Special Issue: *Plea Bargaining in Germany*

Plea Bargaining in Criminal Proceedings: Changes to Criminal Defense Counsel Practice as a Result of the German Constitutional Court Verdict of 19 March 2013?

By Alexander Schemmel, LL.M. (EUR),[*] Dr. Christian Corell,[**] & Dr. Natalie Richter[***]

A. Introduction

Numerous comments have already been published[1] on the verdict of the German Constitutional Court (BVerfG) of 19 March 2013 (2 BvR 2628/10, 2 BvR 2883/10, 2 BvR 2155/11) regarding the constitutionality of the legal regulations on plea bargaining in criminal proceedings under the central provision of § 257c of the (German Code of Criminal Procedure) (StPO).[2] The assessments range from perplexity,[3] "mixed, but with

[*] *Alexander Schemmel* is a lawyer and partner at Roxin Rechtsanwälte LLP.

[**] *Christian Corell* is a lawyer appointed at Roxin Rechtsanwälte LLP.

[***] *Natalie Richter* is currently post-graduate legal trainee at the Tübingen Regional Court. The authors are greatly in the debt of their colleague *Robin Leick* for his extensive and valuable support.

[1] Gerhard Fezer, *Vom (noch) verfassungsgemäßen Gesetz über den defizitären Vollzug zum verfassungswidrigen Zustand*, HÖCHSTRICHTERLICHE RECHTSPRECHUNG IM STAFRECHT [HRRS] 117 (2013), *available at* http://www.hrr-strafrecht.de/hrr/archiv/13-04/hrrs-4-13.pdf; Christoph Knauer, *Die Entscheidung des BVerfG zur strafprozessualen Verständigung—Paukenschlag oder Papiertiger?*, NEUE ZEITSCHRIFT FÜR STRAFRECHT [NStZ] 433, 435 (2013); Hans Kudlich, *Grenzen der Verfassungsgerichtsbarkeit—die Entscheidung des BVerfG zur strafprozessualen Verständigung*, NStZ 379 (2013); Hans Kudlich, *Die Entscheidung des Bundesverfassungsgerichts zu den strafprozessualen Absprachen—Konsequenzen für den Gesetzgeber?* ZEITSCHRIFT FÜR RECHTSPOLITIK (ZRP) 162 (2013) Andreas Mosbacher, *Praktische Auswirkungen der Entscheidung des BVerfG zur Verständigung*, NEUE ZEITSCHRIFT FÜR WIRTSCHAFTS-, STEUER- UND UNTERNEHMENSSTRAFRECHT [NZWiSt] 201 (2013); Carl-Friedrich Stuckenberg, *Entscheidungsbesprechung zur Verfassungsmäßigkeit der Verständigung im Strafverfahren*, ZEITSCHRIFT FÜR INTERNATIONALE STRAFRECHTSDOGMATIK [ZIS] 212 (2013), *available at* http://www.zis-online.com/dat/artikel/2013_4_748.pdf; Thomas Trück, *Strafprozessuale Verständigungen auf dem Prüfstand des BVerfG—mehr Fragen als Antworten*, ZEITSCHRIFT FÜR WIRTSCHAFTSSTRAFRECHT UND HAFTUNG IM UNTERNEHMEN [ZWH] 169 (2013).

[2] MEYER-GOßNER: STRAFPROZESSORDNUNG, § 257c marginal note 1 (2003); Carl-Friedrich Stuckenberg, *commentary in* LÖWE-ROSENBERG: DIE STRAFPROZESSORDNUNG UND DAS GERICHTSVERFASSUNGESETZ, § 257c marginal note 1 (Volker Erb et al. eds., 2013).

[3] Knauer, *supra* note 1, at 433.

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modestly auspicious overtones"[4] and "provisional legal security"[5] to agreement with the decision, although only "in the approach, but not in every point of the justification."[6]

The following article addresses whether the verdict has consequences for the day-to-day practice of criminal defense counsel. The field of appeal is another important aspect, especially in cases where procedural deals are insufficiently documented. The defense, however, generally only has recourse to remedies when procedural deals have failed. As a result of increased demands on the transparency of deals, the "fallibility" of agreements has grown and the susceptibility to appeals for infringements has been correspondingly exacerbated.[7] On one hand, new avenues of attack have opened up for criminal defense counsel, but on the other increased attention is required if the plea bargain is to withstand an appeal.

B. Criminal Procedure Development

Plea agreements in criminal proceedings have long been a matter for discussion in literature and judicial decisions[8] For example, numerous principles already date from decisions in the previous millennium. The proper course to be followed in plea bargaining was first accorded fundamental legal treatment in the landmark decision of the German Federal Court of Justice (BGH) in 1997.[9] The decision aimed to prevent procedural deals[10] that the BVerfG itself termed "trading in justice"[11] or "practice straying off course."[12] In that case, the Fourth Criminal Division established minimum conditions for a procedural agreement framework:

[4] Stuckenberg, *supra* note 1, at 218.

[5] Peters, rescriptum 131, 136 (2013).

[6] Mosbacher, *supra* note 1.

[7] Knauer regards this as the most decisive intervention in the system of the criminal procedure code by the BVerfG. Knauer, *supra* note 1, at 436. Kudlich speaks of far-reaching criminal procedure statements. Kudlich, *supra* note 1, at 381. Mosbacher discusses the most problematic and certainly momentous statements of the BVerfG. Mosbacher, *supra* note 1, at 205.

[8] Stuckenberg, *supra* note 2, § 257c marginal note. For a summary of the judicial rulings before the BVerfG verdict, see Folker Bittmann, *Übersicht über die Rechtsprechung zum Verständigungsgesetz seit 2010*, ZWH 260, 260 (2013).

[9] Bundesgerichtshof in Strafsachen [BGHSt] [Federal Court of Justice] Aug. 28, 1997, 195, 206.

[10] Stuckenberg, *supra* note 2, at marginal note 13. Describes the establishment of plea bargaining as a step backwards, which eliminated the achievements of the reformed criminal procedure in an unreflective manner.

[11] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Mar. 19, 2013, 2 BvR 2628/10, marginal note 74.

[12] Thomas Fischer, *commentary in* KARLSRUHER KOMMENTAR ZUR STRAFPROZESSORDNUNG, § 244 marginal note 30 (C.H. Beck ed., 2013).

