Special Issue: *Plea Bargaining in Germany*

The Decision of the Federal Constitutional Court of 19 March 2013 on Plea Agreements

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A. Introduction

The much–awaited ruling of 19 March 2013 by the German Federal Constitutional Court is of great importance to the forensic practice. The Court ruled on the constitutional appraisal of the provisions on plea agreements in criminal procedures.[1] The decision is basically convincing but not in every point of its arguments. Certain conclusions of the Federal Constitutional Court are particularly problematic because they alter the preceding legal situation substantially and have an extensive effect on the appraisal of appeal law.

B. Core Proposition of the Decision

Apart from the debate about the sensibility of plea agreements in criminal cases, one has to agree with the Federal Constitutional Court that the democratically constituted legislature principally cannot be constitutionally refused to permit plea agreements.[2] The Federal Constitutional Court also argues convincingly that such a provision has to meet certain requirements to avoid running into conflict with basic constitutional decisions, in particular the rule of guilt and the rule of law in its different forms.[3] It finds these requirements to be protected by the Act on Plea Agreements.[4] Although it deplores the fact that infringements against the revision of this act are not uncommon in practice,[5] the Court believes this does not lead to the provisions being unconstitutional because this

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[1] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvR 2628/10 (Mar. 19, 2013) [hereinafter *Mar. 19, 2013 Decision*].

[2] *Id.* marginal no. 107.

[3] *Id*. marginal no. 102ff.

[4] *Id.* marginal no. 108ff.

[5] *Id.* marginal no. 117.

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practice does not reflect the shortcomings of fundamental regulations.[6] Nevertheless, the legislator is forced to keep a close eye on further developments and to react to a possibly undesirable development in the practice by taking appropriate measures.[7] Unless this is done, an unconstitutional state could follow as a consequence.[8]

C. The Constitutional Law Should Mandate a "Specifying Interpretation"

From the Federal Constitutional Court's perspective, the regulations of the Act on Plea Agreements are compatible with Basic Law and there is no reason to interpret them in accordance with the constitution.[9] In order for the Act on Plea Agreements to comply with the constitutional guidelines, the legislature accepted plea agreements to a limited extent and provided the control scheme with specific protective mechanisms. The "compelling specifying interpretation and application" support the prospect that the constitutional requirements for the arrangement of the trial will be fulfilled.[10] On this basis, the Federal Constitutional Court makes a number of determinations on how, from its standpoint, the new regulations introduced into the Code of Criminal Procedure (*Strafprozessordnung*) (StPO) should be interpreted. The revisions of the Act on Plea Agreements specifically undergo a detailed examination[11] on the basis of fundamental considerations for the interpretative methods,[12] which leads to many—sometimes surprising—results. It is not completely clear on what constitutional basis and by which constitutional legitimization the Federal Constitutional Court takes on this detailed "more specifying interpretation"[13] of the ordinary law, which is guided by the legislature's intention and is usually subject to the specialized court system.[14]

[6] *Id.* marginal no. 118ff.

[7] *Id*. marginal no. 121.

[8] *Id.* marginal no. 121.

[9] *Id*. marginal no. 121.

[10] *Id.* at marginal no. 64.

[11] *Id*. marginal nos. 68–99.

[12] *Id*. marginal no. 66f.

[13] *Id.* marginal no. 67.

[14] *See* Dr. Carl-Friedrich Stuckenberg, "Entscheidungsbesprechung Zur Verfassungsmäßigkeit der Verständigung im Straf- verfahren," ZEITSCHRIFT FUR INTERNATIONALE STRAFRECHTSDOGMATIK [ZIS], 212-16 (2013), *available at* http://www.zis-online.com/dat/ausgabe/2013_4_ger.pdf.

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D. Individual Effects of the "More Specifying Interpretation"

In the opinion of the Federal Constitutional Court, the "specifying interpretation" affects all provisions of the plea agreement procedure, in particular the admissible content of a plea agreement, the plea agreement procedure itself, and the regulations that serve to provide transparency, openness, and complete documentation, as well as the control of the legal remedies. A lot of what it derives from the regulations on plea agreements in this way is not new but has already been the subject of the highest court's jurisdiction, especially the prohibition of the "sanction scissors," no guilty verdict on the basis of a meaningless "formal confession," and the control function of the prosecution. In the following sections, important or new declarations by the Federal Constitutional Court on plea agreements—which are especially relevant for the practice—will be outlined and briefly analyzed in the order of the judgment.

