Plea bargaining and the role of the lawyer
- the Portuguese System -

At the outset, I would like to thank the ECBA for inviting me to speak on this subject. Most of you will find it quite odd that I am speaking on *plea bargaining*, because the concept as such doesn't really exist in the Portuguese system – a system that is founded on the legality principle.

This presumption – the inexistence of *plea bargaining* – may nevertheless be out of date. Indeed, within the last decades, some forms of diversion have been enshrined in our Criminal Procedure Law. The question is: did they bring *plea bargaining* along?

When any country first draws up a criminal procedure code it is perfectly possible for it to provide for *plea bargaining*, including discussions between the prosecutor/police and the suspect before the opening of the case.

Briefly, I'll refer to the stages of our criminal procedure in which we can look for the existence of forms of *plea bargaining*.

From the very first beginning of a criminal procedure, there can be *plea bargaining*: the suspect and public prosecutor/police can bargain on the opening of a procedure against the former. Our former Code of Criminal Procedure[1] stated "*the report of a crime always determines the opening of an investigation*". The opening of a criminal case was subject to strict legal criteria. Even if a crime report was totally ill-founded, the public prosecutor/police would have to open an inquiry and investigate the relevant facts. The latest Criminal Procedure Law reform changed this and now states "*subject to the exceptions that are stated in this Code, the report of a crime always determines the opening of an investigation*". These exceptions refer to anonymous ill-founded crime reports and to reports of crimes that depend on the report being made by the victim. Although the Public Prosecutor now has more freedom relating to ill-founded and anonymous crime reports, he still cannot refrain from opening an investigation on discretionary grounds (i.e. low probability of achieving conviction, low interest in pursuing a certain crime, etc.). At this stage, the criminal defence lawyer's role is usually seen as non-existent. In spite of that, and although these rules are new, we dare say that a criminal lawyer can always try to submit evidence that will reveal the ill-founded nature of a crime report. This might, however, be academic, because he/she will only have knowledge of the existence of a case at the moment when his/her client is called for an interview and formally declared *arguido* (suspect). Regarding this aspect, the new Code also introduced a novelty, i.e. mere suspicion is no longer sufficient: there has to be justified suspicion. Is there any room for *plea bargaining* at this stage? The answer is "No". All that a lawyer can do on behalf of his/her client is to try to submit evidentiary elements which can reduce the suspicion against him. No *bargaining* is allowed.

---

[1] Código de Processo Penal, passed by DL (Law Decree) n.º 78/87, of 17 February. The Code was reformed for the first time in 1995 and recently in September 2007.

What about during the investigation? Is *plea bargaining* admissible? What is the role of the criminal defence lawyer? There are four cases in which the CCP allows the public prosecutor to use *diversion* solutions: (1) mediation; (2) provisional suspension of the procedure; (3) closure in cases of penalty absence[2]; and (4) *processo sumaríssimo* (summary procedure).

(1) The mediation procedure could be described as a bargaining procedure. However, it is a *bargaining procedure* between suspect and victim. The public prosecutor will only approve its result. Moreover there is no *plea*. The Criminal Mediation Regime[3] (art. 6, no. 1 and 2) expressly states that the participating procedure subjects can freely determine the terms of the agreement, subject to one exception: sanctions which deprive the suspect from his liberty or demand duties that offend his dignity, or exceed a length of six months cannot be agreed. The criminal defence lawyer (and also the victim's lawyer) can take part in the mediation procedure. If the procedure subjects reach an agreement, the case will be closed (the effect is equivalent to the withdrawal of the complaint by the victim).

(2) The provisional suspension of the procedure (articles 281 and 282 CCP) is a mechanism which allows the public prosecutor not to accuse the suspect. Instead of raising formal charges against him, the public prosecutor can propose the suspension of the procedure subject to the compliance with certain duties by the suspect (moral satisfaction of the victim, compensation, treatment, etc.). If the suspect complies with those duties, the case will be closed and cannot be reopened. The criminal defence lawyer can play an active role by requesting the public prosecutor to apply this mechanism.

(3) Closure in cases of penalty absence (article 280 CCP) is a particular case in which the public prosecutor may refrain from bringing charges against the accused. This happens in those cases for which the Criminal Code[4] foresees the possibility of conviction without applying a sanction to the defendant. These are cases of lower guilt and wrongdoing, in which there has been compensation and there aren't any prevention arguments that hinder the non application of the penalty. Apart from the Criminal Code, there are several specific regulations that allow the public prosecutor to make use of this mechanism[5]. In all these cases, the defence lawyer may also request for the application of the diversion mechanism.

---

[2] In German *Absehen von Strafe*.

[3] Law no. 21/2007, of 12 June.

[4] Código Penal.

[5] For example: *Regime Geral das Infracções Tributárias* (General Tax Infringements Regime), articles 22 and 44. The legislation on drugs trafficking allows the exemption of penalty for those suspects who cooperate with the authorities in gathering substantial evidence to identify or capture other suspects, in particular if these are members of criminal associations, groups or organizations (article 31, Law 15/93, of 22 January). A similar provision for terrorist organizations can be found in the Criminal Code – article 299, no. 4, CP.

