Formalisation of Plea Bargaining in Germany -
Will the New Legislation Be Able to Square the Circle?

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Abstract

Although the guilty plea is unknown in the German criminal procedure, informal negotiations which can be compared to plea bargaining in common law systems, play an increasing role in the German criminal process. Like plea bargaining in England and Wales, informal agreements in Germany have long been strongly criticised.

After years of debate among academics and practitioners and developing case law on informal agreements, the German Federal Parliament has now passed new legislation which regulates agreements and makes them part of the formal procedure (Gesetz zur Regelung der Verständigung im Strafverfahren). This paper will discuss the development and current practice of informal procedures in Germany and analyse the new legislation. It will argue that the German legislator has missed the opportunity to debate the underlying problems which made informal negotiations necessary in the first place.

Introduction

In German criminal trials the common law instrument of the guilty plea is unknown. Consequently one cannot speak of plea bargaining in the strict sense. Nevertheless, informal negotiations which centre on the exchange of a confession for a sentence concession play an increasing role in the German process.1 It is claimed that today in Germany “the criminal procedure cannot be imagined without the phenomenon of informal agreements.”2 After years of academic debate and developing case law on informal agreements, the German Federal Parliament3 has now passed new legislation which regulates agreements and makes them part of the formal procedure.

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2 Lutz Meyer-Großner, Gesetzliche Regelung der “Absprachen im Strafverfahren”2 2004 Zeitschrift für Rechtspolitik 187 (All translations are my own.).
3 Bundestag.
As a civil law country, the German criminal justice system\(^4\) is based on the notion that the prime task of a criminal trial is to find the material truth.\(^5\) Rather than deciding which of the contesting parties can present the better case, in Germany it is the court itself which has to bring the facts of the case to light. §244(2) German Code of Criminal Procedure\(^6\) reads: “In order to establish the truth, the court shall, proprio motu, extend the taking of evidence to all facts and means of proof relevant to the decision.” Finding the truth is an objective goal and not at the parties’ disposal. Hence, an admission of guilt alone is not sufficient to convict the defendant. A confession is rather just one among many forms of evidence and has no procedural function as such. In particular, it is not sufficient to end or even avoid the main hearing.

Nevertheless, in Germany today one can find at all stages of the procedure some kind of negotiations, which are indeed comparable to the Anglo-American plea bargaining. This paper will outline the development and current practice of informal procedures in Germany and discuss the new procedure which was introduced in 2009.

**The early beginnings of informal agreements in Germany**

As in England and Wales, so in Germany, informal negotiations initially spread without being noticed. At the time when the American scholar John Langbein claimed Germany to be the “Land Without Plea Bargaining”\(^7\) informal settlements were already being used regularly. Although it is very likely that in some form there have always been informal agreements\(^8\) it is assumed that the regular engagement in such negotiations was established in large-scale proceedings, such as economic crime\(^9\), tax evasion, environmental crime, and drug related crime\(^10\) around the mid 1970s.\(^11\) One explanation for the rapid spread of informal settlements in these areas is that both courts and prosecution offices became increasingly overworked.\(^12\) During the last four decades, these areas experienced a considerable growth in the number of criminal cases. Economic crime has been prosecuted more intensively, and the number of

\(^4\) For an introduction to the German Criminal Procedure and the main legal principles see Foster, Nigel 1996 *German Legal System and Laws*, 2nd ed. (London: Blackstone Press Limited), 212-228.

\(^5\) BVerfGE 57, 250 (275).

\(^6\) If not stated otherwise all § are those of the German Criminal Procedure Code.


\(^8\) Hans-Peter Marsch, Grundregeln bei Absprachen im Strafverfahren, 2007 Zeitschrift für Rechtspolitik 220.

\(^9\) Wirtschaftskriminalität consists of more crimes than just white-collar crime or commercial fraud, for example pollution (Leigh, Leonard H and Zedner, Lucia 1992 *A Report on the Administration of Criminal Justice in the Pre-trial Phase in France and Germany* The Royal Commission on Criminal Justice (London: HMSO) at 40).


drug offences has grown immensely in this time. However, as Rieß\textsuperscript{13} has shown, the number of legal staff has increased accordingly so that the rising number of cases alone does not explain sufficiently the development of informal agreements. Rather than the growing number of cases, it was the multiplying length of the individual proceedings which led practitioners to look for new means of coping with the case work. The reasons for significantly lengthier trials lie in important changes in substantive criminal law in these areas. Since the end of the 1970s, environmental criminal law, drug related criminal law, tax evasion, fiscal offences and especially economic criminal law have all been developed, amended and most of all extended.\textsuperscript{14} Arguably, the most important development is the change of \textit{actus reus} and causation. In many new offences, especially in environmental and economic crime, rather than one single identifiable action causing harm, the causation of a danger itself has become the \textit{actus reus} of the offence. The traditional concepts of conduct or result crimes are replaced by ‘causation of danger crimes’. This makes it extremely difficult to prove the offence.\textsuperscript{15} At what point does a legitimate risk become an illegal danger? What is the scope of causation for that risk? To what extent did the defendant need to appreciate the risk? In order to eliminate the problems of evidence, criminal liability has moved forward on the scale of actions, so that the \textit{actus reus} is assumed much earlier in the chain of actions.\textsuperscript{16} The distinction between legal and criminal behaviour becomes then increasingly dependent on the state of mind of the defendant. For example an action is deemed dangerous if the defendant perceived or could have perceived the risk. Without a confession, proving the \textit{mens rea} requires a lot of indirect evidence. Investigation in these kinds of crimes calls for the screening of hundreds of documents and the testimony of dozens of witnesses (who sometimes have to be brought from abroad, for example when dealing with multinational trade). Consequently, the length of investigation as well as of trials where the evidence needs to be presented and evaluated has multiplied. The complex German criminal procedure, with its manifold procedural safeguards is not equipped to deal with these new requirements of substantive law. Even if the increase of judicial personnel could initially offset the increasing number of processes, their swelling length and intensity has led inevitably to an enormous overload for the prosecution offices and the courts.\textsuperscript{17}