I. The Obligation of a Comprehensive ex propio motu Investigation and Waiver of the Right to Present Evidence

According to § 257c (1) sentence 2 StPO[15] and § 244 (2) StPO, the court's obligation of a comprehensive *ex propio motu* investigation remains "unaffected." The Federal Constitutional Court concludes from this, in accordance with the previous jurisdiction of the Federal Court of Justice (*Bundesgerichtshof*) (BGH), [16] that the plea agreement as such cannot form the basis of a judgment but can only be formed through a sufficiently founded conviction determined by facts and circumstances reached through the entire main trial.[17] This should lead to two consequences: First, a waiver of the right to present evidence and the taking of evidence cannot operate outside of what the obligation of a comprehensive *ex propio motu* investigation demands.[18] This is appropriate but it does not mean that the waiver of (other) motions to present evidence in the context of a plea agreement is generally inadmissible. The obligation of a comprehensive *ex propio motu* investigation and the right to present evidence are not congruent but are essentially different. By the right to present evidence, the applicant has the possibility to force the court into hearing further evidence extending beyond that which the court would regard as in need of investigation, provided there is no reason for a refusal.[19] Because § 257c (2) sentence 1 of the StPO explicitly makes the procedural conduct of the parties the subject of the plea

[15] STRAFPROZESSORDNUNG [STPO] [CODE OF CRIMINAL PROCEDURE], Dec. 22, 2011, I BUNDESGESETZBLATT [BGBL] 3044, as amended, § 257c(1) s. 2.

[16] *See BGH 3 StR 285/11 v. 31.01.2012 Beweiswürdigung in den Urteilsgründen bei Verständigung*, 11 STRAFVERTEIDIGER [STV] 653, 654 (2012); NEUE ZEITSCHRIFT FÜR STRAFRECHT [NSTZ–RR] 256 (2012).

[17] *Mar. 19, 2013 Decision* at marginal no. 68.

[18] *Id.* marginal no. 68.

[19] *See* STPO § 244(3).

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agreement, this agreement can include a waiver by the parties to file further motions or to withdraw motions already requested, as long as there is no illegal connection between the procedural "good" conduct and a mitigation of sentence deriving from this.[20]

II. Compelling Inspection of the Confession Through Further Evidence

As a second consequence, the Federal Constitutional Court concludes from § 257c(1) sentence 2 of the StPO that a confession in the case of a plea agreement must always be checked for accuracy by taking evidence during the main trial.[21] Up until now, the jurisdiction of the Federal Constitutional Court was that in the case of a confession the hearing of evidence is not absolutely necessary, but that the conviction of the court according to § 261 of the StPO can also be based solely on a substantial confession given in the main trial. The court can then decide with the aid of court records whether further clarification is needed.[22] This is no longer possible in the case of confessions based on plea agreements. In this context, the Federal Constitutional Court correctly points out that the offer of a reduction of the penalty made with regard to plea agreements can lead the defendant to make at least a partially false confession. This also makes the examination of the confession during the main trial necessary.[23] Therefore, in the case of a plea agreement, additional compulsory evidence must now be heard to prove the credibility of the confession. For example, by reading out or self-reading the documents (when this includes contents from an interrogation, a mutual agreement of all parties may be necessary according to § 251 (1) number 1 StPO) or the questioning of the leading investigator as a witness.

III. Restriction of the Means of Plea Agreement by the Continuation of the Court's Obligation of a Comprehensive ex propio motu Investigation

The fact that the obligation of a comprehensive *ex propio motu* investigation remains untouched by § 257c of the StPO and the actual findings are withdrawn from the arrangement of the parties to the plea agreement, leads to the Federal Constitutional Court's opinion that the scope for agreements is noticeably restricted. This is the inevitable consequence of the inclusion of the means for plea agreements into the system of the

[20] *See* DEUTSCHER BUNDESTAG: DRUCKSACHEN [BT] 16/12310, 13 (Mar. 18, 209), *available at* http://dip21.bundestag.de/dip21/btd/16/123/1612310.pdf; *see* also MEYER-GOßNER, STPO: COMMENTARY ON THE GERMAN CODE OF CRIMINAL PROCEDURE 55 (2012); STPO § 257c, marginal no. 14ff.