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- there could not be any deal on a guilty verdict.
- the credibility of confessions had to be examined.
- all parties to the proceedings had to be involved.
- the result of the deal had to be disclosed and recorded.
- only a maximum sentence could be agreed upon.
- the agreed upon sentence limits could only be deviated from if grave new circumstances emerged incriminating the accused.
- the intended deviation had to be communicated at the main trial.
- the sentence had to be in conformity with the individual guilt.[13]

Due to the requirement that the sentence must conform with the individual guilt, coercing the accused to make a confession by threatening an excessive sentence or by promising a legal advantage is forbidden, as is pledging a milder sentence in return for the accused's promise to waive legal remedies or an agreement to waive legal remedies.[14] Moreover, even at that time the BGH set particular value on the procedural contents of deals and results not "occurring under the cover of secrecy and in the absence of control," as there may not be independent, informal proceedings that run "parallel to the trial, without being included in the latter."[15] The creation of a transparent plea bargaining culture through disclosure and recording of the main procedural processes had thus already been established long before the Plea Bargaining Act entered into force.

These conditions were intended to serve as guidelines for the way plea bargaining was handled in legal practice, but complaints very soon emerged in the specialist literature.[16] Despite the BGH ruling, waivers of legal remedies continued to be agreed to when the consequences were unclear.[17] Upon request by the Third Criminal Division, the Great Senate in Criminal Proceedings essentially confirmed the criteria listed above in 2005. It also appealed to the legislature to regulate both the general admissibility and the legal conditions and limits of sentence plea bargaining.[18]

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[13] Bundesgerichtshof in Strafsachen [BGHSt] [Federal Court of Justice] Mar. 03, 2005, 40, 47.

[14] Kai Ambos & Pamela Ziehn, *commentary in* STRAFPROZESSORDNUNG, § 257c marginal note 22 (Henning Radtke & Olaf Hohmann, eds., 2011); Stuckenberg, *supra* note 2, at marginal note 29 e.E., 73.

[15] Bundesgerichtshof in Strafsachen [BGHSt] [Federal Court of Justice], Aug. 28, 1997, 40, 47.

[16] Frank Saliger, *Absprachen im Strafprozess an den Grenzen der Rechtsfortbildung*, JURISTISCHE SCHULUNG [JuS] 8 (2006). Saliger's work is referring to: Hans-Joachim *Weider*, STRAFPROZESSUALE VERGLEICH 540 (2000); Peter *Rieß*, NSTZ 99 (2000); Thomas *Weigend*, *Eine Prozessordnung für abgesprochene Urteile*, NSTZ 57, 59 (1999).

[17] *Id.*

[18] Bundesgerichtshof in Strafsachen [BGHSt] [Federal Court of Justice] Mar. 03, 2005, 40, 63. *See also*, Gerd Pfeiffer & Rolf Hannich, *commentary in* KARLSRUHER KOMMENTAR ZUR STRAFPROZESSORDNUNG, marginal note 29h (C.H. Beck ed., 2008).

In addition, several empirical studies documented the need for statutory regulations because the outlook for the implementation of Supreme Court guidelines was poor. Specifically, plea bargaining continued to occur, for the most part, outside of trial.[19] According to a comprehensive study in 2007 by Karsten Altenhain, Ina Hagemeier, and Michael Haimerl, 95.5% of all those surveyed stated they had taken part in plea bargaining talks, especially in commercial criminal proceedings.[20] The procedural results were negotiated solely by the court, public prosecutor's office, and defense to the exclusion of the public, lay judges, and the accused and only later repeated and recorded in the courtroom.[21] Out of all of the presiding judges surveyed, 79.3% checked the so obtained "lean" confessions solely on the basis of the documents submitted to the court,[22] at most supplemented by other deeds and isolated queries directed to the accused.[23] By contract, examinations of witnesses and experts occurred only very seldom.[24] According to 57.7% of those surveyed, holding out the prospect of a mild sentence versus a severe one (*Sanktionsschere*) in court led accused parties who had initially shown little inclination to cooperate and disputed all charges, or at least remained silent, to give in and prefer a defense based on the level of the sentence.[25] Of the criminal defense counsel surveyed, 48% had doubts on factual or legal grounds regarding the accusation admitted to.[26] By contrast, 41.3% of the judges and public prosecutors surveyed had already agreed on one occasion to a sentence that in their view was too low,[27] as a result of which 57.5% of all those surveyed regarded the accused as the greatest beneficiaries of plea bargaining.[28]

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[19] Petra Velten, *commentary in* SYSTEMATISCHER KOMMENTAR ZUR STRAFPROZESSORDNUNG, §§ 257b–257c ff. marginal note 10 (2012).

[20] Karsten Altenhain, Ina Hagemeier & Michael Haimerl, *Die Vorschläge zur gesetzlichen Regelung der Urteilabsprachen im Lichte aktuelle rechstatsächlicher Erkentnisse*, NStZ 71, 72 (2007). For this study interviews were conducted with 142 lawyers specializing in commercial criminal law in the period from May to October 2005 on their experience with sentence plea bargaining. All the presiding judges of the Commercial Crime Courts in North Rhine Westphalia and 50 public prosecutors selected at random with commercial criminal law departments and specialist lawyers with experience in commercial criminal law. They were all surveyed in an anonymized form on plea bargain practice and in particular asked whether and to what extent the guidelines of the BGH had been implemented.

[21] Velten, *supra* note 19.

[22] Altenhain, Hagemeier & Haimerl, *supra* note 20, at 76, n.55

[23] *Id.* at 76

[24] *Id.*

[25] *Id.* at 73.

[26] *Id.* at 77.

[27] *Id.*

[28] *Id.* at 72.

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Although 81% of all those surveyed ultimately regarded plea bargaining as an indispensable tool in coping with commercial trials,[29] numerous regulatory drafts and four years went by before the German Bundestag passed the Act to Regulate Plea Bargaining in Criminal Proceedings on 29 July 2009, with effect from 4 August 2009. The Act adopted the principles established by the BGH in some respects in a stricter form, and in others in a weakened form.

For example, according to earlier judicial findings the court could only promise a maximum sentence, judges are now permitted to reach an agreement on this with the parties involved in the proceedings.[30] Based on this, § 257c(2) StPO opens up greater freedom in plea bargaining, as now not only the level of the sentence, but also "other measures related to the proceedings in the underlying findings proceedings and the process behavior of the parties involved in the proceedings" may be the subject of the deal.[31] Furthermore, according to § 257c(4) StPO, the court is expressly no longer bound to its promise in the event that the accused disregards the plea bargain. Restrictions were also introduced in § 257c(2) StPO, in contrast with the judicial findings of the BGH which had previously only prohibited deals on the non-imposition of preventive detention. All disciplinary and detention measures have now been ruled out as subjects for plea bargaining.

