of the penalty and in regard to the way it will be executed, because it can order a more gentle solution for the criminal. Consequently, the individualization of the penalty is partially the responsibility of the judge. In lack of contrary provisions, the judge may issue even a smaller penalty than the negotiation limit imposed by the agreement of the superior prosecutor who signed the agreement.

It can also be observed that though the solution of the law, in case the agreement is admitted, we are not actually in the presence of an agreement, whereas the judge orders a solution that the prosecutor did not accept.

An issue is raised regarding what solution should be issued when the court considers that there are sufficient data regarding the existence of the action for which the criminal proceedings were initiated, and regarding the guilt of the defendant, but in the mean time a case liberating them from the criminal liability appeared. For example, after notifying the court by agreement, an amnesty law was adopted. The court must dismiss the agreement and send the file to the prosecutor or it must admit it and order the ceasing of the criminal trial? On one hand, the conditions of article 480 paragraph 2 of the Criminal Procedure Code are met ("there are enough date regarding the existence of the *action* – authors' note") so the dismissal of the agreement is not possible anymore; on the other hand, the solution regarding the approval of the agreement and the ceasing of the criminal trial is not stated by article 485, paragraph 1, letter a) of the Criminal Procedure Code.

The same question is raised when after notifying the court by agreement a law appears discriminating the action, like when despite the defendant accepts the legal qualification set by the prosecutor, the action admitted upon, though it exists as it was noticed and described in the notification document, is not stated by the criminal law.

In our opinion, the logical solution – which is not stated by the law though – would by that in such cases the ceasing of the criminal trial should be ordered, or the acquittal, as the case may require. We believe that the formulation of article 480, paragraph 2 of the Criminal procedure Code should have been different, respectively:" [...] there is enough date regarding the existence of the *crime* for which the criminal proceedings were initiated and regarding the guilt of the defendant, *and he will be criminally liable for them"*

In *lex lata* though, in the cases above, the court cannot do anything else but dismiss the agreement and return the case to the prosecutor, who will order closing the case.

Once the agreement is approved, the court issues a decision in this regard acknowledging also the transaction or the mediation agreement signed between the parties regarding the civil proceedings. If the parties concluded no transaction and no mediation agreement, the court leaves the civil proceedings unsolved. In this case, according to article 27, paragraph 2 of the Criminal Procedure Code, the civil party may start a case on the dockets of a civil court.

b) Dismisses the plea bargain agreement and sends the file to the prosecutor for continuing the prosecution.

This solution is ordered in two hypotheses:

- if the conditions stated under articles 480-402 of the Criminal Procedure Code are not met, regarding all the crimes of which the defendant is accused and which formed the object of the agreement. It is notable that when the agreement is concluded on several crimes, it will be completely dismissed even though the admissibility conditions are not complied with regarding only one or some of the crimes;

The judge who dismissed the plea bargain agreement for this reason does not become incompatible if the court is notified by a new agreement or by a new indictment, except for the situation when the decision by which he rejected the first agreement stated the existence of the crime and the guilt of the defendant; in this situation there will be an incompatibility case which is stated by article 64, paragraph (1), letter f) of the Criminal Procedure Code.

- if he considers that the solution which formed the base for the prosecutor and the defendant to reach an agreement is unjustifiably gentle related to the seriousness of the crime or to the dangerousness of the criminal. We consider that this second situation is subsidiary to the first, because the problem of the way in which the penalty was individualized is not raised except for the situation where it is found that the actions exist, they are crimes, they were performed by the defendant and he is criminally liable.

An issue is also raised upon how the prosecutor should act in this situation. According to article 485, paragraph 1, letter b) of the Criminal Procedure Code, the sending of the case is done "in light of *continuing the criminal prosecution*" even if the decision of the court is only grounded on the disproportion between the solution in the agreement and the seriousness of the crime or the dangerousness of the criminal. Logically, the prosecutor should only restart the negotiation with the defendant for adapting the solution to the

circumstances of the court, only that the defendant – being a new agreement based on which the situation will be unavoidably harder compared to the initial one – is not obliged to accept it. On the other hand, we ask ourselves if the prosecutor could somehow be obliged to restart the negotiation even if the defendant would agree to it; in lack of any remark of the law upon this aspect, we consider that he is not obliged to such thing. Consequently, the simple renegotiation is possible, followed by a new agreement, with a harder solution than the initial one, as well as the continuation of the criminal prosecution, finalized with a trial by indictment.

We consider that if there are no new evidence obtained after continuing the criminal prosecution, the prosecutor is obliged to send the case to trial (if he does not sign a new agreement with the defendant). This is resulted from the circumstance that by the initial solution of dismissing the agreement, a judge found that the action exists, it is a crime and the defendant is criminally responsible, and the prosecutor must consider this point of view. If there are new evidence though, the prosecutor may order any solution, including the closure of the file (for example if resulted that the action is not mentioned by the criminal law or if there is a justifiable case or a non-attributable crime case) or waiving the criminal prosecution (new evidence may show a lower dangerousness of the action and of the perpetrator than initially thought).