[21] *Mar. 19, 2013 Decision* at marginal no. 71.

[22] 50 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFS IN STRAFSACHEN [BGHST] 40, 49; LR BECKER, § 244, margin no. 9 (26th ed. 2009).

[23] *Mar. 19, 2013 Decision* at marginal no. 110.

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current criminal procedural law.[24] The Federal Constitutional Court opposes explicitly a "deal with justice," whereby less clarification in the main trial is bought with a generous offer of a reduction of the sentence.[25] The unsolved relationship of tension between the obligation of a comprehensive *ex propio motu* investigation and plea agreements is seen by many critics as the actual weak point of the regulations for a plea agreement and question what sense an agreement has if it—as propagated by the Federal Constitutional Court—fails to shorten the search for truth.[26]

One can understand the Federal Constitutional Court in regard to the fact that the legitimate starting point of a plea agreement, which is compatible with the constitution, is an open and communicative procedural conduct in which—as often wished for by the parties involved—the state of the proceedings, the evidence, and the extenuating effect of a confession can be the subject of discussion.[27] The core of the constitutionally legitimate agreement is to solidify these noncommittal discussions into a proposal, to be proclaimed in the main public trial that will seek an upper and lower limit of the sentence if a confession is made, and which will become binding if all parties agree.[28] Hence, the plea agreement is led back to its traditional-rational content: The open statement of the court towards the questioning of procedural parties on which punishment possibly should be expected in the event of a confession—and other exceptional procedure-shortening actions or omissions—after a preliminary assessment of the basis of the accusation.[29] With such a plea agreement the following must apply: "If no agreement had been reached but the defendant however had confessed independently or through his lawyer, he would definitely have been punished to the same extent."[30] The same applies to the extent of the hearing of evidence. Only through such an agreement, can the "trade with justice"—branded as unconstitutional by the Federal Constitutional Court—be avoided.[31] In the case of an effectively reached plea agreement according to § 257c (3) of the StPO, regardless of § 257c (4) of the StPO, it is obvious that a defendant, for reasons of fairness, may not be

[24] *Id.* marginal no. 72f.

[25] *Id.* marginal no. 105.

[26] *See* Stuckenberg, *supra* note 14, at marginal no. 215.

[27] *See* Stuckenberg, *supra* note 14, at marginal no. 106.

[28] The confession applies only with the adherence of the upper limit of the sentence.

[29] 57 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFS IN STRAFSACHEN [BGHST] 273, marginal no. 13; *see also* FRIEDRICH-KARL FÖHRIG, KLEINES STRAFRICHTER-BREVIER 30ff, 40 (2d ed. 2013).

[30] FÖHRIG, KLEINES STRAFRICHTER-BREVIER at 40.

[31] *Mar. 19, 2013 Decision* at marginal no. 105.

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held to a confession given in trust of this communication, if the court wants to deviate from its assent for certain reasons.[32]

IV. Plea Agreements only Admissible According to § 257c of the StPO

From the wording in § 257c (1) sentence 1 of the StPO, "in accordance with the following subsections," the Federal Constitutional Court considers that outside § 257c of the StPO any "informal" agreements, such as arrangements and "Gentleman Agreements," are forbidden. Section 257c of the StPO is therefore intended to be of a completing nature.[33] Illegal plea agreements occur when the court reaches a binding agreement with the procedural parties outside the main trial on a particular outcome in exchange for certain procedural actions. The ban on plea agreements outside the form of § 257c of the StPO does not result in a ban on open procedural conduct. As the Federal Constitution Court expressly shows, an open and communicative procedural conduct by the court is a self-evident requirement for a proper management of proceedings, which is why legal consultations and pointers to the preliminary assessment of the evidence or mitigating effect of a confession are not the subject of any constitutional doubts.[34] Such discussions therefore are admissible; their essential content according to § 243 (4) of the StPO must always be disclosed in a public main trial.[35]