Considering suspended sentences, the new legal situation still makes it possible to negotiate not only individual conditions, but also the question of the sentence suspension itself, yet naturally only within the conditions of § 56 StGB.[32] Additionally, a confession was downgraded from the previous be-all and end-all of every plea bargain[33] to a "target condition" under § 257c (2) StPO.[34] To avoid "improper linkages,"[35] however, the court normally expects a confession for a plea bargain with legal consequences.[36] Furthermore, according to § 257c(3), sentence 4 StPO, the approval of the public prosecutor remains mandatory for a plea bargain to be effective.

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[29] *Id.*

[30] MEYER-GOSSNER: STRAFPROZESSORDNUNG, *supra* note 2, at marginal note 3.

[31] *Id.* at marginal note 13 f.

[32] *Id.* at marginal note 12; Gerwin Moldenhauer, *commentary in* WIRTSCHAFTSSTRAFRECHT 250 (Carsten Momsen, Thomas Grützner & Karsten Altenhain et. al. eds., 2013).

[33] MEYER-GOßNER: STRAFPROZESSORDNUNG, *supra* note 2, at marginal note 16; Moldenhauer, *supra* note 32, at 251; Pfeiffer & Hannich, *supra* note 18, Introduction, marginal note 29g.

[34] *See* Stuckenberg, *supra* note 2, at marginal note 38 f.

[35] DEUTSCHER BUNDESTAG: ENTWURF EINES GESETZES ZUR REGELUNG DER VERSTÄNDIGUNG IM STRAFVERFAHREN [BT] 16/11736, 11, *available at* http://dip21.bundestag.de/dip21/btd/16/123/1612310.pdf.

[36] MEYER-GOSSNER: STRAFPROZESSORDNUNG, *supra* note 2, at marginal note 16.

C. The Verdict of the BVerfG of 19 March 2013 (Case Nos. 2 BvR 2628/10, 2 BvR 2883/10, 2 BvR 2155/11)

On closer inspection, the Constitutional Court verdict on plea bargaining in criminal proceedings is no more than the attempt to create a mandatory commentary on § 257c StPO. The occasion and point of departure was a new study, this time commissioned especially for *Altenhain* on the practice of plea bargains in criminal proceedings.[37] According to the judges surveyed, 17.9% of criminal proceedings in local courts and 23% in regional courts, were settled by plea bargains and as a consequence the legal regulations were infringed in more than half of the proceedings.[38] Put in specific figures, 58.9% of the judges stated that they carried out over half of their plea bargains "informally", i.e. without applying § 257c StPO, while 26.7% even dispensed with applying § 257c StPO in all plea bargains. Thirty-three per cent of the judges entered into plea bargains outside of the trial and without later disclosure, 41.8% of the public prosecutors and 74.7% of the defense counsel confirmed such actions, study a significant proportion of those surveyed regarded disclosure as unnecessary formalism. The so-called negative test in § 273(1a), sentence 3 StPO was, thus, often disregarded in practice. Specifically, 54.5% of the judges surveyed considered an incomplete plea bargain as unworthy of mentioning and 46.7% did not even point out an actual underlying plea bargain in the reasons given for judgment, contrary to § 267(3), sentence 5 StPO.

Deal contents ruled out according to § 257c(2) StPO, such as a guilty verdict, are nevertheless partly included in plea bargains. Moreover, 61.7% of the judges stated that they always checked the credibility of confessions made following a plea bargain, 38.3% indicated "frequently", "sometimes", "seldom" or "never" in corresponding cases. Of those surveyed, 35.3 % even declared that besides the maximum sentence limit in a plea bargain, they had at least once mentioned a second sentence in the event of a disputed trial to the accused or his defense counsel. In an almost shocking manner 16% of those surveyed even typically acted in this way.

In contrast, resort to a legal remedy seldom occurred after a plea bargain. Of the judges surveyed, 14.7% declared in this context that, contrary to § 302(1) sentence 2 StPO, a waiver of legal remedies always occurred in their cases following a plea bargain, while 56.6% still recorded such a waiver occurred "frequently." As part of a deal, 16.4% of judges and 30.9% of public prosecutors had agreed to mild sentences in an inappropriate way. On

[37] 2 BvR 2628/10, marginal note 48. For this purpose a total of 190 judges in North Rhine Westphalia who dealt with criminal cases were surveyed of whom 117 worked as criminal court judges or presided over lay judges and of whom 73 presided in criminal divisions. As a control group, 68 public prosecutors and 76 criminal law specialist lawyers were surveyed.

[38] 2 BvR 2628/10, para. 49.

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the contrary, however, 30.3% of defense counsel also considered they had agreed to overly severe sentences in the past. Finally, the "sentence discount" that could be achieved through a plea bargain was between 25% and 33.3%.[39]

Based on this study, the BVerfG decision focuses on the most important open questions and points of criticism regarding plea bargain solutions. It highlights three constitutional complaints against convictions following plea bargains with the accused at the Berlin and Munich II Regional Courts. Two appellants had not been informed according to § 257c(5) StPO of the conditions and consequences of a deviation by the court from the plea bargain contents, the third appellant by contrast had made a formal confession confirming the terms of the charge after the disadvantages of a trial without a confession had been made clear to him. All of the accused were then admittedly convicted as agreed and the respective appeals rejected by the Federal Court of Justice,[40] but all appeal decisions were then set aside on account of the constitutional complaints.

In terms of content, however, the constitutional complaints were actually directed against the statutory regulation of plea bargaining itself. The Federal Constitutional Court has now selected all the aspects it considered to be important and initially dealt with considerations regarding the unconstitutionality of § 257c StPO in the reasons for its decision from marginal note 53. While emphasizing the unchanged outstanding importance of the individual guilt principle, the BVerfG also notes that:

> [T]he unconstitutionality of the statutory regulation of plea bargaining in criminal proceedings cannot be established at the current time. The legislature has only authorized plea bargaining in criminal proceedings within a narrow framework and endowed its regulatory concept with specific protective mechanisms, from which when interpreted and applied with the precision required it can be expected that the constitutional law requirements on the configuration of criminal proceedings will be fulfilled.[41]

Investigation of the material truth was especially important to the BVerfG in the context of the protective mechanisms mentioned, which is why, as a result of being tied to the clarification obligation from § 244(2) StPO, the institution of plea bargaining must be

[39] 2 BvR 2628/10, marginal note 49.

[40] BGH, BeckRS 2010, 27615; BGH, BeckRS 2010, 28945; BGH, BeckRS 2011, 22742.

[41] 2 BvR 2628/10, marginal note 64.