\textsuperscript{13} Rieß, Peter 1982 “Zur Entwicklung der Geschäftsbelastung in der ordentlichen Gerichtsbarkeit” \textit{Deutsche Richterzeitung} 201, 464.
\textsuperscript{14} Herrmann, Joachim 2000 \textit{Absprachen im deutschen Strafverfahren} Archivum Iuridicum Cracoviense, Vol. 31-32, (Krakow Polska Akademia Nauk, Oddzial w Krakowie) at 56.
\textsuperscript{15} Rönnau note 1 above, at 45.
\textsuperscript{17} Hassemer/Hippler note 12 above.
Thus, economic large-scale crimes are considered the pacesetter as well as the principal domain\textsuperscript{18} for informal settlements.\textsuperscript{19}

In 1982, a criminal defence lawyer under the pseudonym of Detlef Deal published an article in Germany describing in detail the common practice of informal negotiations in large-scale criminal cases.\textsuperscript{20} He made it very clear that this practice was both widespread as well as hidden: “Nearly everybody knows it; nearly everybody does it, only nobody speaks it out loudly.”\textsuperscript{21} In his view the formal trial has degenerated to ‘a theatre’ where the participants pretend to contribute to the finding of a sentence, which in reality has been already agreed on by all parties. In spite of strong criticism from all sides, the judiciary was not discouraged from engaging in informal settlements. Most practicing lawyers today agree that courts responsible for economic crime would not be able to cope with the flood of large-scale cases, if it were not for informal agreements.\textsuperscript{22} For example in the state of Lower Saxony over 80 per cent of judgements in the area of organised crime are based on an informal agreement.\textsuperscript{23} Interestingly, informal proceedings have spread to middle serious crime too\textsuperscript{24} and today they can even be found in serious violent crimes such as rape, aggravated robbery and murder,\textsuperscript{25} although this is still exceptional.\textsuperscript{26}

**Main reasons for informal settlements**

The numerous reasons for the development and spread of informal negotiations into all areas of criminal law in Germany can only be summarised here. As in the Anglo-American discourse, German commentators usually mention the increasing overwork of courts and prosecution offices as the main reason for the spread of informal negotiations. Legal experts have no doubt that criminal procedure would break down without informal handling of cases.\textsuperscript{27}

\textsuperscript{18} Bussmann note 16 above, at 19 whose research has shown that in economic criminal cases the inquisitorial process is a rare exception.
\textsuperscript{19} Another area is drugs related crimes. The growing consumption of drugs since the end of the 1960s, the increased prosecution since the 1970s and the increased criminalisation especially by the Narcotics Law (Betäubungsmittelgesetz) from 1982, resulted in the number of cases as well as the length of the procedures growing immensely; Bussmann note 16 above, at 30.
\textsuperscript{20} Deal, Detlef (pseudonym) 1982 “Der strafprozessuale Vergleich” Strafverteidiger 545. This paper was dealing with drug offences in line with the author’s field of work.
\textsuperscript{21} Ibid. at 545.
\textsuperscript{22} Widmaier, Gunter 1986 “Der strafprozessuale Vergleich” Strafverteidiger 357.
\textsuperscript{23} Elisabeth Heister-Neumann, Absprachen im Strafprozess – Der Vorschlag Niedersachsens zu einer gesetzlichen Regelung, 2006 Zeitschrift für Rechtspolitik 137.
\textsuperscript{25} BGHSt 43, 195; BGH NStZ1994, 196; BGH NStZ 1997, 561.
\textsuperscript{26} Herrmann, Joachim 1992 “Bargaining justice – a bargain for German criminal justice?” 53 University of Pittsburgh Review 755 at 775.
\textsuperscript{27} Rönnau note 1 above, at 20.
Thus it is claimed, informal negotiations help to sustain and stabilise the current criminal justice system.\textsuperscript{28} Another major reason is the nature of modern legislation itself. The growing complexity of some areas means that courts are not just overworked, but actually out of their depth.\textsuperscript{29} Further, the change from conduct or result crimes to ‘causation of danger crimes’ means that the outcome of cases is much less predictable.\textsuperscript{30} It is this unpredictability which makes pre-trial agreements compelling for both defence and prosecution. For all courtroom actors informal agreements mean easier and faster completion of the case.

An additional reason for the rise of informal procedures is the shift in theories of punishment. The traditional idea that the primary function of punishment is retribution has now been complemented by the idea of general and specific deterrence.\textsuperscript{31} The purpose of deterrence legitimises efficient as well as time and cost saving procedures as opposed to the absolute theory of retribution, which is guided by the considerations of justice only.\textsuperscript{32} Herrmann further points out that the function of the criminal process is no longer only to enforce the Penal Code but also to help to find solutions for social problems. According to him, more justice is achieved when all participants agree on the outcome and rehabilitation is more likely to succeed when the defendant accepts the sentence.\textsuperscript{33} But agreeing to the mildest sanction possible does not necessarily mean accepting the judgement; rather it might merely mean choosing the lesser evil.

