Special Issue: *Plea Bargaining in Germany*

Consensual Elements in German Criminal Procedural Law

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A. Conventions and Systems

The aim of German criminal procedural law is not to convict the accused at any cost. Even a guilty party can only be convicted if the criminal procedure is held in accordance with the law. If this is not possible, the German legal system accepts the risk of possibly acquitting a guilty party; it finds this more tolerable than the irregular conviction of the culprit. A criminal procedure seeks the truth. Only on the basis of a judicial conviction of the crime and its culprit may a sentence be imposed. This, though, can only be based on the so-called *procedural truth*. On the one hand, the past can never be reconstructed precisely; on the other hand, clarification can only be found through legal means and by following designated paths allowed by procedural law. Therefore, further investigation must cease if it is only possible to proceed by violating procedural law.

One element permitted in helping to discover the truth is the statement of the defendant. This is not seen as a formal piece of evidence; nevertheless, if given in the main trial, it becomes a part of that trial. The court must form its conviction based on the entire main trial.[1] The defendant is not obliged to testify. He has the right to remain silent (*nemo tenetur se ipsum accusare*), which is not only a constitutional right but is also a part of human dignity,[2] and therefore cannot be abolished even by an absolute parliamentary majority. If the defendant decides to make a statement, he is not obliged to give full and truthful information. It is his decision alone when and which truthful or untruthful testimony he gives. The court has to assess all of his actions, including his statements, in connection with all other available information.

I. Normal Procedure–The Principle of Legality

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[1] Strafprozessordnung [StPO] [CODE OF CRIMINAL PROCEDURE], Dec. 22, 2011, BUNDESGESETZBLATT, TEIL I [BGBL. I] 3044, as amended, § 261 .

[2] GRUNDGESETZ FUR DIE BUNDESREPUBLIK DEUTSCHLAND [Grundgesetz] [GG] [Basic Law], May 23, 1949, BGBl. I . Article 1.

Contrary to procedural law in the United States, the court under German procedural law is responsible for the procurement of all evidence. The court has the duty to investigate the facts by its own motion.[3] Although it relies regularly on the prosecution to accumulate and evaluate the evidence in the preliminary proceedings, in principle it has to submit the evidence again at the main trial. If, while doing so, the court finds further need for clarification, this must also be carried out. If one of the other procedural parties, such as the prosecution or the defense, files a motion to present further evidence, the court must accept this evidence unless one of the strict legal conditions under which the court may reject such a motion is satisfied.[4]

Beginning in the 19th century, the former inquisitional procedure typical for absolutist states was removed and gradually replaced by the democratically reformed criminal procedure under the rule of law.[5] Since the defendant is no longer merely an object of the investigation but an independently involved participant, he or she is the subject of the procedure. However, this means only that he no longer has to wait passively while others conduct the process; instead, he may influence the course of the investigation and the overall proceedings himself. This happens basically through applications and statements made which force the court to clarify the circumstances cited by the defendant. Nevertheless, this change from object to subject of the procedure does not lead to direct participation in the decision regarding the outcome: The court bears sole responsibility for the sufficient collection of the facts forming the basis of the judgment, the principle of *ex propio motu* investigation, and the outcome itself, meaning the judgment. Additionally, the principle of legality includes the compulsory criminal investigation in the event of sufficient factual circumstances suggesting the existence of a pursuable criminal offence.[6] But by following this principal, which is principally grounded in German criminal procedural law, every criminal proceeding would have to be conducted on the basis of an investigation of all circumstances, with all the appropriate evidence, causing the criminal justice system to quickly break down under the sheer mass of the procedures.

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[3] Strafprozessordnung [StPO] [CODE OF CRIMINAL PROCEDURE], Dec. 22, 2011, Bundesgesetzblatt, Teil I [BGBl. I] 3044, as amended, § 244(2) .

[4] Strafprozessordnung [StPO] [CODE OF CRIMINAL PROCEDURE], Dec. 22, 2011, Bundesgesetzblatt, Teil I [BGBl. I] 3044, as amended, § 244(3)(6) .

[5] Löwe/Rosenberg/*Kühne*, Strafprozeßordnung (Commentary on the German Code of Criminal Procedure), 26. Edition, Berlin 2006, Introduction F, marginal no. 1 and J marginal no. 66, with further references.

[6] Strafprozessordnung [StPO] [CODE OF CRIMINAL PROCEDURE], Dec. 22, 2011, Bundesgesetzblatt, Teil I [BGBl. I] 3044, as amended, § 152(2) .

II. Deviating Measures and the Principle of Opportunity: Consensual Elements

1. Petty Crimes

Elements following the principle of opportunity, which means that prosecution is not mandatory as it would be by virtue of the principle of legality, but at the discretion of the public prosecutor, found their way bit by bit into German criminal procedural law. Accordingly, not all procedures have to be carried out up to a judicial verdict. For example, this applies to both absolute petty crimes,[7] and relative petty crimes, i.e. crimes or side aspects of a crime (the prosecution of which would not carry much weight regarding the penalty of at least one other crime or the main aspect of the same crime).[8] Also, beyond this area of (absolute and relative) petty crimes, the classic formal criminal procedure did not prove necessary in every respect. It remains available if no other way to reach a binding result is possible. In addition, if a solution accepted by all parties involved is sought, procedural reliefs are available, which also produce an effect in the area of sentencing, and which according to German law is part of substantive criminal law and not criminal procedure.

2. Small-Scale Crime and Crimes of Lower Medium Gravity

Nonetheless, such less formal ways of solving a criminal case always require a more or less distinctive consensus. If a significant legal result seems necessary, yet a formal sentence carrying with it a penalty is not required, the procedure can either be ended in advance by the prosecution or at a later stage by the court, at first provisionally, subject to conditions, and when fulfilled finally concluded. Even if the conditions were suggested by the accused himself, or at least accepted by him, their compliance cannot be forced against his will. Thus, this form of completion of the procedure requires consensus continuing up to the outcome. If this fails, the normal procedure is resumed.

Another purely procedural relief requires acceptance, but not an initially-reached consensus. The prosecution can apply for a judicial fine to be imposed or a term of imprisonment of up to one year suspended on probation in the way of a penalty order.[9] The decree requires a consensus between the prosecution's request and the judicial

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[7] Strafprozessordnung [StPO] [CODE OF CRIMINAL PROCEDURE], Dec. 22, 2011, Bundesgesetzblatt, Teil I [BGBl. I] 3044, as amended, § 153 .

[8] Strafprozessordnung [StPO] [CODE OF CRIMINAL PROCEDURE], Dec. 22, 2011, Bundesgesetzblatt, Teil I [BGBl. I] 3044, as amended, §§ 154, 154a .

[9] Strafprozessordnung [StPO] [CODE OF CRIMINAL PROCEDURE], Dec. 22, 2011, Bundesgesetzblatt, Teil I [BGBl. I] 3044, as amended, § 407 .

decision. Following the imposition of the penalty order, it is solely up to the accused whether he accepts it or not. If he does not appeal, this can be seen as effectively giving his consent.

Similarly, such decisions made by the court that do not require a previously reached consensus, rely on an understanding, or at least an external consensus, may nonetheless result in the convicted person averting the enforcement of the proposed penalty by complying with the court's conditions and/or instructions. Thus a simple warning can be given for small-scale criminal offenses and at the same time the conviction of a fine reserved.[10] If the convicted person accepts the court's decision by complying with it, it ends with a warning from the court. If the court imposes a prison sentence of up to two years, it also has to decide whether the penalty is to be served or is to be suspended for a specified time period. In turn, it is solely in the hands of the convicted person if he *nolens volens* agrees so to speak to the judicial terms and orders by complying with them.[11] If he succeeds, the penalty is remitted after the time limit.

3. Crimes of Higher-Medium Gravity and Serious Crimes

The domain of the above mentioned consensual elements in a German criminal trial are the areas of petty and small-scale crimes up to medium gravity crimes. For anything that went beyond this, especially serious crimes, there remained, up until the 1970s, the need to conduct the normal procedure. This was, and remains, ideally suited to the controversial conduct of proceedings. However, below the legal level shown, the practice developed of using less formal ways to reach a judgment in cases of procedures of serious crimes, as well as those with circumstances difficult to resolve. This development was due to various circumstances and perceptions, at first hardly noticeable, but shortly after were used with less and less inhibitions. Additionally, the scarce resources of the judiciary played an essential, but not a solely decisive, role. The accused, who knows through competent advice that he must expect to be convicted, often tries to seek a short duration of proceedings. Especially in the area of white-collar crime, a long duration of proceedings is practically inevitable due to the potential endless amounts of factual circumstances that are capable of influencing the judgment. Furthermore, as a confession produces a mitigating effect, it seems reasonable to make the confession dependent on a stated and thus prior calculable judicial concession regarding the legal consequences. The simple question of which verdict is to be expected in the case of a confession is the first step towards a decision by the court supported by consensual elements and also in proceedings arising from crimes of higher medium gravity up to serious crimes.