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rightly understood as an integral element of the prevailing criminal procedure system. Consequently, it was not enough:

> [T]o check the plea bargain-based confession merely by reference to the documents submitted to the court, since this did not represent an adequate basis for the formation of its conviction required by the very concept of the trial and precisely with such an approach allowance could not be made for the transparency concern of the Plea Bargaining Act and facilitating effective control of verdicts based on plea bargains.[42]

The BVerfG does not only consider it to be acceptable that, as a result, the practicability, as well as the associated field of application and frequency of plea bargaining is restricted. It even regards the restriction to be indispensable for the compatibility of plea bargains with the principles of the court's obligation ex officio to investigate the facts and also for the formation of the judges' convictions. Besides the prohibition on plea bargain-based shifting of the range of sentences according to § 257c(2) sentence 1 StPO, the BVerfG also emphasized the inadmissibility and recording obligation of informal agreements outside of the statutory framework with reference to § 257c(1), sentence 1 StPO. The BVerfG then also determined the absence of binding force or establishment of trust of public prosecutor promises to halt other pending investigation proceedings.[43]

Transparency and documentation obligations for discussions between the court and the parties involved in the proceedings are then addressed. Apart from purely organizational arrangements, all discussions subject to the "communication" according to § 243(4) StPO in the trial can also be understood as preparation for plea bargaining. At any rate this includes all questions of the effect of procedural behaviour on the result of the proceedings and, as a result, the sentence expectations.

> [T]he guarantee of a "complete" control of verdicts based on plea bargains requires . . . comprehensive transparency of the plea bargaining process in the public trial and complete documentation in the minutes of the trial. Accordingly, the wording of the standards, the system of the regulatory concept and the materials make it unmistakeably clear that the legislature considers plea bargaining to be admissible only if the

[42] 2 BvR 2628/10, marginal note 71.

[43] 2 BvR 2628/10, marginal note 75.

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> transparency and documentation obligations are observed. Consequently, the statutory regulatory concept must be understood as an indivisible unity of permission and restriction of content of plea bargaining with simultaneous fencing in by communication, instruction and documentation obligations. . . . The regulations on transparency of plea bargaining in the public trial, its documentation and permitting effective control, also by the court of appeal, form the heart of the regulatory concept. Hence infringement of the transparency and documentation obligations on principle result in the unlawfulness of a plea bargain nevertheless entered into. If the court adheres to such an unlawful plea bargain, it will normally not be possible to exclude the verdict being founded on this statutory infringement, since the plea bargain on which the verdict is based is in its turn tainted by a statutory infringement.[44]

Infringement of the instruction obligation is likewise subject to appeal under § 257c(5) StPO, because confessions are regularly based on such procedural defects. Against the backdrop of providing an incentive for the accused to receive a binding court promise of a maximum sentence, the Constitutional Court made clear:

> [A]llowance should be made for the associated threat to the freedom not to incriminate oneself, among other things by instruction according to § 257c(5) StPO. Consequently, in the event of an infringement of the instruction obligation, one may regularly assume that in the context of the appeal court examination that the confession and as a result also the verdict is based on omitting the instruction. It will only be possible to deny that the [verdict is based on a statutory infringement] if the accused would also have made the confession in the event of proper instruction.[45]

Only through a positive answer to the question regarding the verdict being based on a statutory infringement it can be guaranteed that the documentation, transparency and instruction obligation have their intended effect. At first the following passage contains a

[44] 2 BvR 2628/10, marginal note 96 f.

[45] 2 BvR 2628/10, marginal note 99.

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very clear decisive finding from the constitutional law point of view on the Plea Bargaining Act. However several relativizations are made in the subsequent explanatory passages with regard to the future of the practical application of the law:

> The Plea Bargaining Act is compatible with the constitution. It does not rule out plea bargaining in criminal proceedings as such. The legislature took adequate precautions to guarantee that plea bargaining adheres to the constitutional requirements in criminal proceedings.[46] . . . The currently highly defective execution of the Plea Bargaining Act has not currently led to the unconstitutionality of the statutory regulation.[47]

This was because:

> [A] statutory regulation which was infringed in an unconstitutional manner of the practical application of the law only infringed the constitution if the unconstitutional practice was attributable to the regulation itself, being therefore expression of a structural normative deficit leading to this practice. Such a deficit cannot be already be detected in this connection by the fact that the legislature permitted verdict-related plea bargaining in the first place, which has proven dangerous through its basic structure to realisation of the principle of individual guilt.[48]

In the absence of a current structural regulatory deficit, the BVerfG considered the responsibility for the lack of clarity and confusion surrounding plea bargaining to be due to a wide-ranging, almost historically deducible deficit in execution. In this context the legislature was exonerated from all responsibility for the practice of informal deals that was established in the last 30 years,[49] but the legislature was not exactly given a *carte blanche* for future developments. Instead, the legislature was urged:

[46] 2 BvR 2628/10 marginal note 100.

[47] 2 BvR 2628/10 marginal note 116.

[48] 2 BvR 2628/10 marginal note 118.

[49] 2 BvR 2628/10 marginal note 119.

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> [To] keep an eye on future developments. Should judicial practice continue to disregard statutory regulations to a considerable extent and should the material and procedural precautions of the Plea Bargaining Act be insufficient to eliminate the deficit in execution determined and fulfil the constitutional law requirements applicable to plea bargaining in criminal proceedings, the legislature must counteract the defective development by suitable measures.[50]

As if this admonishment were not clear enough, the constitutional guardians concluded with an unmistakable warning that otherwise judicial actions may be found unconstitutional. Overall, Germany's highest court secured a hardly courageous, but possibly valuable postponement. In other words, by diagnosing no current requirement for legislative action, but also no need for a final decision of its own, the Court opened up wider room for future reactions.

D. Defense Counsel Practice

I. Advantages and Risks of Plea Bargaining

Procedural deals have several advantages for the defense. Undoubtedly securing a "favorable" result for the client constitutes the core benefit.[51] In addition, plea bargaining has the advantage of saving time, avoiding unnecessary procedural complications, and separating disputed issues from undisputed issues.[52] Moreover, the defense obtains a certain degree of control over the legal consequences of the proceedings with a result that can usually be less harmful than what the accused feared.[53] This leads to positive consequences for the economic, social, and psychological status of the client that should not be underestimated.[54] Conversely, plea bargaining also contains risks and challenges that have to be known and overcome.[55]

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[50] 2 BvR 2628/10 marginal note 121.

[51] Alexander Ignor, Holger Matt, Gunter Weider, *commentary in* MÜNCHENER ANWALTSHANDBUCH STRAFVERTEIDIGUNG § 13 marginal note 32 (Widmaier et. al. eds., 2006).