Related to the change of sentencing purposes is the argument that the development of informal proceedings mirrors the development of a new relationship between state and citizen.\textsuperscript{34} The vertical interrelation in criminal law between the powerful state and its subordinate citizens is being replaced by a correlation between more equal partners. This different relationship has long been recognised in administrative law where the state is in discussion with the citizen to find a solution of the problem rather than exposing them to sanctions as in criminal law. In criminal law the decisive change again started in white collar and environmental crime where the new extended legislation disregards the principle of \textit{ultima ratio}.\textsuperscript{35} Areas previously dealt with by administrative law, which is open to negotiations between state and

\textsuperscript{29} Bussmann note 16 above, at 29.
\textsuperscript{30} \textit{Ibid.}, at 25.
\textsuperscript{32} Rönnau note 1 above, at 61.
\textsuperscript{33} Herrmann note 26 above, at 776.
\textsuperscript{34} \textit{Ibid.}, 775.
\textsuperscript{35} Rönnau note 1 above, at 45.
citizen,\textsuperscript{36} are now subjected to the inflexible criminal procedural law with its principle of compulsory prosecution.\textsuperscript{37} As life becomes much more complicated, legislation expands the scope of the Penal Code to embrace more and more behaviours which do not ordinarily belong to the classical notion of crime, for example forbidden waste disposal.\textsuperscript{38} Whereas criminal law traditionally used to deal with deviant behaviour committed by individuals outside or at least at the margins of society, criminal law now spreads into all areas of society.\textsuperscript{39} In relation to this Bussmann states that the courts tend to be lenient in large-scale proceedings not only because they are overtaxed with the complexity of the complicated legal provisions but due to class distinguishing tendencies.\textsuperscript{40} Defendants of fiscal offences, tax evasion, or environmental crime are often most respected members of society from similar backgrounds as prosecutors and judges. Both of these aspects had an effect on the criminal process. Whereas criminal procedure traditionally reflected the subordination of the citizen to the state, a new form of interaction emerged in which the parties try to solve situations of conflict by cooperating and consenting.\textsuperscript{41} As a result, the defendant’s autonomy in criminal procedures has increased.\textsuperscript{42} Informal agreements reflect this development by replacing formal accusation and judgement with informal discussion and negotiations.

**Procedural framework**

It is important to examine how a practice similar to plea bargaining could be introduced into the German criminal procedure which does not recognise the guilty plea. Although some negotiations are initiated in the context of the main hearing, many informal agreements are linked to those procedures which provide the prosecution with some discretion because they are exceptions to the principle of compulsory prosecution according to which all crime should be prosecuted.

One of the core procedures that is used to open the way for informal negotiations is the penal order.\textsuperscript{43} §407 gives the prosecutor in a case of a misdemeanour the power to request an order imposing punishment from the judge if there is sufficient suspicion.\textsuperscript{44} If the accused

\begin{itemize}
\item Bussmann note 16 above, at 25. Compulsory prosecution is a principle to protect from arbitrary choice of investigation and means that all crime should be prosecuted.
\item Küpper/Bode note 12 above, at 355.
\item Gerlach, Götz 1992 *Absprachen im Strafverfahren: ein Betrag zu den Rechtsfolgen fehlgeschlagener Absprachen im Strafverfahren* (Frankfurt am Main: Verlag Peter Lang) at 23.
\item Bussmann note 16 above, at 29.
\item Herrmann note 14 above, at 78.
\item Schünemann note 31 above, at 1898.
\item Schmidt-Hieber, Werner 1982 “Vereinbarungen im Strafverfahren” *Neue Juristische Wochenschrift* 1017.
\item §§407 ff.
\end{itemize}
does not appeal against it the penal order replaces any further proceeding and the offender will immediately be punished with a fine or a sentence on probation. Thus it avoids a full trial and comes very close to the guilty plea in common law systems. Hence it is not surprising that the penal order is a welcome starting point for informal negotiations. Defence Counsel and prosecutor might agree that the prosecution will not bring further charges, and request only a penal order if the accused is willing to accept the punishment suggested by the order.\footnote{Herrmann note 14 above, at 56.} Typically, the defence lawyer and the prosecutor negotiate the amount of the sanction, with the judge usually agreeing to the order suggested by the prosecution.\footnote{Ibid. at 66.} Today, some 35 per cent of all cases are handled through a penal order\footnote{Schünemann, Bernd 1990 Absprachen im Strafverfahren? – Grundlagen, Gegenstände und Grenzen (München: C.H.Beck’sche Verlagsbuchhandlung) at B153 fn 461. There are German states where more cases are handled with the order than by trial (Herrmann note 14 above, at 65).} and it is realistic to assume that many of those are based on informal settlements.

The other major starting point for informal agreements is the dismissal. According to §153 a case of misdemeanour can be dismissed on the ground of insignificance by the prosecution with agreement of the court, if there is only minor culpability and no public interest in prosecution. Once the trial has commenced, the court too can dismiss the case with the agreement of both prosecution and the defendant. This provision too, is an exception to the principle of compulsory prosecution. However, initially §153 could be used only under very restricted circumstances and practitioners asked to widen its remit. At the insistence of the judiciary, in 1974 §153a was introduced in order to fight mass petty crime. This provision enables the prosecutor to refrain from some or all charges, even when there is generally an interest in prosecuting, if this interest can be overridden because the defendant fulfils certain conditions, usually by paying a sum to charity.\footnote{According to §153a II, if there is already an indictment, the court can take the same decision with the consent of the defendant and the prosecutor.} Initially, §153a was criticised harshly as an “introduction of the American plea bargaining”, “shady horse trading”, “whispering procedure”, and “buying off procedure”.\footnote{Schmidt-Hieber note 24 above, at 50.} However, this rule was not a new creation. The legislature in fact followed an existing informal practice to assume that the public interest in prosecution can be met as soon as the accused obeys the prosecution’s directive. It is an example of how courtroom actors extended a legal provision to such an extent that the legislator saw himself compelled to adjust the law to the lawyers rather than the other way round. This turned out to become the common pattern for the development of informal agreements in Germany. Although the legislator followed the demands of the practitioners and formalised negotiations to some
extent, courtroom actors kept operating beyond the new legal framework. §153a provides safeguards against informal settlements, such as the restriction on misdemeanour offences, minor guilt and clear evidence, but nevertheless this provision is excessively used in large-scale proceedings, which are neither mass nor petty crime and the safeguards are usually bypassed. In 1993 the provision extended the restriction of minor guilt by stating that “the seriousness of the guilt does not require the contrary”. Once again, legislation followed the common practice of extending the criteria beyond the law. §153a is nowadays frequently used as a basis for informal settlements. Especially during the preliminary investigation, it is common for the courtroom actors to agree that the investigation will cease if the accused pays a fine.