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[10] Strafprozessordnung [StPO] [CODE OF CRIMINAL PROCEDURE], Dec. 22, 2011, Bundesgesetzblatt, Teil I [BGBl. I] 3044, as amended, § 59 .

[11] Strafprozessordnung [StPO] [CODE OF CRIMINAL PROCEDURE], Dec. 22, 2011, Bundesgesetzblatt, Teil I [BGBl. I] 3044, as amended, § 56 .

4. Plea Agreements in Preliminary Proceedings and in Criminal Procedures

4.1. Development

The judiciary, prosecution, and court alike, do not only readily accept such questions by the defense, but also ask for or demand them to be addressed not only in difficult and complex proceedings, but in all cases. On the one hand, a quicker completion of the trial is appealing. This does not result in increased spare time, but allows time to deal with other procedures, which would otherwise be delayed–a pleasing consequence for the judiciary. On the other hand, it is also very important that—even through a negotiated and previously dealt with confession—the doubts about the correctness of a conviction that are not completely suppressed can be minimized, if not satisfied completely.

In 1987, the Federal Constitutional Court (*Bundesverfassungsgericht*) ("BVerfG"), in a Chamber decision of three judges,[12] declared this practice to be basically constitutional. The judiciary first tried to reduce the lack of regulation that existed for the practice of agreements in the German Code of Criminal Procedure (*Strafprozessordung*) ("StPO"). In a landmark decision in 1997, the Fourth Criminal Panel of the Federal Court of Justice[13] (*Strafsenat des Bundesgerichtshof*) ("BGH") stipulated the protection of certain aspects to be a condition for an admissible agreement on a verdict. The Grand Criminal Panel[14] (*Große Senat in Strafsachen*) in essence affirmed this decision in 2005, but pointed to a certain tension between the written regulations of the StPO, constituting the normal procedure, and the practice of consensual elements. In view of this, it called on the legislature to tackle this issue. The federal legislature complied with this request. On 4 August 2009, the Act on Plea Agreements (*Verständigungsgesetz*) came into effect.[15] Though it permits the prior *praeter legem* developed practice, it seeks a remedy for repeatedly occurring abuses (i.e. the "sanction scissors", i.e. the gap between the offered and threatened sanctions, or the creation of circumstances which do not coincide with the truth). It established for this purpose both partially very bureaucratic formal obstacles and the validity of the principle of *ex propio motu* investigation, despite a plea agreement. Although it legalized the former practice in essence, it failed to resolve any of the areas of tension identified. The practice in part perceives the legally agreed upon formalities as substantially irrelevant and feels them to be superfluous. Hence, the Act was only able to influence the practice to some extent.

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[12] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court] Case No. 2 BvR 1133/86, 9 NSTZ 419, 420 (Jan. 27, 1987) (chamber ruling).

[13] Bundesgerichtshof [BGH – Federal Court of Justice], Case No. 4 StR 240/97, 43 BGHSt 195 (Aug. 28, 1997) .

[14] Bundesgerichtshof [BGH – Federal Court of Justice], Case No. GSSt 1/04, 50 BGHSt 40 (Mar. 3, 2005).

[15] Act on Plea Agreements (Verständigungsgesetz).

4.2. Inconsistencies

A defendant who cannot avoid his conviction focuses on the severity of the penalty. However, it is still only possible for him to indirectly influence this decision. The specific penalty may not be fixed consensually due to the ban on the agreed "point penalty". The court may give only one penalty range within which it will later determine what that level will be. For this purpose, a maximum and minimum level must be given. The prosecution and defense can position themselves on this later; only if the two parties accept the range outlined by the court will it become the basis of a plea agreement. The defendant can try to persuade the court to offer the lowest possible penalty range through his procedural behavior, his applications, and his cooperation in the talks prior to the judicial offer of an upper limit and a lower limit. Although a plea agreement is binding, the court can nevertheless renounce it if it either overlooked something or an unexpected development occurs. However, if the court keeps to its agreement, the defendant can, through his behavior in court, try to persuade the court to impose the minimum sentence, or just slightly exceed it. In all cases, however, there are only indirect ways of influencing the judgment and thereby the penalty level proposed. Here, the Act on Plea Agreements contains no appreciable improvement on the preceding legal position.

This Act on Plea Agreements, as a fundamental decision of the legislature, is of course to be accepted and does indeed meet the function of criminal justice, in particular that of the criminal courts. It does open a considerable area of unsolved and possibly even unsolvable tensions, though. The more an accused can influence the procedures, which he can do in a rather direct way before the judicial decision is taken, the more one can understand his wish to want to have an influence also on the point most crucial for him. For the defendant himself, but also for the other procedural parties under the intellectual aspect of a systematic structured consequence, it appears not self-evident and even contradictory to allow the defendant to have only indirect influence on the final outcome. If one wants to leave it at that—and according to the German understanding of the law there are good reasons for doing so—then much could be said for abandoning the binding elements of plea agreements totally. They raise expectations, which, in view of a counterfactually perceived boundary at the crucial point for the defendant, must inevitably be disappointed.

Therein lies an important reason why, even after the Act on Plea Agreements came into effect, efforts were made to reach an informal consensus on the outcome not as envisaged by the StPO, thus evading the new regulations that were seen as being too unwieldy. Despite the intervention by the legislature, the law and the practice of law diverged. Although, as shown, the inconsistent legal situation in some measure caused this, it nonetheless does not justify the refusal to abide by the law, whether the reasons be deliberate or through convenient inertia. The core of the bureaucratic requirements can indeed be taken into account. Furthermore, the procedural parties are in a position to

create circumstances that significantly limit the court's scope in decision making before and after a plea agreement has been reached. This, however, assumes trust between not only the professional parties to the proceedings but includes the defendant's trust in the court, which cannot be expected, especially in view of the structured balance of power in a criminal trial in Germany where only the court has the right to make decisions.

Although the highest court tried hard to ensure the compliance of the provisions of the Act on Plea Agreements in the lower courts, this effort could only be partially successful–not only because of the areas of tensions, as mentioned previously, but also because the court of appeal almost without exception deals with failed agreements. If an agreement is reached unanimously by all parties irrespective of their completely different reasons for so doing, there would be no need for an appeal. In its judgment of 19 March 2013, the Federal Constitutional Court, in a plenary session of eight judges,[16] ruled that it is a constitutional requirement that the Act on Plea Agreements is being complied with. At this stage there is no doubt that any deviation from this is not only prohibited, but also punishable; albeit unclear under which specific circumstances punishment may be used. The highest German court has significantly strengthened the extent of controls of the Federal Court of Justice. By stressing the continuing obligation to investigate the procedural truth, which cannot be modified by any agreement, the Federal Constitutional Court granted the legislative decision of upholding the duty of *ex propio motu* investigation to the status of a constitutional order.

4.3. Outlook

It is not fully clear what the consequences of this very restrictive decision of the Federal Constitutional Court will be. Since it was issued, plea agreements have been totally abandoned in some instances. It will be interesting to see if this will lead to an increase in unfinished trials at the courts and at the prosecutor's office. It seems possible that the agreement will be moved to the less regulated area of preliminary proceedings. Even bargaining "in the dark" which was common forty years ago when the plea agreement practice began cannot be ruled out. The Federal Court of Justice appears, however, to be leaning towards a further tightening of the *ex propio motu* investigation, even beyond the already restricted legal situation of the Act on Plea Agreements, as interpreted by the Federal Constitutional Court. Under the direction of its president, the Court ruled, in its resolution of 15 April 2013,[17] that it is inadmissible to base a judgment on facts and circumstances that are not based on a conviction formed through a thorough exhaustion of

[16] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvR 2628/10, 2883/10, and 2155/11, (Sept. 3, 2013), http://www.bundesverfassungsgericht.de/entscheidungen.

[17] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 3 StR 35/13, Rn 7 (Apr. 15, 2013), *available at* JURIS. At least as far-reaching is Bundesgerichtshof [BGH – Federal Court of Justice], Case No. 2 StR 265/13, Rn. 4 (Nov. 5, 2013).

the evidence. This phrasing (set in stone) goes far beyond the practice of plea agreements. Up until now, nobody questioned that a plausible confession, at least when it is not agreed to (arranged and limited to self perceived facts), could be a sufficient basis for a verdict. Because the Federal Court of Justice did not deal with this in particular in the above mentioned resolution, and no reasons for a departure from the depicted practice is apparent, it remains open to question whether the cited passage actually contradicts any restriction of the taking of evidence and at the same time wants to remove any attraction for the judiciary for a plea agreement resulting in the shortening of proceedings. It is safe to assume that a plea agreement will have a much less significant role to play in the future than it has done over the last twenty years at least.