If the court declares, for example, within the scope of a preliminary discussion that it thinks a penalty within a certain range is feasible, but if—possibly due to the lack of the approval of the prosecution—a plea agreement according to § 257c of the StPO was not reached (not an unusual case in practice), the court is not stopped from imposing a penalty lying within the offered range when a confession is given. This is neither an "informal" agreement nor a "Gentleman's Agreement," but the court merely allocating to the confession the penal mitigating effect that it judged as adequate within the scope of an open and transparent procedural conduct. The fact that a court acts this way and does not change its penalty expectation for no reason should actually be obvious. The penalty expectation was formed on the basis of the comprehensive knowledge of the documents and of prior consultations.[36] Reasons of fairness and an open procedural conduct in such cases suggest a continuous need to inform when the preliminary assessment changes in

[32] *See* Bundesgerichtshof [BGH] [Federal Court of Justice], STRAFVERTEIDIGER [StV] 470 (2004); Andreas Mosbacher,, JURISTISCHE SCHULUNG [JuS] 708f (2011).

[33] *Mar. 19, 2013 Decision* at marginal no. 76; *see also* Bundesgerichtshof [BGH - Federal Court of Justice], *supra* note 32, at 470.

[34] *Mar. 19, 2013 Decision* at marginal no. 106.

[35] *Id.* marginal no. 85.

[36] *See* FÖHRIG at 38ff. If lay judges are involved, penalty expectations in prior talks can only be formed with reservations anyway,*See Mar. 19, 2013 Decision* at marginal no. 90.

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the course of the proceedings.[37] The defendant can only rely on the protection of § 257c (4) sentence 3 of the StPO—non applicability of the confession when withdrawing from the plea agreement—if a plea agreement according to § 257c (3) of the StPO was actually reached.

V. Comprehensive Obligations to Notify and Record

The Federal Constitutional Court emphasizes in its decision the importance of the obligations to notify and record for the purpose of documentation and for the establishing of transparency.[38] First, the obligation to notify according to § 243 (4) sentence 1 of the StPO is central. The presiding judge, at the beginning of the main trial and after the charges have been read, then lets it be known whether preliminary discussions with the procedural parties (§§ 202a, 212 of the StPO) have taken place and, if so, what these essential contents are. In the opinion of the Federal Constitutional Court, such expansive preliminary discussions always exist if in preliminary talks the possibility or facts of a plea agreement are on the table, especially questions on procedural actions which are linked with the outcome of the trial and therefore a statement on the penalty expectations is obvious.[39] Discussions that exclusively serve the organization and technical conduct of the main trial are not included in the obligation to notify.[40] If in doubt, it must be reported.[41] In the opinion of the Federal Constitutional Court, the obligation to notify is of a broad scope and, in regard to its contents, refers to who raised the question of a plea agreement (initiator) and what positions the individual participants have taken in the talks.

If a plea agreement according to § 257c of the StPO takes place in the main trial, the Federal Constitutional Court holds that it must be recorded extensively. It should be reported who made the suggestion for the holding of talks, which contents the single contributions to the discussion by the procedural parties and judges had, especially which facts and circumstances were taken as the basis, and which suggestions on the outcome were referred to.[42] Apart from uncomplicated cases, the authenticating official responsible for recording will initially be overburdened in practice if left alone to carry this out.

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[37] *See* Bundesgerichshof [BGH - Federal Court of Justice], Case No. 3 StR 3463, 2011 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 3463 (June 30, 2011).

[38] *Mar. 19, 2013 Decision* at marginal no. 83ff.

[39] *Id*. marginal no. 85.

[40] *Id*. marginal no. 84.

[41] *Id*. marginal no. 85.

[42] *Id.* marginal no. 86.

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VI. "Absolute" Reasons for Appeal in the Case of Violations of the Obligation of Transparency and Documentation

The most problematic and perhaps most consequential remarks of the Federal Constitutional Court, which go far beyond the previous jurisdiction, are those on the relevance of procedural errors of appeal law in the context of plea agreements. The starting point is the consideration of the Federal Constitutional Court that the legislator considers a plea agreement as admissible only if the extensive obligation of transparency and documentation are preserved and, therefore, the legal control concept constitutes an "inseparable unity of the permission, and the restriction of plea agreements with the enclosures of the obligation of notification, admonition and documentation at the same time".[43] In its opinion this "inseparable unity" has the effect that every infringement of these legal regulations leads to an unlawfulness of the correlating plea agreement. If the court abides by such an illegal agreement, the judgment is also based regularly on the procedural infringement; the final appellate court therefore could exclude a sentence "being based" on an infringement against the obligation of transparency and notification according to § 337 (1) of the StPO only in specific cases.[44]