If after continuing the criminal prosecution, the prosecutor informs the court upon a new agreement or upon an indictment, the judge who dismissed the initial agreement will be incompatible with judging upon this (article 64, paragraph 1 letter f) of the Criminal Procedure Code).

When the notification was made based on the same documentary evidence (the criminal prosecution did not provide consequently new evidence) there lies the question whether the court is related to the definitive decision by which the initial agreement was rejected based on the fact that the penalty was too gentle. We consider – at least in the case of the notification by indictment – that the answer is negative, and the determining argument is related to the different evidence standard between the regular and the special procedure. Though the definitive previous decision by which the agreement was dismissed determines the fact that the action exists, it is a crime and it was committed by the defendant, it is grounded still only on "enough data" (the minimum condition for concluding the agreement), while the solution of convicting according to the regular procedure requires findings "beyond any reasonable doubt". Consequently the judge notified by indictment cannot be compelled to issue the conviction on the substance, done by another judge, where the evidence standard was much looser. On the other hand, the procedure where the court issued a decision upon the plea bargain agreement lack contradictory aspects, while the procedure based on the notification by indictment enjoys all the guarantees attributable to the trial.

A problem which may appear in practice is related to the value of the plea bargain statement, if the agreement is dismissed. Should it be limited exclusively at the conditions of the special procedure or can it have the value of documentary evidence when the criminal prosecution continues? In lack of a law text regulating this, we choose the last meaning (including with the possibility of withdrawing the acknowledgement), as being at the choice of the prosecutor and of the judge, in the process of analyzing the evidence, if maintained or removed, as corroborated or not with the general view of the documentary evidence in the case.

The law does not state what solution is given to the civil action in case of dismissing the agreement. By analyzing the provisions of article 486 paragraph 2 of the Criminal Procedure Code, we believe that the only logical solution – not stated by the law though – is that the civil action remains unsolved. The civil party cannot address the civil court (after the definitization of the decision upon the agreement) based on article 27 paragraph 2 of the Criminal Procedure Code, because once the agreement is dismissed, the court sends the file to the prosecutor in order for the latter to continue with the prosecution, which means that the civil party will continue to be in the criminal trial, and the civil proceedings are going to be solved by the criminal court notified by indictment.

By the decision solving the plea bargain agreement, the court will also apply properly the provisions of article 396 paragraph 9 (referring to the payment of the criminal fine from bail), article 398 (on the trial expenses) and article 399 of the Criminal Procedure Code (on the precautionary measures).

V. The appeal.

The decision issued on the plea bargain agreement can be challenged by an appeal.

According to article 488 paragraph 1 of the Criminal Procedure Code, the persons who can appeal are only the prosecutor and the defendant. The solution of the lawmaker is debatable. Under the conditions where the court issues a decision and in the case of trial expenses, we don't see why for example the defender (the legal assistance being compulsory) or the interpreter – whose presence in court is compulsory if the defendant does not speak or understand Romanian or he may not express his messages (article 12 paragraph 3 of the Criminal Procedure Code) – could not appeal that part of the decision regarding the charges or the fees related to them when they are not satisfied. Also, if the court accepts the agreements but fails to acknowledge the transaction between the defendant, the civil party and the party which is accountable from a civil perspective, why couldn't the last two make an appeal against the decision?

In regard to the injured party, so long as it was

opted for the solution of neither being cited, nor heard on substance, the lawmaker correctly excluded it from the initiators of the appeal.

The appeal deadline is of 10 days and it starts from the communication.

Solving the appeal, the court may decide to:

a) Reject the appeal as being late, inadmissible or ungrounded and maintaining the sentence (article 488, paragraph 4 letter a)

b) Accept the appeal and:

- cancel the decision by which the plea bargain agreement was only accepted on the way and quantum of the penalty or the way in which the penalty is executed and issuing a new decision, proceeding according to article 485 paragraph 1 letter a) of the Criminal Procedure Code, which is applied accordingly (article 488 paragraph 4 letter b) of the Criminal Procedure Code);

In our opinion, both hypotheses for accepting the appeal are superficially conceived.

Thus, the solution stated by article 488 paragraph 4 letter b) is corroborated with the provisions of article 488 paragraph 2 of the Criminal Procedure Code, according to which against the decision by which the acknowledgement agreement was accepted, an appeal may be submitted only regarding the type and the quantum of the penalty or regarding the way the penalty is executed. Practically, only the prosecutor may challenge this decision, when the first court accepted the agreement and issued a much easier solution for the defendant. The defendant would have no interest in challenging such a decision which is favorable for him.

In this case, according to the above cited texts, the court of appeal proceeds to the new individualization of the penalty or of the way it is executed, stating a much harsher solution for the defendant, because of the prosecutor's appeal and not the defendant's one. The solution cannot be harsher though than the one initially reached in the agreement, because the provisions of article 485 paragraph 1 letter a) of the Criminal Procedure Code are applied correspondingly. Practically, the court of appeal has two possibilities: *(i)* either it applies the solution reached by an agreement; *(ii)* or it applies a different solution than the one reached to by an agreement, much harsher than the one in the decision, but in any case not harsher than the one stated by the agreement.