Despite an unexpected increase in personnel, the immergence of congestion in the proceedings should not necessarily be the outcome. The legal practice certainly does not have to return to the state it was in forty years ago. After all, the Federal Constitutional Court emphasized expressly that a communicative procedural conduct is not only constitutionally unproblematic, but also appears highly preferable due to its advantages. Where an opportunity arises, therein lies a chance; however, this can only be taken up if the legal practice distances itself from opinions ingrained over the last decades. The courts must take their leadership role seriously and make clear to the procedural parties their willingness to investigate everything in need of clarification, but must not let themselves be subjected to obstructive strategies. If, on the one hand, they face up to the latter and actively confront these tactics, they strengthen their own authority. If they win trust, on the other hand, through their open procedural conduct to the effect that the defense, particularly the defendants, recognize that the judges have not come with predetermined ideas and are ready to take note of exonerating circumstance and, if the courts prove their eligibility of the trust by the defense and accused given in open communication with the imposition of very measured legal consequences in these cases, the tendency will show itself in the medium term that the most favorable defense strategy consists of engaging in open communication over the subject of the procedure. Those, however, who have opted for a defense strategy which is built on confrontation with the court, will not be impressed by this option. Their convictions by all means are bound to be harsher. This is even set out in the law that recognizes "post criminal behavior" as a contributing factor in sentencing.[18] If the courts make use of the flexibility granted to them accordingly, the tendency of the non-professional criminal increases on the one hand to take part in the communicative procedural conduct of the trial. Significant exoneration effects will come about through this. It makes room to focus intensively on the confrontation-minded. It reduces time pressure on the judiciary and creates the incentive to devote more attention to the especially serious offenders striving to receive a too lenient sentence in exchange for a too weak confession.

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[18] Strafprozessordnung [StPO] [CODE OF CRIMINAL PROCEDURE], Dec. 22, 2011, Bundesgesetzblatt, Teil I [BGBl. I] 3044, as amended, § 46 .

Seen in this way, the communicative procedural design could develop into a counter model afflicted with inner flaws and *de lega lata* a very bureaucratically developed practice of plea agreements and could point the legal practice in the direction on the one hand to continue, albeit in a slightly more modified form to act pragmatically, and on the other hand to avoid very easily a breach of the provisions on the Act on Plea Agreements. The essential difference between the two possibilities lies in the binding force of the discussions: It should take effect with a plea agreement at least provisionally. However, in the (merely) communicative procedural design, this is not strived for.

In the latter case, most provisions on the Act on Plea Agreement are not relevant. The discussions on the subject of the procedures also have to be documented. If they do not aim for a plea agreement between the courts, prosecution and defense–and this the court can make perfectly clear regardless of the wishes of the other parties–the effort is significantly reduced and the risks to the appellate law, which have greatly increased since the Federal Constitutional Court's decision, have almost been averted. Only the essential content of the discussions prior to the trial needs to be documented.[19] The duty to notify does not extend to this.[20] But, according to § 257b of the StPO, the court, at the main hearing, may discuss the status of the proceedings with the participants, which must be documented in compliance with §273 (1) sentence 2 of the StPO. These requirements can be relatively easily fulfilled by chronological documentation of the core content of "requests to speak" comments. All further requirements for documentation,[21] with the exception of the necessity for a negative certificate,[22] cease as does the compulsory statement in the judgment,[23] and the obligation of instruction on the possibility of the court deviating from an agreement. [24]

Nonetheless, there is a fine line between admissible communicative procedural conduct and inadmissible evasion of the provisions of the Act on Plea Agreements. The latter would

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[19] Strafprozessordnung [StPO] [CODE OF CRIMINAL PROCEDURE], Dec. 22, 2011, Bundesgesetzblatt, Teil I [BGBl. I] 3044, as amended, § 202(a), sentence 2 .

[20] Strafprozessordnung [StPO] [CODE OF CRIMINAL PROCEDURE], Dec. 22, 2011, Bundesgesetzblatt, Teil I [BGBl. I] 3044, as amended, § 243(4) .

[21] Strafprozessordnung [StPO] [CODE OF CRIMINAL PROCEDURE], Dec. 22, 2011, Bundesgesetzblatt, Teil I [BGBl. I] 3044, as amended, § 273(1)(a), sentences 1 and 2 .

[22] Strafprozessordnung [StPO] [CODE OF CRIMINAL PROCEDURE], Dec. 22, 2011, Bundesgesetzblatt, Teil I [BGBl. I] 3044, as amended, § 273(1)(a), sentence 3 .

[23] Strafprozessordnung [StPO] [CODE OF CRIMINAL PROCEDURE], Dec. 22, 2011, Bundesgesetzblatt, Teil I [BGBl. I] 3044, as amended, § 267(3), sentence 5 .

[24] Strafprozessordnung [StPO] [CODE OF CRIMINAL PROCEDURE], Dec. 22, 2011, Bundesgesetzblatt, Teil I [BGBl. I] 3044, as amended, § 257(c)(5) .

be assumed to be, for example, a non-verbal rather than a verbal agreement.[25] It is necessary but also sufficient—with all inevitable trust of the parties in mutual fairness—that the parties have autonomous decision-making power over their own procedural behavior. By maintaining this, they convey to the other parties to the proceedings that they are fully committed to the formal non-binding nature of the discussions and take them seriously. By this they consciously do not submit themselves to the existing procedural rules established for plea agreements; however, they do not evade them. Instead, they choose a different, permissible way as they would do if they followed the classic, confrontational (statutory legal) normal proceedings. The purely communicative procedural conduct is less marked by consensual elements than that aimed for in a plea agreement. The required professional trust nevertheless contrasts with confrontational behavior. On the contrary, it is also based on the belief in the possible benefits of striving for a consensus, or at least for an acceptance of one. Whether the courts will actually accept the role outlined with communicative procedural conduct as imperative and paved with magnanimity only the future will tell.

B. Manifestation of the Act in the Forensic Practice

In the following section, an overview of the published jurisprudence on the Act on Plea Agreements can be found, arranged chronologically: Preparation before trial, during the main trial, and after the trial concludes. The following section documents especially the view of the Federal Court of Justice and mirrors the legal practice in the way it has developed up to the 19 March 2013 ruling of the Federal Constitutional Court.[26] The jurisprudence of the high court had preempted the view of the Federal Constitutional Court broadly with the result that no change is to be expected in the future. As the Federal Constitutional Court ruled the Act on Plea Agreements as such to be constitutional, changes with regard to the interpretation of the provisions are not to be expected; however, changes should be expected with regard to the handling of informal agreements and concerning the interpretation of other laws. Especially in regard to the degree of control, the Federal Constitutional Court ordered a tightening of the courts of appeal. How the relevant courts will react in respect to this is yet to be seen. But since they are bound by the Federal Constitutional Court's guidelines, they must comply with them. This allows for a prediction on which of the previous decisions will likely have a different outcome in the future. The prediction can be found in the publication reference in the footnotes, respectively. Therein the mark "Äa" means "changes to be applied" ("Änderungen anzunehmen") and "Äd" means "changes to be considered" ("Änderungen denkbar"). In the latter, it is much less certain whether the principles of the relevant decision will be permanent.

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[25] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 StR 267/13 (Sept. 24, 2013), *available at* JURIS.

[26] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvR 2628/10, 2883/10, and 2155/11 (Sept. 24, 2013).

I. In Preparation of the Main Trial

1. Section 160b of the StPO

Discussions between the prosecution and defense in preliminary proceedings shall be documented.[27] Furthermore, all plea agreements have to be disclosed, especially to the courts.[28] For logical reasons, the transparency is to be documented in transcripts of court proceedings.[29]

2. Section 202a of the StPO

Prior to the opening of the main trial, the professional judges are permitted to make a preliminary prediction on a penalty range in the case of a confession.[30] Their ability to declare such predictions was affirmed by the Federal Court of Justice for the period of preparing the main proceedings because of coordinating with the witnesses, without deciding on the previous periods. Even if resolutions were reached in such preliminary talks, they would not be binding.[31] This also applies for agreements between the prosecution and the court.[32] However, the ongoing pre-trial custody is justified by a status conference which is well prepared and thereby fosters the proceedings (including the outcome that a plea agreement on the possible elements of the judgment is not achievable) even if the opening of the trial is being delayed.[33]

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[27] Strafprozessordnung [StPO] [CODE OF CRIMINAL PROCEDURE], Dec. 22, 2011, Bundesgesetzblatt, Teil I [BGBl. I] 3044, as amended, § 160(b), sentence 2 .