[52] *Id.*

[53] Ulriche Sommer, *Der moderne Strafverteidiger und die neuen Deal-Strategien*, DEUTSCHER ANWALT VEREIN [ANWBL] 197 (2010).

[54] Helmut Satzger, *commentary in* HANDBUCH DES FACHANWALTS STRAFRECHT pt. 8 ch. 3 marginal note 5 (Jan Bockemühl ed., 2009).

[55] Armin von Döllen**,** *commentary in* WIRTSCHAFTSSTRAFRECHT 280f (Carsten Momsen et. al. eds., 2013).

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Plea bargaining, in practice, is influenced by communication psychology factors.[56] Therefore the selection of a suitable communication strategy for the defense counsel has a decisive effect on the further course of the proceedings. For example, if he wishes to secure an acquittal, discussions with the court or public prosecutor that indicate readiness to cooperate and an associated admission of guilt should be avoided.[57] The greatest risk in plea bargaining lies in the premature realization of a supposed favorable result while giving away other defense options,[58] often based on various external applications of pressure by the law enforcement bodies and/or especially critical client situations.[59]

Plea bargaining also frequently fails because of promises that cannot be kept by judicial bodies in return for confessions made in advance.[60] Fortunately, § 257c(4) sentence 3 StPO expressly specifies[61] that advance confessions which fail to meet their purpose cannot be used and establishes an obligation to provide information on all deviations from the result stated in (5). Furthermore, the institution of plea bargaining leads public prosecutors increasingly into the temptation to engage in so-called "overcharging," i.e. expanding the charges excessively and/or the level of the sentence in order only to return in the event of a plea bargain—in a seemingly conciliatory manner—to what was in any case the only appropriate level.[62]

Finally, defense counsel themselves are exposed to prosecution risks. The primary risk to mention is preventing execution of a sentence under § 258 of the German Criminal Code (StGB).[63] According to the ruling of the BVerfG and BGH, defense counsels are to be regarded not just as counsels of the accused, but also as an independent body of the administration of justice. For this reason strictly speaking they would not even be authorized to institute a deal leading to the actual facts being obscured.[64] Consequently,

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[56] *See* HANS DAHS, HANDBUCH DES STRAFVERTEIDIGERS, marginal note 296 (2005). *See generally*, Alfred Dierlamm, *commentary in* HANDBUCH DES WIRTSCHAFTS- UND STEUERSTRAFRECHTS 1700 (Heinz-Bernd Wabnitz & Thomas Janovsky eds., 2007).

[57] Sommer, *supra* note 53, at 198.

[58] Ignor, Matt, & Weider, *supra* note 51, § 13 marginal note 36.

[59] *Id.* at marginal note 37.

[60] *Id.* at marginal note 49.

[61] *See* Velten, *supra* note 19, § 257c marginal note 48 f (calling for generalization).

[62] Ignor, Matt, & Weider, *supra* note 51, § 13 marginal note 46; Hans-Joachim Weider, STRAFVERTEIDIGER FORUM (STRAFO) 406, 408 (2003).

[63] Fischer, ZEITUNG FÜR RECHTSPOLITIK (ZRP) 249, 251 (2009).

[64] Annika Diessner, *Der Deal nach alter Schule im Lichte des Verständigungsgesetzes—eine strafrechtliche Risikoanalyse*, STRAFVERTEIDIGER 43, 48 (2011); *See also* Imme Roxin, *commentary in* BECK'SCHES

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liability of the defense counsel is quite possible, but not if he merely fails to point out to the court or the public prosecutor that the offer is too lenient. In this case he has to rely on the duty of confidentiality incumbent on him.[65] In addition, liability for betrayal of a client under § 356 StGB is conceivable even if the subjective conditions of the offense will in most cases probably be absent.[66] Punishment for participation or attempted participation in perverting the course of justice according to § 339 StGB is equally conceivable.[67]

Ultimately, especially in commercial criminal law, the defense counsel is almost like a business advisor in legal questions.[68] The defense counsel must anticipate a profit and loss account for his client[69] because the risk of a disadvantageous result in plea bargaining is just as omnipresent as missed opportunities in the event of failing to engage in plea bargaining. A wrong decision, or even just a decision that the client feels to be wrong, can and will therefore have a very negative effect on the future relationship between defense counsel and the client,[70] which is why it is necessary to provide both skillful as well as credible representation .[71] On the merits, there are other options apart from providing a confession: above all striving to achieve a perpetrator-victim settlement, but also offering clarification aid on associated offenses or striving to obtain a quick, dispute-free trial.[72]

RECHTSANWALTSHANDBUCH, § 52 marginal note 54 (Hans-Ulrich Büchting & Benno Heussen eds., 2011). For more on the aspect of collusion, see generally Bundesgerichtshof in Strafsachen [BGHSt] [Federal Court of Justice] Sept. 1, 1992, 345, 348.

[65] Diessner, *supra* note 64.

[66] *Id.* at 48 f.

[67] Reinhold Schlothauer & Hans-Joachim Weider, *Das Gesetz zur Regelung der Verständigung im Strafverfahren*, STRAFVERTEIDIGER 600, 606 (2009); *see also* Stefan Kirsch, *Die gesetzliche Regelung der Verständigung im* Strafverfahren, STRAFVERTEIDIGER FORUM [STRAFO] 96, 101 (2010).

[68] Not without reason, Stuckenberg speaks of "haggling luck" and refers to Kant's *Metaphysik der Sitten, Metaphysische Anfangsgründe der Rechtslehre*, which warns against giving away justice for any old price. *See Stuckenberg*, supra note 2, at marginal notes 3, 9; *See also,* IMMANUEL KANT, METAPHYSIK DER SITTEN, METAPHYSISCHE ANFANGSGRÜNDE DER RECHTSLEHRE (1798).

[69] Dierlamm, *supra* note 56, at 1685.

[70] Ignor, Matt, & Weider, *supra* note 51, § 13 marginal note 54 f; Pfeiffer & Hannich, *supra* note 18, at marginal note 29i. These articles justifiably deal with civil law claims to damages.

[71] DAHS, *supra* note 56, at marginal note 497.

[72] Sommer, *supra* note 53, at 199.