This fundamental derivation from the previous "legal doctrine to let the matter rest"[45] is made possible by the unusual "trick" of the Federal Constitutional Court to combine all procedural provisions of the Act on Plea Agreements to an "inseparable unity" and thereby attribute every infringement of a separate provision, a sweeping relevance to the entirety of the events concerning the plea agreement (especially to the confession based on the agreement taken as a basis for the sentence). Up until now, according to § 337 (1) of the StPO, every infringement had to be examined individually on whether it could have had a particular influence on the sentence.[46] But now, because of the "inseparable unity" of the regulations for a plea agreement, one procedural error is enough to extend the examination of the rationale of the overall package of a plea agreement. With such a perspective, it will be hardly possible to rule out the fact that a sentence is based on an overall faulty agreement.[47] Only in this way does the opinion of the Federal Constitutional

[43] *Id*. at marginal no. 96.

[44] *Id*. at marginal no. 97.

[45] *See* Stuckenberg, *supra* note 14, at 215.

[46] This is why in both decisions the First Criminal Panel of the Federal Court of Justice correctly denied a substantial error according to § 337 StPO (1) despite infringements of the obligations to instruct according to § 257c StPO (5). These decisions have since been overturned by the Federal Constitutional Court. *See* Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 1 StR 443/10 (Sept. 17, 2013); Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 1 StR 469/10 (Sept. 17, 2013).

[47] *Mar. 19, 2013 Decision* at marginal no. 97.

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Court become understandable[48] that every infringement of the obligation to provide instructions according to § 257c (5) of the StPO as a rule leads to a reversal of a verdict unless it can be determined with certainty that the defendant would also have confessed if the instructions had been provided properly.[49]

But the Federal Constitutional Court goes one step further: If, according to § 243 (4) of the StPO, the necessary information on whether preliminary talks had taken place is missing or if, according to § 273 (1a) sentence 3 of the StPO, the regulated negative certificate is absent, then in the opinion of the Federal Constitutional Court a sentence based on the infringement of § 257c of the StPO should not be excluded principally because of the inseparable interleaving of all protective provisions for a plea agreement.[50] In the case of an infringement of such obligations, it cannot be ruled out in most cases that the verdict is based on an undisclosed illegal "informal" arrangement or on efforts to hold talks on this. Only if it is absolutely certain that no talks were held in which the possibility of a plea agreement was on the table, a "being based" can be ruled out. Deviating from the previous jurisdiction, therefore, mere "protocol errors" (absence of a negative certificate) can become quasi-absolute reasons for an appeal.[51] Not only in the case of an actual plea agreement between all parties to the procedure, certain procedural errors become absolute reasons for an appeal, but also if perhaps no agreement had taken place, but this, however, cannot be ruled out with certainty. This reversal of the burden of proof seems logical because the lack of evidence is based on an offense against the obligation of documentation that has to be attributed to the legal authorities.

E. Conclusion

The decision of the Federal Constitutional Court is of a compromising nature and has far reaching consequences for the practice. A great deal of what the Federal Constitutional Court expresses is not new but merely illustrates what the legislator wanted to regulate and had already regulated. This decision will certainly not end the discussion about the sensibility of a plea agreement. However, with its—constitutionally not automatically to comprehend—control scheme, the Federal Constitutional Court will likely succeed in that judges will now comply strictly to these legal provisions with its implementation through its decision, because otherwise their decisions will be overturned and they themselves put

[48] *Id*. marginal no. 99.

[49] This can be the case if the defendant already through his lawyer, his own legal knowledge, or previous instructions was aware of the ruling in StPO § 257c (4). *See also* Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 1 StR 220/10, 2002 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 975 (Nov. 11, 2001) (discussing StPO § 136).

[50] *Mar. 19, 2013 Decision* at marginal no. 98.

[51] *See* Stuckenberg, *supra* note 14, at 213.

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at risk of prosecution. To achieve this aim, the Federal Constitutional Court performed some dogmatic mental acrobatics, which are not convincing at first. But perhaps its approach is wiser overall than one believes on first reading the decision.

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