In practice, §153a can be extended either in favour of the defendant or to their disadvantage. It is to their disadvantage that the application of §153a violates the rights of the accused in cases where there is insufficient suspicion of a criminal act and the presumption of innocence should mean that there is no prosecution at all. As in England and Wales, the common practice of exchanging a dismissal for a confession or waiver of appeal can result in the prosecutor charging a more serious offence simply in order to have more substance to bargain with. More often, however, §153a is extended in favour of the accused, particularly for economic crime when §153a is applied even when there is more than just minor guilt. Often the case is re-defined to fit the requirements of §153a, for example perjury might be re-framed as a false unsworn statement.

The context of informal negotiations

Informal settlements in Germany occur most often when the case involves complicated questions of evidence or law. The more a court is overworked, the greater is its willingness to avoid complicated cases. Schünemann found in his research that 77 per cent of judges, 72 per cent of prosecutors and 51 per cent of defence lawyers favour informal settlement if the

50 Bussmann note 16 above, at 28.
51 Herrmann note 26 above, at 775.
52 Interestingly, the legislation did not take this opportunity to address informal settlements one or way or the other.
53 Schünemann, note 31 above, at 1896. The same is true for §§154 and 154a, which are sometimes applied even if the requirements are not strictly fulfilled if the court wants to reward a confession or withdrawal from motion for admission of evidence; Rönnau note above 1, at 32.
54 Herrmann note 14 above, at 56.
55 Schünemann note 47 above, at B19.
56 Ibid. at B109.
57 Rönnau note 1 above, at 37.
59 Deal note 20 above, at 550.
case has difficult legal issues. If there are problems of evidence, 91 per cent of the judges, 90 per cent of the prosecutors, and 53 per cent of the defence lawyers in the study preferred an informal agreement.\(^\text{60}\) This is especially true for large-scale proceedings, where countless documents and witness statements have to be analysed. Frequently, cases are so technical that the court is dependent on expensive experts’ statements. All these factors mean great expense and delay for the trial and increase the interest in informal procedures.

Further, the closeness between the participants is a crucial factor.\(^\text{61}\) Like plea bargaining in England and Wales, informal agreements in Germany are based on personal relationships of trust. The better the participants know each other and the more positive their previous experiences with each other have been, the more straightforward the negotiations will be. The older the relationship between the prosecution and defence lawyer, the more emphasis they will put on co-operation rather than contest. Sometimes the negotiations even embrace different cases with different defendants and concessions in one case are rewarded in another case. This basic element of trust between the professionals is the reason why agreements are seldom breached although legally they are not binding. If however the agreement falls apart, the other parties to the settlement will feel their trust violated and future negotiations will be threatened.\(^\text{62}\) Since some private defence lawyers are dependent on the court to get them appointed as defence counsels, they are taking a personal risk that the defendants will keep their promises.\(^\text{63}\) It is said that some courts even have ‘black lists’ of lawyers who did not keep their promises.\(^\text{64}\) Hence the defence lawyer is often interested in not letting the client know the details of the deal, so that the defendant cannot obstruct the negotiations.\(^\text{65}\) This also prevents the defendant from complaining if the sentence is higher than that agreed on.

The characteristics of the defendant are likewise decisive. According to Schünemann’s report, 76 per cent of practitioners stated that juvenile defendants are more willing to agree to informal settlements;\(^\text{66}\) 89 per cent confirmed higher willingness of older defendants and 91 per cent stated that defendants with no previous conviction are more ready to reach agreements. Only 36 per cent of the practitioners thought that defendants in a weak financial situation would be willing to reach settlements, and 29 per cent considered that those with low education would be interested to come to an informal agreement. According to Deal...
dants who belong to the upper or middle class are more likely to be in favour of reaching settlements with the court and prosecutors and judges are more likely to reach an agreement with the defence lawyer if the defendant appears sympathetic to them.\footnote{Deal note 20 above, at 549.} Because of court’s interest in compensation, white-collar criminals benefit because they can offer higher sums.\footnote{Bussmann note above 16, at 28.} Whether the gender of defendant, defence counsel, judge or prosecutor plays any role is not addressed in any empirical research. Another aspect considered by judges and prosecutors is, as in England and Wales, the victim’s interest especially in sexual crimes. Informal settlements, which lead to confessions and waivers of evidence production and thus protect the victim from having to appear in court and give evidence, are favoured.\footnote{Schünemann note above 47, at B23.}

Defence lawyers favour settlements especially in cases in which there is a high probability of conviction (96 per cent of the lawyers in Schünemann’s survey mentioned this reason). In this situation in particular, the defence lawyer can show the defendant that although the case was hopeless for the client, the lawyer could gain some reduction of the sentence. An informal negotiation does not just demonstrate how much influence the lawyer has in court, but moreover the settlement can be sold as a successful outcome. Other examples of situations in which the defence lawyers favour informal settlements, are when they want to protect their client from public exposure (83 per cent) and in cases where a high sentence is expected (83 per cent).\footnote{Braun note above 60, at 11.}