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II. Effects of the Constitutional Court Verdict

1. Subjects Excluded from Plea Bargaining

However, the BVerfG expressly rules out particular legal consequences and promises as the subject of deals. For example, according to § 257c(2), sentence 1 StPO, shifting the range of sentences may not be the subject of plea bargaining if it applies to cases that are legally classified as serious or less serious than the average case.[73] To be precise, the concept of "legal consequence" employed in § 257c(2) sentence 1 StPO cannot also be expanded to shifts in the range of sentences after a comprehensive evaluation of the regulatory concept of the Plea Bargaining Act,[74] though the inclusion of unspecified shifts in the range of sentences are considered.[75] Although the question of a shift in the range of sentences due to a less or especially serious case actually involves the sentence attribution and as a result "legal consequences,"[76] special range of sentences are an expression of the wrongfulness and individual guilt content according to the BVerfG, which the legislature assigns to conduct subject to punishment.[77] When examining if a special range of sentence is applicable, a confession of the accused naturally must be taken into account[78] and moreover the courts effectively remain at liberty to hold out the prospect of a punishment that can only be justified on the assumption of a less serious case.[79] Consequently, shifts in the range of sentences in the event of plea bargains are not generally prohibited. It must certainly be made clear though, that the acceptance of shifts in the range of sentences cannot be due to plea bargains.[80]

In addition, promises made by the public prosecutor to drop other investigative proceedings pending by way of so-called "package deals" are ruled out under § 154(1) StPO. They do not have any binding effect and cannot establish any agreement worthy of protection that would result in an overall criminal procedure solution for the client. The wording of § 257c(2) StPO only permits the underlying findings proceedings; inclusion of other proceedings is not covered by the court of decision and are inadmissible.[81]

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[73] 2 BvR 2628/10, marginal note 74.

[74] *Id.*

[75] Trück, *supra* note 1, at 172.

[76] Mosbacher, *supra* note 1, at 203.

[77] BvR 2628/10, marginal note 74.

[78] Knauer, *supra* note 1, at 435; Mosbacher, *supra* note 1, at 203; Trück, *supra* note 1, at 172.

[79] Kudlich, *supra* note 1, at 380.

[80] *Cf.* Mosbacher, *supra* note 1, at 203.

[81] 2 BvR 2628/10, marginal note 79.

By contrast, the defense aspires to a clarification of the overall allegations in a deal in order to obtain legal security for the client and maximum "quantity discount." Of course, following the decision of the Constitutional Court achieving this ambitious goal is highly dubious.

Since the BVerfG expressly referred to legislative materials, there is reason to believe that promises made by the public prosecutor are permitted.[82] To be specific, the BVerfG states that promises to drop proceedings according to § 154 StPO are not ruled out in the context of the public prosecutor's power to handle cases in other pending investigation proceedings.[83] Consequently, such promises of the public prosecutor do not have any binding effect because they are not the subject of the plea bargain and therefore cannot be binding. However, they are not generally inadmissible;[84] after all, the public prosecutor can refrain from prosecuting an offense according to § 154(1) StPO in any case. After a charge has been brought, the court of decision can only drop the charge according to the clear wording of § 154(2) StPO on application of the public prosecutor, because then the court lacks jurisdiction and also the possibility of a deal in third cases.[85]

Consequently, in commercial criminal law, the especially attractive "overall solution" with the public prosecutor—who in any case is the first point of contact for plea bargains—still remains possible. However, it must be borne in mind that no binding effect arises from promises of the public prosecutor's office, and no agreement worthy of legal protection.[86]

2. Method of Procedure of Criminal Defense Counsel

Due to the mandatory approval requirement, legislators and the Constitutional Court assign an active role to the public prosecutor's office in terms of the monitoring of plea bargaining.[87] The emphasis on the participation of public prosecution in plea bargaining is doubtlessly justified from a legal theory perspective. However, with this finding that only seems to be substantial, the Constitutional Court misjudges the current legal practice of lower courts. In the vast majority of cases suited to plea bargaining, the criminal defense

[82] Mosbacher, *supra* note 1, at 204.

[83] DEUTSCHER BUNDESTAG: ENTWURF EINES GESETZES ZUR REGELUNG DER VERSTÄNDIGUNG IM STRAFVERFAHREN [BT] 16/12310, 13 *available at* http://dip21.bundestag.de/dip21/btd/16/123/1612310.pdf.

[84] Mosbacher, *supra* note 1, at 204.

[85] *Accord* Knauer, *supra* note 1, at 435. This view is supported by Velten among others, admittedly based on the legal position before March 2013. *See* Velten, *supra* note 19, at marginal note 3, 30.

[86] Trück, *supra* note 1, at 173.

[87] 2 BvR 2628/10, marginal note 91.

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counsel contacts, namely, the public prosecutor's office as so-called "master of the preliminary or investigative proceedings" in the investigative proceedings phase in any case.[88]

In the course of the plea bargain itself, the criminal defense counsel must take account of numerous formal requirements both for the desired subsequent adherence to the agreement, as well as for any intended appeal. On the one hand, the agreement is only appeal-proof if the comprehensive documentation and transparency duties are met, but on the other hand, any error occurring opens a door for an appeal if the plea bargaining should fail.

The BVerfG differentiates here between two scenarios. In the main proceedings, pursuant to § 243(4) StPO, there is a notification duty for discussions preparing plea bargains as soon as the options and circumstances of plea bargains are discussed explicitly or even implicitly when, typically, proceedings-related conduct is brought into connection with the results of proceedings, opening up the area of "anticipated punishment."[89] In accordance with § 243(4) sentence 1 StPO, the chairman notifies those present at the start of the main proceedings, after having read through the files, whether preliminary discussions were held with the parties involved in the proceedings, in particular who posed the question of a plea bargain and who adopted which stances in the matter.[90] Moreover, in accordance with § 273(1a) sentence 2 StPO, the notifications concerning discussions about plea bargains prescribed in § 243(4) StPO are to be noted in the record so the fact that they have been held can be verified in the main proceedings. In the case of extensive preliminary discussions, it is even advisable to provide the parties with supplementary notes to be read out in the main proceedings to document recollections of the content of the discussions deviating from that already recorded.[91] Through the significant enhancement of information and documentation duties and the associated exclusion of all informal agreements,[92] there are feelings of hope or of dread for a drastic reduction in plea bargains, depending on the perspective and interest of the party concerned.[93]

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[88] Dieter Dölling, *commentary in* GESAMTES STRAFRECHT, preamble to § 1 StPO, marginal note 25 (Dieter Dölling, Gunnar Duttge & Dieter Rössner eds., 2011).

[89] 2 BvR 2628/10, marginal note 85.

[90] Knauer, *supra* note 1, at 436; Mosbacher, *supra* note 1, at 205.

[91] Mosbacher, *supra* note 1, at 205.

[92] 2 BvR 2628/10, marginal note 75, 90, 115. *See also*, Stuckenberg, *supra* note 2, at marginal note 77 (prior to March 2013).