The above presented may show that in the special procedure, the appeal submitted against the decision of approving the agreement does not have the general effect of devolution stated under article 417 paragraph 2 of the criminal procedure code (according to which "the court is obliged outside the reasons invoked and the requests submitted by the holder of the appeal, to examine the case under all the factual and lawful aspects").

If this was actually the wish of the lawmaker we consider that we are in the presence of a serious mistake. Two hypotheses seem eloquent to us.

Firstly, it may happen that the court of appeal considers that the approval should not be admitted by the first court, considering for example that there are no sufficient data upon the existence of the crime or of the defendant's guilt. In other works, it could consider that the appeal is grounded, but for other reasons than the ones invoked by the prosecutor. How should the judges invested for solving the appeal proceed in this case? Out of the way in which article 488 paragraph 4 letter b) of the Criminal Procedure Code is conceived, it results that they are obliged by the considerations of the first court regarding the existence of the crime and the guilt of the defendant. But what if the judges of the appeal have doubts that the crime was committed by the defendant? If they dismiss the appeal, they maintain against their beliefs a conviction solution (or, as the case may require, waiving the application of the penalty or delaying the application of the penalty). If they would accept the appeal, they should issue a much harsher solution than the one of the first court, again against their beliefs upon the validity of the solution.

Secondly, the lawmaker forgot that the decision of accepting the appeal could be given in violation of provisions sanctioned with absolute nullity. It is for example possible that the court which approved the agreement was not competent in terms of matter or quality of the person or it is possible that the legal assistance of the defendant was not provided. According to article 281, paragraph 3 of the Criminal Procedure Code, absolute nullity derived from the lack of material or personal competence when the trial was done by an inferior court to the legally competent one, may be invoked in any state of the trial. Also, according to article 281 paragraph 4, letter c) of the Criminal procedure Code, violating the provisions upon the compulsory legal assistance of the defendant may be invoked at any stage of the trial, regardless of the moment when the violation appeared (*authors' note – so even if it was recorded during the criminal prosecution*), when the court was informed upon the plea bargain agreement. Moreover, the absolute nullity can be found also ex officio (article 281, paragraph 2 of the Criminal Procedure Code). We ask ourselves how these flaws could be invoked "in any stage of the trial", as stated by the above mentioned tests and what effects does this have if the decision for accepting the agreement can only be challenged by appeal regarding the type and the quantum of the penalty or regarding the way in which it is executed, and in case the appeal is accepted, canceling the decision is limited exclusively to the same three aspects?

We appreciate that such situations are inadmissible. Though the law does not state it, we believe that also in the case of the plea bargain agreement, the general devolution effect of the appeal stated under article 417 paragraph 2 of the Criminal Procedure Code must be applied.

And the solution stated by article 488 paragraph 4, letter c) of the Criminal Procedure Code is objectionable. Also here, the aspects signaled above

regarding the absolute nullity of the decision (the dismissal of the agreement) are valid. We believe that in the cases of absolute nullity, a retrial must be ordered to be made by the court with the cancelled decision or, in case of lack of competence, a retrial made by the competent court, as stated by the provisions of article 421, item 2, letter b) of the Criminal Procedure Code.

Again, we don't believe that this special procedure was meant to avoid the general devolution effect of the appeal.

We consider that a much simpler and clearer solution would have been the corresponding application in the procedure of the agreement, of the general provisions in the matters of appeal.

VI. Conclusions.

The novelty feature of the institution of the plea bargain agreement generated unavoidably inadvertences among the applicable procedural regulations, starting on one hand from changing the nature of the actions leading to the issuance of a solution by the court, from the conflict regulations to the negotiation ones and on the other hand starting from changing the standards regarding the evidence, the active role of the court and the application of the principle of contradictory nature and of the principle of immediacy. These amendments to the mechanism by which the judge of the case makes decisions and to the dynamics of the criminal trial generated problems related to taking and using the procedures upon the control of solutions and the possibilities of the judge to deliberate and decide, being absolutely necessary to create own regulations for the special procedure and move away as much as possible from the traditional constructions involving the development of a simplified trial stage.

References

- N. Volonciu, A.S. Uzlău, R. Moroşanu, V. Văduva, D. Atasiei, C. Ghingheci, C. Voicu, G. Tudor, T.-V. Gheorghe, C.M. Chiriţă, *The New Criminal Procedure Code – Comments*, Ed. Hamangiu, Bucharest, 2014.
- The Public Ministry, *The plea bargain – study*, 2015, http://www.mpublic.ro/presa/2014/studiu_acord_recunostere.pdf
- Şt. Gh. Daniel, *The role of the prosecutor in the plea bargain procedure – practical and theoretical problems in the new special procedure in the Criminal Procedure Code*, www.juridice.ro