If not all parties favour an agreement, courtroom actors might employ a number of different strategies in order to impose pressure on the others to settle. To increase their negotiating power, the prosecution might ‘overload the accusation’ in order to be able to offer to withdraw offences from the accusation\footnote{Lüdemann, Christian 1994 “Land without Plea Bargaining? How the Germans Do It. Results of an Empirical Study” 17 EuroCriminology 119 at 122.} - so-called ‘over-charging’.\footnote{Blake, Meredith and Ashworth, Andrew, Some Ethical Issues in Prosecuting and Defending Criminal Cases, 1998, Criminal Law Review, 16, at 28.} Another strategy to put pressure on the defence is to take advantage of the fact that only the prosecution, and not the defence, can request a dismissal or a penal order. Accordingly, the prosecutor can combine an offer of dismissal under §153a with a warning that this is the last chance for settling.\footnote{Herrmann note 14 above, at 63.} Moreover, the prosecutor can indicate that a refusal to accept an agreement could lead to a higher sentence recommendation. Obviously, it is not right to punish the defendant for objecting to a negotiation with a more severe sentence. However, since the exact final sentence is nearly

\footnotesize{\begin{itemize}
  \item \footnote{Deal note 20 above, at 549.}
  \item \footnote{Bussmann note above 16, at 28.}
  \item \footnote{Schünemann note above 47, at B23.}
  \item \footnote{Braun note above 60, at 11.}
  \item \footnote{Lüdemann, Christian 1994 “Land without Plea Bargaining? How the Germans Do It. Results of an Empirical Study” 17 EuroCriminology 119 at 122.}
  \item \footnote{Blake, Meredith and Ashworth, Andrew, Some Ethical Issues in Prosecuting and Defending Criminal Cases, 1998, Criminal Law Review, 16, at 28.}
  \item \footnote{Herrmann note 14 above, at 63.}
\end{itemize}
impossible to anticipate, it is very hard to evaluate whether the final sentence is more severe because of the earlier rejection to settle. An increased sentence might even be an unconscious consequence.\textsuperscript{74}

Defence lawyers, on the other hand, use the defendant’s extensive procedural safeguards to threaten the courts with an enormous number of expensive interim appeal motions just to initiate an informal settlement of the case,\textsuperscript{75} threatening with very time and cost consuming evidence-based proceedings.\textsuperscript{76} They bombard the court with motions of different kinds which the court cannot reject without risking an appeal. Thus the trial is artificially prolonged, just to enforce a shortening of the procedure through settlement.\textsuperscript{77} The same tactic can be used with motions to disqualify the judge.\textsuperscript{78} Compared to England and Wales, the defence counsel in Germany is in an advantageous position because they have access to the prosecution’s dossiers which is not restricted by disclosure rules.\textsuperscript{79}

There are many examples of abuses on both sides and there are even cases known in which defendants were put under grave pressure to confess to crimes which they denied having committed.\textsuperscript{80} In one case, the lawyer forced the prosecution into a settlement declaring that he knew that there was a serious basis for appeal, without revealing the court’s mistake. The prosecutor had a choice between risking the judgement being reversed by the appeal court or engaging in negotiations with the defence.\textsuperscript{81} Unfortunately, the literature has to rely on anecdotal evidence as there is no systematic empirical research on the extent of severe abuses.

**Content of agreements**

The defendant (usually through the lawyer) can offer to confess to all or parts of the accusations, to testify against a co-defendant,\textsuperscript{82} to waive a motion for the admission of evidence, or to waive the right to file an appeal.\textsuperscript{83} In addition, the defendant might promise to undertake

\begin{itemize}
\item \textsuperscript{74} Ibid, 67.
\item \textsuperscript{75} Leigh, Leonard H and Zedner, Lucia 1992 *A Report on the Administration of Criminal Justice in the Pre-trial Phase in France and Germany* The Royal Commission on Criminal Justice (London: HMSO) at 41.
\item \textsuperscript{76} Wassermann speaks of a boycott and even a sabotage of the criminal procedure; Wassermann, Rudolf 1994 “Von der Schwierigkeit, Strafverfahren in angemessener Zeit durch Urteil abzuschliessen” Neue Juristische Wochenschrift 1106.
\item \textsuperscript{77} Gerlach, Götz 1992 Absprachen im Strafverfahren: ein Betrag zu den Rechtsfolgen fehlgeschlagener Absprachen im Strafverfahren (Frankfurt am Main: Verlag Peter Lang) at 24.
\item \textsuperscript{78} §§24, 26.
\item \textsuperscript{79} In fact at trial the defence lawyer has the same dossier as the prosecution and the court.
\item \textsuperscript{80} Herrmann note 14 above, at 77.
\item \textsuperscript{81} Deal note 20 above, at 548.
\item \textsuperscript{82} Braun note 60 above, at 6.
\item \textsuperscript{83} For the question to what extent such a waiver is binding see below.
\end{itemize}
to pay court costs or indemnification payments\textsuperscript{84} or to waive his own requests for any compensation.\textsuperscript{85} As in England and Wales, the centre of informal negotiations in Germany is the confession. However, as in the English discourse on plea bargaining, an essential question is what effect a confession should have on the sentence. It is generally accepted that a remorseful confession should generate a sentence reduction. In the case of an informal agreement, however, it is more likely that the cause for the confession is the expected sentence reduction rather than true remorse. Schmidt-Hieber argues that the possibility of remorse is at least not ruled out and that the principle of \textit{in dubio pro reo} should be accounted for.\textsuperscript{86} Schünemann counters that the confession in this case \textit{depends} on the offer of an advantage and therefore cannot indicate \textit{unconditional} remorse.\textsuperscript{87} On the other hand, Schmidt-Hieber stresses that even without remorse the confession’s value for establishing the facts is sufficient for mitigating the sentence.\textsuperscript{88} Moreover, the Federal High Court of Justice\textsuperscript{89} has held that a confession is a mitigating factor, even if it is given primarily for tactical reasons.\textsuperscript{90} Additionally, according to Widmaier, the ethical effort of admitting to the offence in front of the court, the public and to oneself should be rewarded.\textsuperscript{91} On the other hand, especially in the areas of economic, environmental and similar crimes, defendants cannot be absolutely convinced of their blameworthiness, because the question often does not depend on the facts (as in traditional crime) but rather on definitions and interpretation by the courts.\textsuperscript{92} To express deep remorse is difficult under these circumstances. Even more pressing is the relationship between confession and truth. As was shown earlier, following the principle of substantive truth the judge has to examine every confession as to its truthfulness and consider additional evidence if needed. However, research reveals that informal agreements drastically undermine this principle. When Schünemann asked judges whether they would accept a confession even in a situation where the trial had not brought up enough evidence for a conviction, some 72 per cent showed themselves ready to accept the confession and to take it as the only basis for conviction.\textsuperscript{93} The principle of substantive truth is considerably undermined further if an informal agreement