[93] Knauer, *supra* note 1, at 436. *See also*, Trück, *supra* note 1, at 172 (highlighting a contradiction to § 257b stop).

By contrast, those discussions that exclusively organize the main proceedings,[94] which may of course address the issue of the date of the proceedings, are not subject to mandatory notification in accordance with § 243(4) StPO. Due to the dependence on the length of the proceedings and thereby the number of dates for the main proceedings on materially legal and evidence-specific aspects, the defense counsel continues to have the option—via the "back door" as it were—to de facto negotiate in a manner similar to plea bargaining beyond the more stringent formal requirements.

According to the BVerfG the Plea Bargaining Act constitutes a conclusive regulation basis for the reliability of plea bargains in criminal proceedings.[95] Therefore conversely, plea bargains agreeing to a certain result outside the main proceedings in the case of concrete procedural conduct are illegal.[96] The invalidity of the waiver of appeal on the basis of a deliberate, informal agreement[97] is also supported by the statement issued by the Constitutional Court. It states that an effective waiver of appeal is also excluded in cases where the parties involved have come to a plea bargain in violation of the relevant statutory regulations.[98] The relative disadvantage arising from this for the criminal defense counsel would seem to have to be accepted in accordance with the statutory ruling on this endorsed by the BVerfG, whereas the noting in the record of illegal plea bargaining demanded in accordance with the decisions passed down by the Constitutional Court remains totally unclear as according to the fundamental principle of criminal proceedings practiced hitherto only such items could be noted in the minutes as were also the object of the main proceedings.[99]

An agreement-based confession now must be imperatively examined for correctness through the collection of evidence in the main proceedings,[100] whereas mere comparison with the details on file, formal confessions,[101] and evidence collected for "show" ought to be a thing of the past.[102] However, mandatory interrogation duties for prime defense and

[94] 2 BvR 2628/10, marginal note 84.

[95] *Id.* at marginal note 75.

[96] Mosbacher, *supra* note 1, at 205.

[97] Kudlich, *supra* note 1, at 381.

[98] 2 BvR 2628/10, marginal note 78.

[99] Likewise Knauer, *supra* note 1, at 435; Mosbacher, *supra* note 1, at 204.

[100] 2 BvR 2628/10, marginal note 71. The trend was already evident prior to the Constitutional Court decision. *Cf.* Ambos & Ziehn, *supra* note 14, at marginal note 22.

[101] 2 BvR 2628/10, marginal note 70 f., 129.

[102] Knauer, *supra* note 1, at 435; likewise, *See also*, Stuckenberg, *supra* note 2, at marginal note 10, 41 (prior to March 2013).

prosecution witnesses in confession cases cannot be derived from § 244(2) StPO even in disputed proceedings. For this reason, statement-related psychological consideration of an agreed confession and, if necessary, the collection of evidence kept to a minimum, ought to suffice.[103] Otherwise one advantage for plea bargain offers would be lost virtually in full: namely the time and cost savings for the client. Lawyers' fees are constantly increasing for business crime-related legal services and are currently on average 384 euros for partner hours and 276 euros for associate hours.[104]

3. Appeal

The actual changes occurring by way of the verdict open up further areas of attack for judicial complaint in accordance with § 344(2) sentence 2 StPO. Plea bargain-based decisions with shifts in the punishment framework or inadequately verified confessions can now be appealed, but even more importantly, the enhanced transparency requirements constitute sources of error.[105] By its statements on the appeal options for plea bargain-related errors, the BVerfG goes much further than the case law, and forces lower courts[106] to adhere to the notification, documentation, recording and instructional duties laid down while at the same time opening up new opportunities for the defense. In this connection, three scenarios are possible: (1) the missing notification and recording of a successful plea bargain, (2) a failed plea bargain, and (3) missing instructions in accordance with § 257c(5) StPO.

3.1

Violation of the transparency and documentation duties for the record of the main proceedings principally results in the illegality of the plea bargain.[107] If the court nevertheless acts according to the illegal plea bargain, it cannot generally be ruled out that the verdict is "tainted".[108] The duties mentioned are provided with particularly strong protection and assume virtually absolute status as grounds of appeal.[109] In line with the previous BGH rulings, there is no reason to suppose irrefutably that holding the verdict in

[103] Trück, *supra* note 1, at 170, 171; Ambos & Ziehn, *supra* note 14, at marginal note 17, n.69, marginal note 22, n.85; Stuckenberg, *supra* note 2, at marginal note 23.

[104] JUVE RECHTSMARKT, Feb. 2013, at 62.

[105] *Cf.* Mosbacher, *supra* note 1, at 206.

[106] According to Mosbacher, the "necessary assertiveness" ought to be assured in practice. *See* Mosbacher, *supra* note 1, at 206.

[107] 2 BvR 2628/10, marginal note 96 f.

[108] *Id.* at marginal note 97.

[109] Knauer, *supra* note 1, at 436; Mosbacher, *supra* note 1, at 206; Stuckenberg, *supra* note 1, at 216.

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abeyance cannot be ruled out in the case of the violation of § 243(4), sentence 1 StPO. Even if standard procedure clearly serves to create transparency, according to the BGH, it does not generate an impact comparable with that of absolute grounds of appeal.[110] Should no plea bargain be reached, the recording duty loses its ongoing significance as the main proceedings continue and abeyance becomes increasingly unlikely.[111]

The BVerfG nevertheless justifies its deviation from the previous case law with a simple reference to the legislative decision to only allow plea bargains subject to compliance with transparency and documentation duties and to consider the statutory regulation concept as an "inseparable unit comprising the facilitation and content-related limitation of plea bargains as well as their simultaneous restriction by way of notification, instructional and documentation duties."[112] Consequently, each violation of individual provisions would then have an effect on the plea bargain as a whole.[113] This would disregard the fact that it is correctly a matter of whether an error may have actually affected the verdict content and whether this potential "holding in abeyance" can be established in concrete terms. Alternatively, the legal difference between absolute and relative grounds of appeal would be undermined on the basis of the ruling handed down by the Constitutional Court.[114]

3.2

Even after a failed plea bargain with the associated lack of negative notification under § 243(4) sentence 1 StPO, or negative test under § 273(1a) sentence 3 StPO, the Constitutional Court would generally wish to accept holding the verdict in abeyance due to violation of § 257c StPO[115] and only grant an exceptional case subject to the definite lack of deal discussions. Only in this way could verdicts based on illegal, informal agreements or their preparation be ruled out.[116]

The BVerfG faces justified opposition for two reasons. First, the formally almost unanswerable question about the basic right violated by the missing negative test has to

[110] Bundesgerichtshof [BGH] [Federal Court of Justice] Oct. 20, 2010, NStZ 2011, 592 at 593.