Finally, (4) the *processo sumaríssimo* (articles 392-398 CCP) is the only case in the Portuguese system in which a defendant may be subject to a criminal sanction without a trial. In this so called *special procedure form*, the public prosecutor serves the accusation together with a proposal for a criminal sanction directly to the defendant. He may accept it and, after judicial approval, the sanction will be executed. This special procedure only applies if the public prosecutor finds it unnecessary to apply a custodial sanction. The defence lawyer can trigger the application of the *processo sumaríssimo*.

These four cases have some differences that must be pointed out. Regarding the cases in which these mechanisms can be used, the closure without penalty may only be applied to crimes punished with a sentence of up to six months imprisonment. The other diversion mechanisms may in general be applied to crimes punished with a sentence of up to five years imprisonment. Mediation may only take place in *private or semi-private crimes* (i.e. crimes regarding which the prosecution depends on the victim submitting a formal complaint and bringing charges against the defendant – the latter only in private crimes). Finally it must be stressed that only the conviction in *processo sumaríssimo* will be written on the defendant's criminal records[6]. The other decisions will also be registered, but this register is only available to the courts and prosecution authorities.

All these forms of procedure – with exception of the closure without penalty – have a particular characteristic: the victim (although in different degrees[7]) is also a part of the agreement and may oppose it. Otherwise, apart from mediation – whose result is approved by the public prosecutor – the application of diversion mechanisms must be approved by a judge.

Are these mechanisms forms of *plea bargaining*? In my opinion, the mechanism that most resembles *plea* bargaining is the *processo sumaríssimo*. In this procedure form, both the suspect, through his criminal defence lawyer, and the public prosecutor may make a proposal under which the suspect pleads guilty and accepts a certain criminal sanction. Nonetheless there is usually no real oral *bargaining* – the procedure takes place in writing, through formal requests. The defence lawyer doesn't call the public prosecutor or vice-versa, in order to negotiate, although it may occasionally happen, for instance during an interview.

Closure without penalty and provisional suspension of the procedure, as well as mediation do not require a formal *plea*. Nevertheless, an admission of guilt is usually required. This could be seen as problematic because, when a lawyer is trying to negotiate the application of these mechanisms (especially the first two), this will imply the admission of guilt by his client. In general the application of these mechanisms will only take place after the suspect makes a statement in which he admits his guilt. If

[6] Although even in these cases it is possible to exceptionally request the judge not to order the transcript of the decision in the criminal records, for employment purposes.

[7] In the mediation procedure, the agreement of the victim is always required. In the provisory suspension of the procedure, it will only be required if the victim requested her admission as an Assistant (similar to the German *Nebenkläger* and *Privatkläger*).

everything goes well, the case will be closed. If there is a breach of the agreement or obligations (in the cases of mediation and provisional suspension of the procedure), the normal procedure will continue and charges will be brought (we have to bear in mind that the application of these mechanisms is only allowed if there are strong evidentiary elements, from which it may be concluded that there is a probability that the suspect actually did commit the crime). Of course, an admission of guilt by the former suspect and now defendant will be a disadvantage. This happens especially during the investigation – the suspect may have given important leads to the investigating authority. Before the Court, however, the defendant may nevertheless rely on his right to silence and his former statements may not be used. But, if he decides to speak before the Court, he may be confronted with former declarations made before an investigating Judge. An important aspect: with the exception of the *processo sumaríssimo*, the suspect doesn't always have a lawyer. He may request one, but the appointment is not automatic or compulsory[8]. This means that during the investigation, when facing the possibility of accepting diversion mechanisms, the suspect doesn't always enjoy the advice of a criminal defence lawyer.

Finally, some words on the *pleas* before the Court. In our system, the defendant doesn't simply plead guilty or not guilty and there is no such thing as formal "pleas". The defendant is given the opportunity to make a statement at the beginning of the trial hearing. If he states that he is innocent, he should also provide an explanation of the facts – otherwise the "plea" won't have any real effect… If the defendant pleads guilty – i.e., if he confesses the facts which are brought against him of his own free will and without any exceptions – closing arguments will take place and the judge(s) will decide on the penalty (which is not subject to negotiation). The "guilty plea" will only have this effect on crimes punished with imprisonment up to 5 years. The contradictory and oral discussion of the case is compulsory whenever a more severe crime comes to play.

In our system, the criminal defence lawyer sometimes finds himself in a complicated situation: should he advise his client to request or accept the use of these diversion mechanisms? Or should he risk going to trial? Once before the Court, should the defendant "plead guilty"? In my opinion, this requires a very thorough assessment of the evidence, but also the lawyer's instinct. If there is strong evidence against the client, it might be better for him to admit his guilt and to get in exchange the assurance of a non-custodial sanction (*processo sumaríssimo*) or a closure (which means, no criminal records...). Sadly the task of reaching a decision is sometimes very difficult, because we do not have a precedent system and our case-law is everything but coherent and uniform. In this system, how can we assess the probability of conviction and, most importantly, the degree of sanction that may be applied? Ultimately this can lead to a tendency to advise clients to accept the diversion procedures (to avoid criminal register or a custodial sanction) or to "plead guilty" (in order to get a milder sentence). Must we

[8] Although there are cases in which the appointment is compulsory – ex: people under 21, foreigners, detainees, etc.

conclude that the old saying "*a bad settlement is always better than a good dispute*" applies to Criminal Procedure?

Bratislava, 4 October 2008

Vânia Costa Ramos
Advogada (Lawyer)
Mestre em Ciências Jurídico-Criminais (Masters' in Criminal Law)
vcr@advogados.in