

*Decision No 490 of 27 October 2022 on the exception of unconstitutionality of the provisions of Article 478 (1), Article 479 and Article 482 (g) of the Criminal Procedure Code, published in the Official Gazette of Romania, Part I, No 1240 of 22 December 2022*

## Summary

**I. As grounds for the exception of unconstitutionality**, its author claimed that the provisions of Article 478 (1), Article 479 and Article 482 (g) of the Criminal Procedure Code were unconstitutional, as they force the defendant to fully admit the facts held against him and the legal classification given thereto, prior to the conclusion of a plea bargain, which allows the prosecutor to obtain a statement of admission of guilt from the defendant without guaranteeing either the conclusion of such a bargain, or the removal of her/his statement should such a bargain be rejected.

The conclusion of a plea bargain is a right provided for by the provisions of Article 478 of the Criminal Procedure Code in favour of the defendant, but its exercise does not ensure the guarantees specific to the presumption of innocence, provided for in Article 23 (11) of the Constitution, whereas, in case of non-conclusion or rejection of such a bargain by the competent court of law, according to Article 485 (1) (b) of the Criminal Procedure Code, the prosecutor may use the statement given by the defendant for the purpose of indicting her/him.

Also, the author of the exception argued that the impugned legal provisions violated the right to a fair trial, by the fact that the initiation of the conclusion of a plea bargain may lead to an aggravation of the defendant's procedural situation through her/his own procedural conduct.

**II. By examining the exception of unconstitutionality**, the Court underlined that the plea bargain represented an exception to ordinary criminal proceedings, the purpose of which being the expeditious solving of the criminal cases in which defendants wish to expressly admit to having committed the facts and accept the legal classification for which the criminal proceedings have been initiated, which results in the reduction, by one third, of the punishment limits provided for by law in case of imprisonment and, by one fourth, of the punishment limits provided for by law in the case of a fine.

The conclusion of a plea bargain is a two-stage process. The first stage consists in concluding the bargain and approving its effects by the hierarchically superior prosecutor. The second stage includes its review by the court competent to adjudicate on the merits of the case. The bargain cannot be considered concluded if no agreement is reached between the defendant and the prosecutor, if the effects of the agreement are not approved by the hierarchically superior prosecutor or if it is rejected by the competent court.

The Court was called upon to decide whether, in case of failure to conclude the plea bargain or of its rejection, through final court decision, the statement given by the defendant in order to conclude the bargain could be used in the ordinary criminal proceedings for settling the criminal case.

The Court held that, between the initiation of the plea bargain and its admission by the court, the actual bargain did not exist, considering that a suspensive condition consisting in the acceptance of the bargain by the competent court of law, through final court decision, affects its very existence. Therefore, the statement given by the defendant according to the provisions of Article 482 (g) of the Criminal Procedure Code exists and produces legal effects only from the moment when the plea bargain can be deemed concluded. Failure to meet the suspensive condition consisting in the acceptance of the bargain by the court of law means that the statement given by the defendant in order to conclude it does not produce legal effects from the procedural moment of its registration by the judicial bodies.

Thus, as a result of the failure to conclude the plea bargain or of its rejection through final court decision, the defendant goes back to the procedural situation prior to the initiation of the special proceedings under consideration, and (s)he will therefore benefit from all the procedural rights and guarantees (s)he had prior to the initiation of the plea bargain and which (s)he would have had if such special proceedings had not been initiated. These fundamental rights include the right to defence, as regulated in Article 24 of the Constitution, as well as the presumption of innocence, regulated in Article 23 (11) of the Basic Law.

From the perspective of the exercise of the fundamental right to defence, the statement regulated in Article 482 (g) of the Criminal Procedure Code must be analysed by reference to the purpose for which it is given by the defendant, i.e., that of concluding the plea bargain in order to benefit from the legal effects of this special procedure. However, if the aforementioned purpose does not exist, namely in ordinary criminal proceedings, the defence strategy drawn up by the defendant, personally or through her/his lawyer, may be a different one and may not contain a statement by the defendant. Consequently, the fact of maintaining the statement given by the defendant under Article 482 (g) of the Criminal Procedure Code in ordinary criminal proceedings, after the initiation of the plea bargain, in case of non-conclusion or rejection thereof by the court, represents a violation of the defendant's right to build her/his own defence strategy.

Furthermore, it follows from the joint interpretation of Articles 107 to 110 of the Criminal Procedure Code that the statement that they regulate will include only those accounts that the defendant considers useful to defend her/his procedural rights and interests, and not the recognition of all the facts held against her/him by the criminal investigation bodies, which would be contrary to the defendant's right to silence, referred to in Article 109 (3) of the Criminal Procedure Code. In contrast, the provisions of Article 487 (g) of the Criminal Procedure Code provide that the statement given by the defendant during the plea bargain procedure must be express, and its content must consist in the acknowledgement of the commission of the fact and in the acceptance, by the defendant, of the legal classification for which the criminal proceedings have been initiated. Thus, the criminal procedural rules regulating the procedure for concluding the plea bargain do not ensure the procedural guarantees provided for in Article 109 (2) and (3) of the Criminal Procedure Code.

Therefore, although the defendant's statement, regulated by Articles 107 to 110, and the one referred to in Article 482 (g) of the Code represent the same means of evidence, they are two subcategories of the statement, which are fundamentally different in terms of content, proceedings under which they are given by the defendant, procedural guarantees provided to her/him and purpose of their administration, these differences being determined by the specificities of the proceedings in which they intervene, i.e., ordinary criminal proceedings and plea bargain. Taking into account all these aspects, the administration, as evidence, contrary to the will of the defendant, in ordinary criminal proceedings, of the statement given by her/him under Article 482 (g) of the Criminal Procedure Code, in case of non-conclusion or rejection of the plea bargain, is equivalent to the performance, by the judicial bodies, of an act incompatible with the ordinary criminal proceedings, in violation of the procedural guarantees specific to the fundamental right to defence provided to the defendant according to Article 109 of the Criminal Procedure Code.

Moreover, the statement given by the defendant in ordinary criminal proceedings is not binding. As regards the right to silence, the Constitutional Court noted that concerns related to public interest could not justify measures that would nullify the very essence of an applicant's right to defence, including the right not to incriminate oneself.

As regards the provisions of Article 478 (1) and Article 479 of the Criminal Procedure Code, they are in accordance with the provisions of Article 21 (3) of the Constitution. The Court noted that the institution of the plea bargain had been adapted by the legislator to the requirements of continental law and that it provided all the procedural guarantees specific to the right to a fair trial.

**III. For all these reasons,** by a majority vote, the Court upheld the exception of unconstitutionality and found that the provisions of Article 482 (g) of the Criminal Procedure Code were constitutional to the extent that the statement given by the defendant in order to conclude the plea bargain could not be used, against the will of the latter, as evidence in criminal proceedings, for the purpose of solving the case according to the ordinary criminal proceedings.

Also, by a majority vote, the Court dismissed as unfounded the exception of unconstitutionality and found that the provisions of Article 478 (1) and Article 479 of the Criminal Procedure Code were constitutional in relation to the pleas filed.