\textsuperscript{84} Braun note 60 above, at 6.
\textsuperscript{85} Rückel, Christoph 1987 “Verteidigertaktik bei Verständigungen und Vereinbarungen im Strafverfahren – Mit Checkliste –” \textit{Neue Zeitschrift für Strafrecht} 297 at 303.
\textsuperscript{87} Schünemann note 47 above, at B112.
\textsuperscript{88} Schmidt-Hieber note 86 above, at 356.
\textsuperscript{89} Bundesgerichtshof.
\textsuperscript{90} BGHSt JR 1998 245, 248.
\textsuperscript{91} Widmaier note 22 above, at 358.
\textsuperscript{92} Bussmann note 16 above, at 76.
\textsuperscript{93} Schünemann note 47 above, at B23. See also OLG Bremen, StV 1989, 145 where the presiding judge admitted not to have read the file before initiating negotiations with the defendant.
consists of a so-called ‘slim confession’. A ‘slim confession’ means that the defendant only confirms the already known evidence rather than revealing any new facts. This kind of confession is usually formulated by the defence counsel\(^94\) and then just confirmed by the defendant. The defendant favours a ‘slim confession’ because they thus avoid having to release details, which might otherwise bring about a harsher sentence or be used in a civil action by the victim.\(^95\) The court too might favour a less elaborate statement of the facts of criminal liability because more details of the crime could lead to suspicion among the public who might not understand the mild sentence or probationary custody.\(^96\) Instead of revealing the material truth, which is the aim of the German criminal process, the defendant does not expose any more details than had already been known by the prosecution. In this respect, the argument that a confession deserves a sentence reduction because it facilitates fact-finding, is no longer applicable.

The second form of offer by the defendant is to waive or withdraw a motion for the admission of evidence\(^97\) in order to shorten the proceeding. The defence also might agree not to challenge the admission of certain evidence by the prosecution or the court.\(^98\) In this way, the defendant renounces a considerable part of their procedural rights. Sometimes the defence offers additional remedies such as a promise to improve the environmental protection at their factory or to waive administrative procedures.

Most informal settlements include the waiver of the right to file an appeal.\(^99\) Although any promise to waive the right to appeal made by the defendant before the final conviction is not legally binding\(^100\) it is only rarely broken. Even though there are legal remedies against a sentence based on an informal settlement, the defendant rarely uses these, notwithstanding the fact that in contrast to professionals, they have no consequences to fear. There are three possible reasons why the defendant does not challenge the conviction. First of all, they may be satisfied with the outcome to which they have agreed. Secondly, they might be reluctant to spend more time, money and effort on another process. The third and most serious reason is that the defence counsel might not have informed the client about the legal remedies against the settlement, or even about the existence of the agreement itself, which the lawyers have negotiated on their own.\(^101\)

\(^94\) Who chooses the formulations carefully in order to avoid any civil action.
\(^95\) Schünemann note 47 above, at B83.
\(^96\) Ibid, B26.
\(^97\) Braun note 60 above, at 6.
\(^98\) Schmidt-Hieber note 60 above, at 6.
\(^99\) Küpper/Bode note 12 above, at 353.
\(^100\) Herrmann note 14 above, at 75.
\(^101\) Schünemann note 31 above, at 1900.
Besides the dismissal or a penal order, the prime offer the prosecution can make is to recommend a lower sentence to the court.\textsuperscript{102} As in England and Wales, the result of a settlement can also be a downgrading of the charge, for example from attempted manslaughter to dangerous injury\textsuperscript{103} or from perpetrator to abettor.\textsuperscript{104} However, the court is not bound “by the offense's evaluation which formed the basis of the order opening the main proceedings.”\textsuperscript{105} This means if the evidence during the hearing shows that an act has to be evaluated as the higher charge the court has to convict accordingly. If however the court accepts a slim confession without further investigation it will not have any indication that a higher charge might be more appropriate.

In addition to a sentence reduction the accused might be offered release from custody\textsuperscript{106} and other coercive measures against them.\textsuperscript{107} Also, the exclusion from the public can be offered in order to maintain the defendant’s privacy and professional reputation. Especially in white-collar crimes, the publicity of a criminal procedure can cause serious financial losses owing to the damage done to the reputation of the defendant or their business. Since the public can only be excluded if the requirements of §§169ff Judicature Act\textsuperscript{108} are met, informal strategies, such as the scheduling of the trial for late afternoon, or not passing information to the judicial press service, are used to avoid an audience in the court room.\textsuperscript{109}

**Criticisms**

The main criticism in relation to plea bargaining is not so much that the accused is pressured in an undue way as is claimed in England and Wales.\textsuperscript{110} Although such cases might occur, there is no evidence that this happens more than just exceptionally. Until last year the largest part of the academic discourse was instead dealing with the question of whether informal agreements are reconcilable with the German constitution, the general principles of criminal procedure, and certain provisions of the Criminal Procedure Code and the Penal