[28] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 1 StR 287/11 Rn. 13 (Nov. 29, 2011).

[29] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 1 StR 287/11 Rn. 12 (Nov. 29, 2011); Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 1 StR 349/11 Rn. 49 (Feb. 22, 2012).

[30] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 4 StR 571/10 Rn. 11 (Apr. 14, 2011).

[31] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 1 StR 274/11 Rn. 3 (Jul. 12, 2011).

[32] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 1 StR 287/11 Rn. 12 (Nov. 29, 2011).

[33] Oberlandesgericht [OLG – Higher Regional Court of Nürnberg], Case No. 1 Ws 125/11 H, 1 Ws 126/11 H (Apr. 26, 2011).

II. The Main Trial

1. Section 243(4) Sentence 1 of the StPO

Even when talks regarding a plea agreement have taken place previously, this has to be noted in the trial,[34] even if no new aspects–in the sense of the second sentence of § 243(4) of the StPO–were produced.[35] The duty to notify therefore exists irrespective of whether or not a plea agreement has been reached in full or in part. Only those talks which are led by the court (or, in the case of a collegiate court which is led with the order of the court, by a member of the chamber with members of the procedural parties) must be reported before or during the trial. If the latter includes talks that were led by a judge without the support of the chamber, then the judgment in the case in question was not based on such a procedural error.[36] The agreements of a parallel proceeding are not subject to §243(4) sentence 1 of the StPO,[37] but must be disclosed.[38] The legal provision does not grant a subjective right to the defendant to be informed about the possibility of a plea agreement.[39]

2. Section 257b of the StPO

The subject of a discussion can also be the penalty.[40] Therefore, it does not follow that fear of bias stems from the statement made after the failed plea agreement: "Chamber stands by what it has said."[41]

3. Conflict of Interest

It cannot be refused to a judge (handling the judgment) to contact members of the procedural parties outside the main trial. If a silent defendant or a defendant who is

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[34] Strafprozessordnung [StPO] [CODE OF CRIMINAL PROCEDURE], Dec. 22, 2011, Bundesgesetzblatt, Teil I [BGBl. I] 3044, as amended, § 243(4), sentence 1 .

[35] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 3 StR 287/10 (Oct. 5, 2010).

[36] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 1 StR 400/10 (Oct. 20, 2010).

[37] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 1 StR 438/11 Rn. 14 (Feb. 9, 2012).

[38] Strafprozessordnung [StPO] [CODE OF CRIMINAL PROCEDURE], Dec. 22, 2011, Bundesgesetzblatt, Teil I [BGBl. I] 3044, as amended, § 243, sentence 1 .

[39] Oberlandesgericht Celle [OLG – Higher Regional Court of Celle], Case No. 32 Ss 87/11 Rn. 15 (Aug. 30, 2011).

[40] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 4 StR 571/10 Rn. 11 (Apr. 14, 2011).

[41] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 4 StR 571/10 Rn. 10 (Apr. 14, 2011); *see also* Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 5 StR 423/12 Rn. 8 (Mar. 6, 2013).

denying the allegations is not present himself and neither is his lawyer, so from the point of view of the excluded, the suspicion of bias is fed. But the impression can be dispelled successfully if the court announces the dialogues, its contents, and its results by its own initiative (possibly during the next date of the trial). This is also necessary if an understanding has not been reached.[42] At separate hearings, the holding of collective dialogues is not possible, at least when other lay judges are involved). Nevertheless, the plea agreements of the other hearings have to be disclosed.[43] If the court follows—or settles because of—the version of a confessing defendant before being ready for a decision, from the point of view of the co-defendant, the fear of bias could arise.[44] The plea agreement with only one defendant because of his mere commitment to a separately made statement, also concerning the role of the co-defendant, makes it from their point of view possible to raise the suspicion of bias at least if the further offered plea agreement has been made dependent on further circumstances (i.e. a confession) and if, in respect to the decision stage of the separated hearing, at least a borderline case exists.[45] Simply the plea agreement on a penalty decision in favor of one defendant alone does not put undue pressure on the other, according to § 136a of the StPO, to submit oneself to a plea agreement.[46] The Federal Court of Justice has to date made no decision on the consequences of unlawful pressure from the defense lawyer.[47] Should a plea agreement fail because of the prosecutor's refusal to give his consent due to his disagreement with the upper limit set by the court, so the remark made by the presiding judge to the defendant that the court in principle stands by what it said does not make the judge biased. The Regional Court (*Landgericht*) ("LG") of Verden[48] dismissed an application for a challenge by the prosecutor based on this.

4. Subject of a Plea Agreement: Sections 257c(2) Sentence 1, (3) Sentence 2 of the StPO

Because a plea agreement cannot lead to a lower sentence than the degree of guilt demands,[49] the court has to make an assessment on the sentencing based on the

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[42] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 3 StR 287/10 (Oct. 5, 2010).

[43] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 1 StR 438/11 Rn. 11 (Feb. 9, 2012); see also Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 1 StR 17/12 Rn. 6 (Mar. 6, 2012).

[44] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 2 StR 455/09 Rn. 8 (June 30, 2010).

[45] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 3 StR 400/11 Rn. 22 (Jan. 10, 2012).

[46] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 5 StR 176/11 Rn. 22 (Jul. 21, 2011).

[47] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 1 StR 170/12 Rn. 13 (Aug. 22, 2012).

[48] Beschl. vom 4.3.2010 – 2 KLs 13/09. (Order of 4.3.2010 – 2 KLs 13/09).

[49] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 1 StR 400/10 (Oct. 20, 2010); Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 1 StR 116/11 Rn. 23 (May 5, 2011).

accusation in accordance with the substantive statutory provisions before it makes a proposal (it is the law, § 257c(3) sentence 4 of the StPO, that has come to this remarkable term).[50] The court has to exercise due diligence as they would when deliberating on a proper judgment. The impression of an undignified negotiation has to be avoided. Therefore the court has to desist from amending the agreement according to the "offers" which have not been accepted by the defense.[51] To avoid an unlawful agreement on a "point penalty,"[52] the court has to name an upper and lower limit in the proposed plea agreement.[53] The court is then able to draw out the described penalty range and is not committed to a lower limit.[54] Additionally, the court is allowed to specify an "alternative sentence" in the case of a default plea agreement, missing confession, or if the specification of a lower limit is missing. This usually is not detrimental to the defendant.[55] But the "sanction scissors" may not put the defendant under unacceptable pressure and may not exceed an appropriate assessment of the penalty related to the seriousness of the crime.[56] But the latter depends on circumstances which can still be influenced in the further proceedings, so that the sentence of 7 years and 3 months after a failed plea agreement to a maximum of 5 years and 9 months was not objected to,[57] just as the sentence of 3 years and 10 months after a considered 2 years and 6 months[58] and like the reference that only a confession can allow the range of penalties, according to § 250 (3) of the German Code of Criminal Law (minor case).[59] Simply the prosecutor's voicing of the

[50] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 4 StR 623/11 Rn. 13 (June 21, 2012).

[51] See, for example, Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 2 StR 354/10 (Oct. 6, 2010); Bundesgerichtshof [BGH - Federal Court of Justice], Case No. – 5 StR 423/12 (Mar. 6, 2013).

[52] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 3 StR 426/10 Rn 2 (Feb. 17, 2011).

[53] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 3 StR 359/10 Rn 10 (Sept. 28, 2010); Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 3 StR 426/10 Rn 4 (Feb. 17, 2011); Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 1 StR 52/11 (Mar. 1, 2011); Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 1 StR 60/11 Rn 8 (Mar. 16, 2011); Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 4 StR 623/11 (June 21, 2012).

[54] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 1 StR 345/10 (Jul. 27, 2010); Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 1 StR 208/12 (May 23, 2012).

[55] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 1 StR 347/10 Rn. 9 (Oct. 8, 2010); Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 1 StR 359/10 Rn. 6 (Oct. 11, 2010); Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 1 StR 60/11 Rn. 8 (Mar. 16, 2011).

[56] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 1 StR 400/10 (Oct. 20, 2010).

[57] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 1 StR 458/10, Apr. 14, 2011, Rn. 37 .

[58] Oberlandesgericht Celle [OLG – Higher Regional Court of Celle], Case No. 32 Ss 87/11 Rn. 22 (Aug. 30, 2011) .