[111] Bittmann, *supra* note 8, at 265.

[112] 2 BvR 2628/10, marginal note 96.

[113] Mosbacher, *supra* note 1, at 205 f.

[114] Stuckenberg, *supra* note 1, at 215.

[115] In accordance with 2 BvR 2628/10, marginal note 78, an incorrect negative test may be a punishable offence in accordance with § 348 StGB. Stuckenberg considers this to be doubtful as the record of the proceedings is no official document and therefore has no evidential value for or against anyone as § 274 StPO only applies to appeal proceedings. *Id*. Kudlich, *supra* note 1, at 381 (referring also to § 339 StGB).

[116] 2 BvR 2628/10, marginal note 98.

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be asked as the examination competence of the Constitutional Court is only activated in such case.[117] Secondly, the case law does not recognize any grounds of appeal for recording defects or even the total absence of a record.[118] These two reasons can be based on the following arguments: In view of the function a record has for the court of appeal, the creation of a new record complaint based on constitutional law as purely agreement-related and virtually absolute grounds of appeal are incompatible with the specific system and the system as a whole.[119] The purpose under appeal law of a record of the proceedings is, according to § 273(1) StPO, merely to verify the course, results, and primary formalities of the main proceedings and to note down the written submissions read out, the applications submitted, the decisions made and the wording of the verdict. As such, defects in the proceedings themselves suitable for lodging a complaint can be obtained from the record, but purely record-related inadequacies, by contrast, only result in either the full or partial invalidation of the legal evidential value. Consequentially, they must remain inaccessible to the complaint.[120]

3.3

Furthermore, in the case of a breach of the obligation to warn the defendant under § 257c(5) StPO, the Constitutional Court regularly assumes that the confessions and rulings are based on the omission.[121] A plea bargain without such a warning therefore results in a breach of the right to a fair trial and the freedom from self-incrimination.[122] The aim of the provision is to make defendants aware of the danger of unfavorable judicial deviations from predicted results despite the provision of a confession. Dependence can therefore only be negated if the defendant confessed without any doubt following a proper warning.[123]

Contrary to the opinion of the BVerfG, however, no dependence can regularly be assumed, at least when the court adheres to the content of the agreement,[124] because it is logically impossible for the missing clue to develop into a decisive reversible failure due to an eventuality which never occurred.

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[117] Stuckenberg, *supra* note 1, at 216.

[118] *See* Bundesgerichtshof [BGH] [Federal Court of Justice] Jan. 2, 1955, [BGHST] 7, 162 (established case law).

[119] *Cf.* Stuckenberg, *supra* note 1, at 216.

[120] Stuckenberg, *supra* note 2, § 271 marginal note 77.

[121] According to Mosbacher, this must also be seen in the context of the "inseparable unity" of formal obligations and settlement. *See* Mosbacher, *supra* note 1, at 206.

[122] 2 BvR 2628/10, marginal note 124, 127.

[123] *Id.* at marginal note 99.

[124] Kudlich, *supra* note 1, at 381 (including in comparison to § 136 (1), sentence 2 StPO et al.).

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4. Peculiarities in Commercial Criminal Law

In commercial criminal law, economic judicial aspects such as overloading the criminal justice system and high procedural costs often[125] lead to mutual plea bargains.[126] In major cases in particular, the judicial system is increasingly accepting settlements in order to avoid virtual long-term blockages in commercial criminal courts and commercial criminal court sections or departments of public prosecutor's offices.[127] The interpretation of the Plea Bargaining Act by the BVerfG therefore leads to major practical difficulties and bottlenecks. In laborious procedures, the verification of the confession by gathering evidence in the trial represents such a major effort that the procedural benefits of a confession no longer apply,[128] even though the BVerfG implicitly cites procedural simplification as the goal of § 257c StPO.[129]

The increased demands of evidence collection and the lack of a binding effect of "package deals" therefore significantly complicate the settlement process in commercial criminal law. The significantly-tightened situation can therefore hardly be overcome without multiplying judicial resources because, from a judicial perspective, a settlement is almost useless if the time required is not significantly reduced[130] because the disputable procedures have the same requirements for clarification.[131]

E. Conclusion

The ruling has not resulted in any extensive practical changes in criminal defense; settlements remain possible. However, the increased requirements of evidence collection in the event of a confession mean that the preparation effort required from the defender for file processing, determining the truth, and the production of evidence increases. The result is, in part, a situation which is hardly different from the dispute proceedings

[125] MICHAEL TSAMBIKAKIS & JOACHIM KRETSCHMER, *commentary in* WIRTSCHAFTSSTRAFRECHT IN DER PRAXIS, 1056 (Marcus Böttger ed., 2011).

[126] JOSEPHINE SCHARNBERG, DIE ABSPRACHE IM STRAFVERFAHREN—HISTORISCHE ENTWICKLUNG, HEUTIGER DISKUSSIONSSTAND UND ENTWÜRFE ZU EINER GESETZLICHEN REGELUNG, 31 (2010).

[127] For acceleration and eliminatory effects, see also Ambos & Ziehn, *supra* note 14, at marginal note 17; Huber, NStZ 530, 533 (1996); Armin von Döllen, *commentary in* WIRTSCHAFTSSTRAFRECHT, 280 (Carsten Momsen & Thomas Grützner eds., 2013).

[128] *See also* Knauer, *supra* note 1, at 435; Kudlich, *supra* note 1, at 380.

[129] Stuckenberg, *supra* note 1, at 216.

[130] *Id.* at 215.

[131] Kudlich, *supra* note 1, at 380.

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although for the clients the advantages of legal certainty and calculability—much more important than the financial savings—remain, as do the level of the custodial and monetary punishments. Even if the procedural efficiency purpose of a plea bargain is significantly reduced, the panels of judges still retain certain advantages. Due to the significantly-higher level of legal protection in settlements, the effort in drafting a ruling is significantly less because both the prosecution and defense will not appeal in the event of the concurrence of the final result of the settlement.

Overall, the ruling of the highest German court fits in seamlessly with the now multi-faceted chain of attempts by legislation, jurisprudence and literature to resolve the conflict between practical necessities resulting from the extreme overloading of the justice system and the traditional, particularly valuable rules of thumb of the criminal justice system.[132] It therefore remains to be hoped that the now even constitutionally-established clarifications of the Plea Bargaining Act do not drive agreements into virtual insignificance, but rather lead to a suitable handling of the practical approach to settlements that avoids juridical violation.

[132] Overview also in WERNER BEULKE, STRAFPROZESSRECHT, marginal note 15 (2010).

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