\textsuperscript{102} Herrmann note 14 above, at 68. On the duty of the prosecutor to recommend a sentence to the judge, see Fionda, Julia Alison 1995 *Public Prosecutors and Discretion: A Comparative Study* (Oxford: Clarendon Press) at 148.
\textsuperscript{103} Herrmann note 14 above, at 63.
\textsuperscript{104} Hassemer/Hippler note 12 above.
\textsuperscript{105} § 264 II.
\textsuperscript{106} Schmidt-Hieber note 43 above, at 1017.
\textsuperscript{107} Braun note 60 above, at 6.
\textsuperscript{108} Gerichtsverfassungsgesetz.
\textsuperscript{109} Bussmann note 16 above, at 18.
Principles which were claimed to have been infringed are the presumption of innocence, the right to a fair trial, the right to one’s lawful judge, the right to judicial hearing, the principle of public trial, the principle of substantive truth and court investigation, the principles of immediacy and orality, the privilege against self-incrimination, the compulsory prosecution, the duty of presence of the accused, the prohibition of undue pressure. Whereas most academics held informal settlements an illegal practice, most practitioners were convinced of its compatibility with the German legal system. Even though in the early 1980s the topic of informal case dispositions was considered explosive and disreputable, many authors soon ascribed legality to this practice long before the introduction of the new legislation this year. The main points can only be summarised here but it will be evident that the discourse resembled very much the plea bargaining debate in Anglo-American criminal justice systems. The main arguments supporting the legality of informal agreements were that the Criminal Procedure Code did not forbid them expressly; that there were other provisions which allowed negotiations; that a decision based on consensus helped to achieve a fair and accepted outcome; and that the practice had been so well established that it was not reversible anyway. The major arguments against informal procedures were that, as long as the Criminal Procedure Code did not allow them explicitly, they were illegal; that they violated most major principles of the criminal process; that they compromised the role of the trial; and that they led to arbitrary results with a class bias. Although informal negotiations played such a vital role in Germany’s criminal justice system for at least 40 years, the literature shows that the legality of informal agreements was highly contested in relation to numerous principles and provisions. It is interesting to observe how many arguments some authors advanced to show that informal procedures are legal, while before 1982 no one doubted their illegality. Only after it was no longer possible to deny that informal negotiations were more than rare

112 It is also discussed that courtroom actors engaging in informal agreements might commit offences themselves. It is argued that participating professionals might violate §336 Penal Code (perversion of justice), §§258, 258a Penal Code (preventing prosecution of a guilty person), or according to §240 Penal Code (duress). Likewise the betrayal of the client’s interests (§356 Penal Code) and breach of the duty to observe secrecy (§203 I no. 3 Penal Code) are discussed in the literature.
113 Herrmann note 26 above, at 775.
114 Bussmann note 16 above, at 48.
115 See Tscherwinka, Ralf 1995 Absprachen im Strafprozeß (Frankfurt am Main: Lang).
116 Swenson note 111 above, at 392 and 400.
117 See Tscherwinka note 115 above.
exceptions, were justifications sought.\textsuperscript{118} Otherwise, one would have had to recognise and admit that judges made wide scale use of illegal means.\textsuperscript{119}

Unfortunately, the discussion of legality failed to address broader questions, such as what the development outside informal procedures can tell us about the actual balance of judicial and legislative power in Germany, the relation between work-quotas and law obedience, the role of legal principles and values, and the relationship between substantive and procedural criminal law. Rather, the debate concentrated exclusively on the question of legality and the need for regulation. This gap in the discussion is regrettable as, as will be argued below, it seems very questionable whether legislation can heal the rift between the traditional theoretical principles of the formal German criminal procedure and the new informal practice which is created to shortcut this procedure.

**Attempted restrictions by court rulings**

In economic crimes, informal settlements have been carried out for years in spite of the fact that all participants were aware that the Federal High Court of Justice would not accept this practice.\textsuperscript{120} Since a crucial part of the agreement is usually the waiver of the right of appeal only a handful of higher court rulings dealt with informal settlements. But because of an increasing number of failed agreements (usually claiming a violation of the principle of freedom from coercion under §136a\textsuperscript{121}) the Federal High Court of Justice and even the Federal Constitutional Court were eventually forced to provide some rulings on this practice.\textsuperscript{122}

The first landmark decision\textsuperscript{123} was delivered by the Federal Constitutional Court\textsuperscript{124} in 1987 when the appellant claimed that his constitutional rights were violated. In the preliminary procedure the Court denied having jurisdiction over the present case about an informal agreement as it could not identify any drastic violation of constitutional rights. It was held that negotiations outside the court in which the partners discuss the prognosis of the case, were not generally forbidden as long as the law was respected. In this case there was no violation of any procedural law because the presenting of evidence at trial had been nearly completed and

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\textsuperscript{118} Bussmann note 16 above, at 90 “The knowledge of the existence and the significance of an informal practice changed its legal interpretation.”

\textsuperscript{119} Bussmann note 16 above, at 126. This is even supported in many other areas of law such as civil law or administrative law, where agreements are legal.

\textsuperscript{120} \textit{Ibid.}

\textsuperscript{121} “(1) The accused's freedom to make up his mind and to manifest his will shall not be impaired by ill-treatment, induced fatigue, physical interference, administration of drugs, torment, deception or hypnosis. Coercion may be used only as far as this is permitted by criminal procedure law. Threatening the accused with measures not permitted under its provisions or holding out the prospect of an advantage not envisaged by statute shall be prohibited.”

\textsuperscript{122} For a summary see Swenson note 111 above, at 419.

\textsuperscript{123} BGHSt NSZ 1987, 419.

\textsuperscript{124} Bundesverfassungsgericht.
the final sentence was commensurate with the offender’s guilt. In addition the Court stated that the free choice of the defendant had not been violated in an unlawful way. However, like the Court of Appeal in *Turner*, the Federal Constitutional Court established a set of rules under which informal settlements could be accepted: first, all participants have to be involved and any negotiations including their contents have to be set out in the main trial hearing. The settlement must not include any *ultra vires* promises and the agreed outcome must be lawful and justifiable. Further, the agreement is not binding, but there must be no divergence without reason. Finally, following the principle of substantive truth, the defendant’s confession has to be examined by the court to determine if it is genuine. Setting out these limitations, the Court seemed to acknowledge the general validity of informal settlements. However opponents pointed out that only in these very restricted circumstances would negotiations be allowed, but that the majority of informal settlements would fall outside these limits and were therefore illegal.