[59] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 5 StR 287/1 (Aug. 29, 2011).

penalty suggestion does not open these "sanction scissors".[60] The punishment imposed after the conclusion of a normal trial must not differ too strongly from the proposed penalty in the attempted agreement. Nonetheless, there is no mathematical margin for this, as both the time period between discussions and decision and the development of the level of knowledge have to be taken into account. The longer the main trial takes, the weaker the continuing influence of the court's suggestion from the earlier stage.[61] Even after a failed agreement, the suggestion may guide a court, but it does not bind them.[62] Detention should not be proposed for the purpose of the defendant making an agreement.[63]

In the plea agreement on sentencing, some compulsory legal principles have to be considered.[64] According to § 54(1), sentence 2 of the German Criminal Code (*Strafgesetzbuch*) ("StGB"), a subsequent total financial penalty cannot be set up with the inclusion of a custodial sentence.[65] The presumption of a delay of the proceedings, contrary to due process of law-clause which however did actually not take place cannot be the subject of a plea agreement.[66] In addition, the decision regarding confinement can be the subject of a plea agreement, according to § 257c (2) sentence 1 of the StPO.[67] In a case decided by the Federal Court of Justice, the Court also allowed the closing of a different case in the plea agreement.[68]

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[60] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 5 StR 432/11 Rn. 1 (Feb. 7, 2012); Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 1 StR 618/11, Mar. 22, 2012, Rn. 5 . The court is not bound by promises made to the prosecution in regard to their conduct, see, for example, Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 5 StR 419/10 Rn. 4 (Oct. 27, 2002).

[61] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 1 StR 400/10 (Oct. 20, 2010); Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 1 StR 458/10 Rn. 38 (Apr. 14, 2011).

[62] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 4 StR 571/10 Rn. 12 (Apr. 14, 2011).

[63] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 1 StR 459/12 Rn. 19 (Jan. 23, 2013) (in concreto rejected).

[64] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 4 StR 623/11 Rn. 16 (June 21, 2012). This case applies these statement to all substantive criminal law, as does Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 1 StR 421/12 (Oct. 25, 2012).

[65] Kammergericht [KG – Superior Court of Berlin], Case No. 121 Ss 34/12 (28/12) Rn. 3 (Apr. 23, 2012), http://www.burhoff.de/asp_weitere_beschluesse/inhalte/1892.htm.

[66] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 2 StR 354/10 (Oct. 6, 2010).

[67] Kammergericht [KG – Superior Court of Berlin], Case No. 2 Ws 176/11 (Jul. 21, 2011), http://openjur.de/u/285005.html.

[68] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 1 StR 459/12, Jan. 23, 2013, Rn. 25 .

5. Confession–Duty to Inform: § 257 (1) and (2) of StPO

A confession given as part of a plea agreement on a penalty cannot be taken as a basis for a verdict without its truth being investigated. This requires the confession's assessment under the free appraisal of evidence principle.[69] This insures that the thorough preparation of the main trial—despite a promising plea agreement suggested by the court—does not lead to an unconstitutional delay of the proceedings.[70] The willingness of the defendant alone to accept a sentence because of certain circumstances is not sufficient.[71] If a confession made without an agreement is already checked in the beginning to ensure its correctness, this is inappropriate.[72] In the appeal proceedings, the explicit confession can be replaced by the restriction of the appeal to the sentence. Alternatively, the withdrawal of the legal remedies can be enough if the prosecution appealed the case only against the suspended sentence.[73]

6. Section 257c (2) Sentence 3 of the StPO

A plea agreement regarding the legal culpability of the defendant is not permitted,[74] nor is an agreement about the omitting of a compulsory report to the register of corruption.[75] Basically, the conviction cannot be the subject of a plea agreement.[76] But, according to § 154(2) of the StPO, this does not hinder an agreement about the extent of the termination

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[69] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 3 StR 335/11 Rn. 5 (Feb. 7, 2012); Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 3 StR 380/12 , Rn. 7 (Sept. 20, 2012); Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 4 StR 170/12 Rn. 15 (Oct. 25, 2012); Oberlandesgericht Celle [OLG – Higher Regional Court of Celle], Case No. 32 Ss 87/11 Rn. 22 (Aug. 30, 2011) ; *see also* Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 1 StR 60/11, Mar. 16, 2011, Rn. 7 ; Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 2 StR 639/11 Rn. 7 (Feb. 29, 2012).

[70] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 1 StR 525/11 Rn. 49 (Feb. 7, 2012).

[71] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 5 StR 171/09 (Oct. 28, 2009); Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 2 StR 222/10, note 8 (June 23, 2010); Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 2 StR 428/10, para. 3 (Mar. 9, 2011); Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 2 StR 383/11, para. 3 (Sept. 22, 2011); Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 3 StR 285/11, para. 7 (Jan. 31, 2012); *see also supra* note 40.

[72] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 1 StR 208/12, para. 6 f (May 23, 2012); Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 1 StR 459/12, para. 49 f (Jan. 23, 2013).

[73] LG Freiburg [Regional Court of Freiburg], Case No. 7 Ns 610 Js 13070/09 (Jan. 18, 2010).

[74] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 5 StR 226/11, para. 3 (June 22, 2011); Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 5 StR 482/11, para. 17 (Jan. 25, 2012).

[75] OVG Berlin [Higher Administrative Court of Berlin], Case No. OVG 1 S 159.11, para. 8 (Oct. 21, 2011).

[76] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 3 StR 359/10 (Sept. 28, 2010).

of proceedings.[77] Deviation in the wording of the recorded plea agreement, combined with the assessment of the evidence concerning the gang actions, gives rise to a suspicion that the agreement was related to the conviction,[78] e.g. to a gang agreement[79] or to the level of participation.[80] According to § 257(2) sentence 3 of the StPO, this is illegal.[81] The absence of a guilty verdict according to § 263(5) of the StGB does not disadvantage the defendant.[82] An action according to §456a of the StPO, when an extradition accompanies the enforcement of a sentence, also cannot be the subject of an agreement.[83] Lastly, a plea agreement cannot include the arrangement to read the tables belonging to the written charge itself. The sentence is not based on this because these tables do not have to be read out.[84]

7. Upper and Lower Sentence Limit: § 257c(3) Sentence 2 of the StPO

The First Criminal Panel of the Federal Court of Justice leans towards the view that neither an upper sentence limit nor a lower sentence limit can be given. The naming of a lower limit, in which the interest of the prosecution is omitted, does not regularly give grounds to the defense's appeal.[85] The naming of upper and lower limits does not create a confidence of trust in the matter from the point of view of the defendant that he does not have to expect a penalty lying over the limit. The Federal Court of Justice concludes this from the continuing ban on agreements on a "point penalty."[86]

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[77] OLG Frankfurt am Main [Higher Regional Court of Frankfurt am Main], Case No. 3 Ws 538/10 (Oct. 26, 2010), https://www.jurion.de/Urteile/OLG-Frankfurt_am_Main/2010-10-26/3-Ws-538_10.

[78] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 3 StR 359/10, para. 8 (Sept. 28, 2010).

[79] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 1 StR 52/11 (Mar. 1, 2011).

[80] OLG Celle [Higher Regional Court of Celle], Case No. 32 Ss 152/10, para. 23 (Nov. 9, 2010).

[81] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 1 StR 60/11, para. 3 (Mar. 16, 2011).

[82] *Id.* at para. 7.

[83] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 3 StR 426/10, paras. 3 and 7 (Feb. 17, 2011).

[84] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 1 StR 429/09, paras. 6 and 8 (Mar. 15, 2011) (with reference to BGH (GS), Case No. GSSt 1/10, u.a., para. 17 (Jan. 12, 2011)).

[85] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 1 StR 347/10 (Oct. 8, 2010); Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 1 StR 359/10 (Oct. 10, 2011).

[86] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 1 StR 345/10 (July 27, 2010); Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 3 StR 359/10 (Sept. 28, 2010).

8. Binding Effects: § 257c(3) Sentence 4 of StPO

The binding effect covers exclusively plea agreements that were reached in the main trial and recorded within the law.[87] Regardless of their credibility, informal agreements do not become binding according to § 257c(3) sentence 4 of the StPO.[88] From such a particularly unlawful agreement no basis of trust arises for the defendant.[89] The same applies to one-sided remarks by the president of the chamber[90] and to promises made by the prosecutors (only) in regard to their own application.[91] The ruling on the reaching of a plea agreement does not prevent, however, removable trust through indications, according to §265 of the StPO, in other conduct of the court (no plea agreement necessary as the accused will be suspended on probation anyway).[92]

9. Ending of the Binding Effect: § 257c(4) Sentence 1 of the StPO

Binding or otherwise trust-establishing promises can only be gained if the associated requirements actually arise. It is improbable that claims for specific legal consequences can arise from a "not accepted offer."[93] From the beginning, the court is not bound to any maximum sentence proposed in talks held outside the framework of § 257c of the StPO.[94]

The prosecution cannot end this binding effect by itself.[95] The defense, similarly, cannot end the effect *de jure* alone. Also, the binding effect does not end for the court by itself; it ends through the court's constitutive decision.[96] If the broad estimation of the prospective sentencing range of penalties, despite changes in circumstances or findings, is still appropriate to the crime and the defendant's guilt, the court will keep to it in the case of §

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[87] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 2 StR 205/10 (Aug. 4, 2010).

[88] *Id.* at note 14; Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 1 StR 349/11, para. 41 (Feb. 22, 2012).

[89] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 2 StR 354/10 (Oct. 6, 2010).

[90] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 3 StR 426/11 (Dec. 20, 2011).

[91] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 5 StR 419/10, para. 4 f (Oct. 27, 2010).

[92] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 3 StR 39/11, para. 12, 5 ff (June 20, 2011).

[93] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 1 StR 458/10, para. 38 (a.E.) (Apr. 14, 2011).

[94] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 1 StR 274/11, para. 3 (July 12, 2011); Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 1 StR 302/11, para. 45 (Nov. 9, 2011); Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 1 StR 103/12, para. 42 (May 22, 2012).

[95] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 4 StR 623/11, para. 13 (June 21, 2012).

[96] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 4 StR 623/11, para. 14 (June 21, 2012); left opened by Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 1 StR 421/12 (Oct. 25, 2012).

257c (4) sentences 1 and 2 of the StPO.[97] In addition, it can also reduce the single penalty considered, if the foreseen or anticipated total penalty could not otherwise be made due to legal reasons.[98]

But, only the chamber involved in the plea agreement is bound by it.[99] Hence, the binding effect also ends after its annulment and rejection.[100] However, the ban on *reformatio in peius* still applies.[101]

10. Section 257c (3) of the StPO

According to § 257c(4) sentence 3 of the StPO, the exclusion of evidence only applies to a confession and any other factual statements that form the basis of a guilty verdict which were made in the period after the plea agreement was reached and the possible court's distancing itself from that deal respectively.[102] Such a confession is inadmissible only if the court frees itself from the plea agreement, but not if it keeps to it. This applies to an inadmissible agreement on the guilty verdict[103] or other faulty plea agreements.[104] After an annulment and remittal, a confession given within the scope of an agreement does not become unusable if only the defendant files an appeal. Then the ban on *reformatio in peius*, according to § 358 (2) sentence 1 of the StPO, leads to a perpetuation of the penal upper limit offered by the court and accepted by the defendant.[105] However, by a successful sentence appeal by the prosecution, there is no restriction if the guilty verdict is based only on a confession unusable for fairness reasons.[106] However, the confession repeated after judicial distancing is usable even if it is identical with that of the unusable one,[107] as is also a witness's statement after separation, even if this was based on an

[97] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 4 StR 623/11, para. 15 f (June 21, 2012); Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 1 StR 421/12, para. 3 (Oct. 25, 2012).

[98] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 4 StR 537/12, para. 10 (Feb. 28, 2013).

[99] *See* OLG Nürnberg [Higher Regional Court of Nürnberg), Case No. 1 St OLG Ss 292/11 (Feb. 29, 2012).

[100] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 4 StR 537/12, para. 12 (Feb. 28, 2013).

[101] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 5 StR 38/10, para. 10 (Feb. 24, 2010).

[102] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 3 StR 226/10, para. 13 (Aug. 19, 2010); Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 1 StR 33/11, para. 4 ff (Mar. 15, 2011).

[103] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 1 StR 52/11 (Mar. 1, 2011).

[104] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 1 StR 60/11, para. 5 (Mar. 16, 2011); Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 1 StR 349/11, para. 41 (Feb. 22, 2012).

[105] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 5 StR 38/10 (Feb. 24, 2010).

[106] OLG Düsseldorf [Higher Regional Court of Düsseldorf], Case No. III-4 RVs 60/10, paras. 12-14 (Oct. 6, 2010).

[107] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 1 StR 33/11, para. 4(ff) (Mar. 15, 2011).

inadmissible plea agreement.[108] The Fifth Criminal Panel is considering, in accordance with the legal principle of § 257c(4) sentence 3 of the StPO, banning of the confession function. This lies in the fact that the defendant made contributions in preparation for a victim/offender mediation in the hope of receiving a suspended sentence if the possibility of the desired outcome is shattered.[109]

11. Section 257 (5) of the StPO

The instruction on the conditions and results of a divergence of the court of the promised result must occur together with the announcement of the judicial plea agreement process before the defendant makes a decision on it.[110] It has to deal with various aspects: On the one hand, with the matter of the facts, under which the court would not be bound any longer to the plea agreement (i.e. unexpected behavior, new facts, overlooked circumstances) and, on the other hand, in such cases applicable to the ban on utilization.[111] However, a violation causes no ban on utilization of a confession delivered subsequently because the court is bound to the plea agreement.[112] Also, for the defendant it is obvious that the court does not become bound (1) without the fulfillment of the expectation contained in the plea agreement proposal of a confession, or (2) when new circumstances arise.[113] This is different in the case of a judicial solution possibility because of overlooked circumstances, according to § 257c(4) sentence 1 alternative 1 of the StPO. Because the defendant should have been informed about the ban on utilization coming into effect and the defendant in the relevant case had to expect a guilty verdict although not having given a confession himself on account of the confession of his co-defendant, the chamber denied that the judgment was based on the violation of the obligation to inform.[114]

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[108] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 1 StR 349/11, paras. 2 and 40(ff) (Feb. 22, 2012).

[109] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 5 StR 174/12, para. 15 (May 23, 2012).

[110] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 3 StR 226/10, para. 4 (Aug. 19, 2010).

[111] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 3 StR 226/10 (Aug. 19, 2010).

[112] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 3 StR 226/10, para. 7 (Aug. 19, 2010).

[113] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 3 StR 226/10, para. 10(f) (Aug. 19, 2010).

[114] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 3 StR 226/10, para. 12(ff) (Aug. 19, 2010),; Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 4 StR 228/10 (Aug. 17, 2010); Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 1 StR 347/10, para. 11 (Sept. 8, 2010); Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 1 StR 443/10 (Aug. 8, 2010) (overturned); Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 1 StR 469/10, para. 3 (Nov. 2, 2010) (overturned); Bundesgerichtshof [BGH - Federal Court of Justice] Case No. 1 StR 449/10, para. 3(ff) (Nov. 3, 101 ; Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 1 StR 33/11, para. 6 (Mar. 15, 2011).

12. Legal References: § 265 of the StPO

A plea agreement does not eliminate the need for the granting of a legal note on a divergent (substantive) acknowledgment. This also applies beyond § 257c(4) sentence 4 of the StPO if the court, in spite of changed legal assessment of the crime, intends to keep to its promised penalty range.[115] However, no reference is required if the court does not keep to a penalty range after its failed plea agreement.[116]

13. Section 273(1a) Sentence 3 of the StPO

If the court distances itself from a plea agreement, the notification of this has to be recorded in the court's minutes.[117]

14. The Last Word

If the detention order is lifted after granting the last word against a defendant with which a plea agreement was reached, the last word is to be given to the co-defendant unwilling to accept a plea agreement.[118]

15. Appeal Waiver: § 302 (1) Sentence 2 of the StPO

The revocation of an appeal filed after a plea agreement is also effective if it is carried out within the legal appeal time period of one week (in concreto: one (!) hour after filing the appeal).[119] Article 6(1) of the European Convention on Human Rights ("ECHR") does not require a regulation such as § 302(1) sentence 2 of the StPO.[120]

III. After the Main Trial

1. Evaluation of Evidence

If a plea agreement with a co-defendant led to a decisive statement by this person or at least was considered by him this must be included in the evaluation of evidence.[121]

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[115] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 2 StR 590/10, para. 9(f) (May 11, 2011).

[116] OLG Celle [Higher Regional Court of Celle], Case No. 32 Ss 87/11, para. 18(ff) (Aug. 30, 2011).

[117] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 4 StR 623/11, para. 17 (June 21, 2012).

[118] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 5 StR 433/10, para. 7(ff) (Oct. 26, 2010).

[119] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 1 StR 64/10 (Apr. 14, 2010).

[120] Litwin v. Germany, ECHR App. No. 29090/06 (Nov. 3, 2011), http://hudoc.echr.coe.int/.

[121] BGH, Case No. 1 StR 17/12 at para. 6; BGH, Case No. 5 StR 423/12 at para. 15.

2. Reasons for a Judgment: § 267 (3) Sentence 5 of the StPO

The reasons for a judgment after a plea agreement require a minimum level of accuracy.[122] Hence, a confession given in the course of a plea agreement does not release the trial court of its duty to coherently present the ascertained facts of the crime.[123] The plea agreement must be included in the written judgment if it was successful[124] and preceded the judgment.[125] Details of the agreement only have to be stated in the court report.[126] The approval of the procedural parties, according to § 257 (3) sentence 3 of the StPO, does not have to be included in the reasons for judgment.[127] The reasons also do not have to reveal why the court accepted the agreement even when new circumstances arose.[128]

3. Prosecution

The prosecution has to make sure that no legal violations (e.g. when recording plea discussions) are made during the plea agreement.[129] Also, the prosecution must determine whether there is need for action in respect to § 147 (1) sentence 3 of the Guidelines for Criminal Procedure and Administrative Fine Proceedings, which outlines the legal remedies for sentences that are disproportionate to the criminal acts.[130]

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[122] BGH, Case No. 2 StR 222/10; BGH, Case No. 3 StR 226/10.

[123] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 5 StR 594/10 (Feb. 10, 2011); BGH, Case No. 5 StR 171/09; BGH, Case No. 2 StR 428/10 at para. 3; Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 1 StR 154/11, para. 2 (July 13, 2011); Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 3 StR 203/11, para. 21 (Nov. 17, 2011); BGH, Case No. 3 StR 285/11 at para. 7; BGH, Case No. 2 StR 639/11 at para. 7; BGH, Case No. 3 StR 380/12 at para. 7.

[124] BGH, Case No. 5 StR 423/12 at para. 10(ff).

[125] BGH, Case No. 3 StR 226/10.

[126] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 3 StR 528/09 (Jan. 13, 2010); BGH, Case No. 3 StR 226/10 at para. 16; BGH, Case No. 1 StR 359/10 at para. 8; BGH, Case No. 1 StR 60/11 at para. 4.

[127] BGH, Case No. 1 StR 359/10.

[128] BGH, Case No. 4 StR 623/11 at para. 17. *See also* BGH, Case No. 1 StR 421/12 at para. 4.

[129] BGH, Case No. 1 StR 60/11 at para. 3. *See also* Administrative Fine Proceedings (Richtlinien für das Strafverfahren und Bußgeldverfahren [RiStBV] [Guidelines for Criminal Procedure and Administrative Fine Proceedings] § 127 para. 1 .

[130] BGH, Case No. 1 StR 116/11, para. 23(f); BGH, Case No. 1 StR 52/11.

4. Right of Appeal

A plea agreement does not prevent the appeal of a sentence or negate the argument that the trial court was incompetent.[131] Also, it does not restrict the prosecution's right of appeal,[132] so the general rule is that the procedural parties may appeal a sentence despite an agreement.[133] In the opinion of the Third Criminal Panel, the complaint due to lack of jurisdiction, therefore, is legitimate because an agreement has been reached before the sentence under appeal.[134] The same has been decided in the case of a complaint made because of an illegitimate administrative leave under § 231c sentence 1 of the StPO.[135] Similarly, the First Criminal Panel ruled the defendant's complaint to be admissible despite an agreement because the legal reference had been inadequate and the proceedings should have been stopped due to a double jeopardy claim.[136] Certain circumstances, though, may lead to restrictions. The Fifth Criminal Panel of the Federal Court of Justice is of the opinion that a request filed—but never decided upon—in the interlocutory proceedings to change the court-appointed counsel cannot form the basis of a complaint if the convicted person accepted a plea agreement, according to § 257c (2) of the StPO, with the exclusive participation of his original court-appointed counsel.[137] The Fifth Criminal Panel left the question open as to whether this view concurs with that of the Third Criminal Panel because it understood the defendant's acceptance of the plea agreement as a withdrawal of the request to change its counsel. Whether a similar procedure would be effective in the case of contesting the composition of the court despite a reached agreement was also left open by the Fifth Criminal Panel[138] because the complaint had been without merit.

5. Appeal on Points of Facts and Law (Berufung)

A confession made in the court of first instance as part of the agreement is fully admissible in the appellate court although the higher court is not bound by the agreement.[139] Section

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[131] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 3 StR 196/11, para. 4(ff) (Sep. 13, 2011).

[132] OLG Düsseldorf, Case No. III-4 RVs 60/10 at para. 10(f); KG, Case No. (3) 121 Ss 34/12 (28/12) at para. 2.

[133] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 4 StR 73/10 (June 10, 2010).

[134] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 3 StR 156/09 (Sep. 3, 2009).

[135] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 3 StR 547/08 (Aug. 6, 2009).

[136] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 1 StR 587/09 (Jan. 14, 2010).

[137] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 5 StR 23/10 (Feb. 24, 2010).

[138] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 5 StR 159/10 (Aug. 31, 2010).

[139] *Compare* OVG Berlin, Case No. OVG 1 S 159.11 at para. 6, *and* OLG Nürnberg, Case No. 1 St OLG Ss 292/11, *with* OLG Düsseldorf, Case No. III-4 RVs 60/10 at para. 12(f).

257c(4) sentence 3 of the StPO establishes an absolute ban on utilization of the confession only by the court that has absolved itself from the reached agreement.[140] In qualifying this, the Higher Regional Court (*Oberlandesgericht*) ("OLG") of Düsseldorf held that the prosecution's appeal may not be restricted if the verdict of guilt is based on the confession delivered in the context of a plea agreement but is not usable for reasons of fairness.[141]

6. Appeal on Points of Law (Revision)

A breach of the rules, which have to be complied with in the case of a plea agreement, can only be claimed by means of an alleged procedural irregularity,[142] even if the verdict unnecessarily documents details of the agreement.[143] The prosecution has to submit how it and the defense reacted to the proposal made by the judges in the course of the plea proceedings.[144] After an agreement was accepted by the court, the application for reinstatement into the unobserved time limit for filing an appeal needs a statement of assent of the defense lawyer to actually file an appeal. The mere statement to have asked the defense lawyer to file the appeal is not enough.[145] Section 257c (3) sentence 2 of the StPO cannot be violated if an agreement was not achieved.[146] If the appeal is based on a general substantive complaint, the verdict is also looked into when it is based on an agreement.[147] If it is complained that in the judgment under appeal it is not acknowledged that a relevant offending testimony was preceded by a plea agreement, the complaint is established, §§ 261 or 244(2) of the StPO, whereas § 267(3) sentence 5 of the StPO cannot be violated in this manner.[148]

The Fourth Criminal Panel[149] dealt with the formal demands of a complaint made because a plea agreement was reached by means of undue pressure. The allegation of an

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[140] OLG Nürnberg, Case No. 1 St OLG Ss 292/11.

[141] OLG Düsseldorf, Case No. III-4 RVs 60/10 at paras. 12–14. *See also* STRAFPROZESSORDNUNG [STPO] [CODE OF CRIMINAL PROECEDURE] § 257c para. 4, sentence 3 .

[142] BGH, Case No. 1 StR 52/11; BGH, Case No. 1 StR 60/11 at para. 4; BGH, Case No. 1 StR 302/11 at para. 46.

[143] BGH, Case No. 1 StR 60/11 at para. 4.

[144] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 5 StR 411/11, para. 3 (Mar. 13, 2012).

[145] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 1 StR 510/10, para. 2(f) (Oct. 19, 2010).

[146] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 4 StR 472/11, para. 3 (Nov. 8, 2011).

[147] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 5 StR 520/11, para. 1 (Jan. 10, 2012). See Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 1 StR 28/12, para. 3 (Mar. 7, 2012) (for an example of the state of competition between multiple crimes).

[148] BGH, Case No. 5 StR 423/12 at para. 143.

[149] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 4 StR 620/09 (Feb. 2, 2010).

inadmissible range of criminal penalties (i.e. "sanction scissors") therefore requires at least the presentation of which parties took part in the plea agreement discussions and which alternative legal consequences were considered. Whether the complaint was already inadmissible because the cited plea agreement was not noted in the report was left unanswered by the Panel. But the Panel stated that even in the case of perceived undue pressure, it expects a represented defendant to contest the alleged inadmissible contents of the agreement by making the contents the subject of the appeal.

7. Claims for the Ineffectiveness of the Declared Waiver of Remedies

If the pleadings in the appeal do not signal an agreement that could end the proceedings, then there are no doubts about the validity of the waiver of remedies.[150] The mere fact that the court report reveals an interruption for the purpose of a legal consultation (obviously according to § 257b of the StPO) does not indicate that a plea agreement has been reached when the note in the report required by § 273(1a) sentence 3 of the StPO is absent. Therefore, the Second Criminal Panel declared the waiver of remedies to be valid.[151] However, a report that neither notes that an agreement took place, nor that such has not taken place, is contradictory or incomplete and missing; therefore, it has no probative value. If the defendant in such a case would like to claim that the declared waiver of remedies is ineffective due to preceded talks, he has to explain in detail and in a verifiable form how the alleged agreement came about.[152] The mere complaint that the report does not fulfill the legal requirements does not succeed as the so-called report complaint.[153] Doubts have to be cleared up in the proceedings for the taking of evidence.[154] When the Higher Regional Court of Celle[155] ruled without any restriction that the principle of doubt does not apply here, the Federal Constitutional Court overruled this by referencing a case of the Higher Regional Court of Dresden. In that case, if the impossibility to clear up doubts is based on the infringement of the judicial duty of

[150] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 2 StR 86/11 (Apr. 14, 2011).

[151] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 2 StR 16/10 (Feb. 17, 2010).

[152] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 2 StR 371/10, para. 4(ff) (Sep. 29, 2010); BGH, Case No. 2 StR 16/10; Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 5 StR 419/10 (Oct. 27, 2010); Oberlandesgericht Frankfurt am Main [Higher Regional Court of Frankfurt am Main], Case No. 3 Ws 141/10 (Feb. 23, 2010), http://www.lareda.hessenrecht.hessen.de/.

[153] BGH, Case No. 1 StR 359/10 at para. 7; Oberlandesgericht Celle [OLG Celle - Higher Regional Court of Celle], Case No. 1 Ws 381/11 (Sep. 27, 2011), http://www.rechtsprechung.niedersachsen.de/.

[154] BGH, Case No. 1 StR 170/12 at para. 8(ff); OLG Düsseldorf, Case No. III-4 RVs 60/10 at para. 17; OLG Celle, Case No. 1 Ws 381/11 at para. 13.

[155] OLG Celle, Case No. 1 Ws 381/11 at para. 16.

documentation, it may not be to the detriment of the defendant.[156] The Higher Regional Court of Celle[157] sympathizes with the appliance of § 302(1) sentence 2 of the StPO, also in the case of illegitimate arrangements.[158]

At least the regular premise for a review is the adherence of the deadline of remedies.[159] Contrary to § 302(1) sentence 2 of the StPO, a declared waiver of remedies after having reached an agreement only leads to the fact that the defendant still has a one-week deadline under § 341 (1) of the StPO to appeal. Letting the deadline elapse is not the precondition to reset the start of the deadline for remedies.[160] If the answer of the timeliness of the lodged appeal or the merit of the application for *restitutio in integrum* depends on the effectiveness of the declared waiver of remedies, then only the Court of Appeal is authorized to make a decision.[161]

The waiver of remedies is ineffective when the report contains a negative certificate; for example § 273 (1a) of the StPO expressively requires a note in the record that the parties did not come to a plea agreement pursuant to § 257c.[162] Because in the view of the Second Criminal Panel of the Federal Court of Justice this is an essential formality, it can only be excluded as evidence if fraud has been proven. Noteworthy is the added comment in brackets that indicates the Federal Court or Justice affirmed the mandatory record only for agreements regulated by § 257c of the StPO, whereas it found arrangements *praeter legem* as not mandatory. Consequently, the ineffectiveness of a waiver of remedies should be omitted also.[163] The Federal Constitutional Court henceforth ruled unambiguously that arrangements are only permissible in the context of the Act on Plea Agreements, as was explained above. Although the defense is also bound by the law and therefore cannot

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[156] Bundesverwaltungsgericht [BVerwG - Federal Administrative Court] Case No. 2 BvR 1464/11 (Mar. 5, 2012), http://www.bundesverfassungsgericht.de/. *See also* Oberlandesgericht Zweibrücken [Higher Regional Court of Zweibrücken], Case No. 1 Ws 169/12, para. 10(ff) (July 31, 2012).

[157] OLG Celle, Case No. 1 Ws 381/11 at paras. 10, 22(ff). The Federal Constitutional Court requires this.

[158] Leaving open BGH, Case No. 5 StR 419/10 at para. 5, as promises by the prosecution only in regard to their own application neither are an evasion of § 257c German Code of Criminal Procedure nor likely suited to create confidence in an identical judicial decision.

[159] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 3 StR 12/13, para. 1 (Feb. 5, 2013).

[160] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 4 StR 637/09 (Apr. 1, 2010).

[161] Oberlandesgericht Frankfurt am Main [Higher Regional Court of Frankfurt am Main], Case No. 3 Ws 538/10 (Oct. 26, 2010), http://www.lareda.hessenrecht.hessen.de/.

[162] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 2 StR 31/10 (Mar. 31, 2010) (as already in a main trial ended before the Act on Plea Agreements came into force: Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 2 StR 441/09 (Oct. 28, 2009).

[163] Leaving open BGH, Case No. 5 StR 419/10.

expect any protection when moving outside the permitted limits,[164] the Federal Constitutional Court leans towards the conclusion that the waiver of legal remedies after an admissible agreement has to be ineffective if this is the result of a lawful plea agreement. The Court therefore interprets § 302(1) sentence 2 of the StPO as a regulation only serving the defendant.

8. Foundation

A plea agreement can avoid the sentence being based on a dubious assessment of the weight of transported drugs[165] just as with an incorrect state of concurring criminality is taken as that basis.[166] However, the sentence can be based on a violation of § 265 of the StPO in spite of being bound to a proposed penalty range.[167] If the last word was not granted to the defendant, he can successfully object to the violation of § 258 of the StPO even when the sentence is based on a plea agreement. This is because the binding force of a proposed upper and lower limit ceases and the restricted penalty range is no longer proportionate to the crime, which leads to reliance on the last word.[168] When in the appellate court, if the conviction is dropped because of the lapse of time, to base the conviction on the violation can be debarred when the sentence, according to § 257c (3) sentence 2 of the StPO, corresponded to the lower limit.[169] The same applies to the false assumption of an especially serious case of fraud.[170] If the court lets itself be guided by a plea agreement when sentencing although the proposed confession was not given, this does not burden the defendant.[171] Even a sentence that appears appropriate cannot be excludable, based on the lack of consideration of legal consequences for the defendant, if the court proposed an incomprehensively low sentence in the context of a failed plea agreement.[172]

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[164] The Second Criminal Panel of the High Court of Justice therefore voiced doubts on whether a violation of § 257c of the German Code of Criminal Procedure can be contested by a party, who consciously took part in such an agreement and even condoned an incorrect recording. BGH, Case No. 2 StR 205/10.

[165] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 4 StR 99/12, para. 9 (Dec. 13, 2012). *See also* BGH, Case No. 1 StR 28/12 at paras. 3, 5.

[166] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 2 StR 277/12, para. 4 (Aug. 21, 2012) (leaving open BGH, Case No. 5 StR 159/10 at paras. 2, 6).

[167] BGH, Case No. 2 StR 590/10 at para. 11(ff).

[168] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 1 StR 3/10 (Feb. 4, 2010).

[169] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 5 StR 74/10 (Mar. 25, 2010).

[170] BGH, Case No. 4 StR 620/10.

[171] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 3 StR 372/09 (Oct. 22, 2009).

[172] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 4 StR 445/09 (Nov. 3, 2009).

Indeed, the decision can be based on the violation of the obligation to state in the written judgment if it was preceded by a plea agreement, according to § 267(3) sentence 5 of the StPO, despite the violation of procedural law occurring after the pronouncement of the judgment, but only if solid indications of such exist.[173] The violation of the duty of recording talks ending without a plea agreement being reached loses its force the further the main trial progresses, so that basing an appeal on this would be rare.[174] It already does not constitute a violation of the law when the judgment does not mention that the parties had the opportunity to comment on the judicial proposal of a plea agreement and consented to it.[175] If the court fails to acknowledge a plea agreement that was preceded by relevant testimony, the judgment does not have to be based on this if the assessment of evidence seems "highly comprehensible" nonetheless.[176]

[173] BGH, Case No. 3 StR 226/10 at para. 15(ff); BGH, Case No. 5 StR 423/12 at para. 12.

[174] BGH, Case No. 1 StR 400/10 at para. II(3).

[175] BGH, Case No. 1 StR 359/10 at para. 8.

[176] BGH, Case No. 5 StR 423/12 at paras. 16(ff), 18 (especially para. 18).