The Federal High Court of Justice passed a number of confusing rulings regarding specific aspects of informal agreements, without however addressing whether the practice in general was permissible. In 1989 it was held that the trial judge was allowed to contact the parties outside the courtroom but the Federal High Court of Justice did not deal with the question of whether this contact could amount to any negotiations with the parties. The Court made clear that if the trial court raised certain sentence expectations the defendant could rely on them but it is not clear whether it was allowed to raise such expectations in the first place. In a tax evasion case in 1990 the Court held that the prosecution’s offer to drop some charges if the defendant accepted a penal order would not preclude proceedings against the withdrawn charges later but would be considered mitigating circumstances. In another case of the same year the Court again avoided dealing explicitly with the legality of informal settlements in general, but held that in the present case the judges had been biased because they negotiated with the two co-defendants but not with the appellant, who was not informed about the settlement. One year later, the court declared that informal agreements contradict the rule of law, and in another decision of the same year, it clarified that the agreement does not

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126 Bundesverfassungsgericht.
127 Braun note 60 above, at 128.
128 Swenson note 111 above, at 419.
129 BGHSt NJW 1989, 2270.
130 BGHSt NJW 1989, 2270.
131 BGHSt NJW 1990, 1924.
132 BGHSt NJW 1990, 3030.
133 BGHSt NStZ 1991, 348.
bind the trial court as this could render judges biased. Further, it now criticised the practice of informal negotiations in the strongest terms. Any informal contact should be limited to ‘feeling out’ the parties, without dealing with questions of sentencing or probation. However, only a couple of months later a different Senate of the same court disallowed an informal settlement for specific reasons, rather than reasoning that they were generally impermissible. In 1993 it was confirmed that extra-trial settlements would not necessarily prejudice the court’s judgement. The decisions of the Federal High Court of Justice on the practice of informal negotiations have been ambiguous throughout and consequently the interpretation of the rulings highly debated. The Court seemed to oscillate between criminal procedural principles on the one hand and the pragmatic necessity of informal agreements on the other. In an obiter dictum the Court stated the incompatibility of informal settlements with the legal system, but made a contrary ruling soon after. It explained that the solution lay in a linguistic distinction between illegal ‘accordance’ (Absprache) and legal ‘understanding’ (Verständigungen), but the Court did not provide any criteria to distinguish between the two forms in practice.

In a landmark decision in 1997, the Fourth Senate of the Federal High Court of Justice declared informal settlements “not prohibited” if they were within certain limits: The negotiation has to take place in the main trial hearing, although discussions in the course of preparation are allowed if the result is revealed during the main trial. Further, all participants (including co-defendants) have to be informed. The trial court is not relieved from its obligation to find the objective truth and thus has to investigate the credibility of the confession. As a consequence the verdict of guilt of any offence must not be part of the negotiation. Further, a confession made as part of the informal negotiation has a mitigating effect but the court is not allowed to indicate the exact sentence. However, it is permissible to indicate the maximum penalty that could be expected. Threats or undue promises are forbidden. The same is true for a waiver of the right to appeal by the defence. As will be shown later, it is especially the

134 BGHSt NJW 1991, 1692.
135 The Federal High Court of Justice is divided into five chambers, called Senate.
136 BGHSt NJW 1992, 519.
137 BGHSt NJW 1994, 1293.
138 Küpper/Bode note 12 above, at 395.
139 BGHSt 37, 298.
140 BGH NStZ 1994, 196.
141 BGHSt NJW 1998, 86 (This was a case of hundredfold sexual abuse and rape of the minor daughter of the defendant).
142 Herrmann, Joachim 1999 “Rechtliche Strukturen für Absprachen in der Hauptverhandlung: die Richtlinienentscheidung des Bundesgerichtshofs – BGHSt 43, 195” Juristische Schule 1162; For a critique of this decision, see Weigend, Thomas 1999 “Eine Prozeßordnung für abgesprochene Urteile” Neue Strafrechtszeitung 57.
last rule which is generally disregarded in practice. Since this decision the Federal High Court of Justice repeatedly emphasized that although the practice of informal negotiations was developed *praetor legem* it is now a necessary part of the German criminal justice system and thus permissible within the restrictions of the 1997 decision. However, these guidelines were met with incomprehension by the general judiciary who felt they would not address their concerns. The restrictive limits of the ruling did not reflect the practice of informal negotiations and practitioners felt that the Federal High Court of Justice was too remote from the day to day work of trial courts to understand the practical necessities. The 1997 decision did not prove to be the final clarifying decision many had been waiting for. Seven years later there were still discrepancies between the five criminal Senates of the Federal High Court of Justice regarding informal agreements. In 2004, the Third Senate put the question of validity of waivers of appeal as part of the agreement to the Joint Senate of the Federal High Court of Justice. The Joint Senate confirmed once again the general permissibility of informal agreements within the guidelines of the 1997 decision but limited the waiver of appeal. The court made clear that if the judgement is based on an informal agreement any waiver of appeal by the defendant was not binding unless the defendant has been informed by the court that they were not bound by any promises to waive the right to appeal made previously as part of the agreement, the so-called ‘qualified information’. Moreover, the court declared that “the limits of judicial lawmaking” had been reached and called for action by the legislator.

**The new legislation**

The German legislator followed the call of the Federal High Court of Justice, and on May 28, 2009 the German Federal Parliament passed the Bill for the Regulation of Agreements in the Criminal Procedure which formalises agreements during the criminal trial. Except for some minor changes the legislation largely follows the guidelines set out by the Federal High Court of Justice. A new section (§257c) was introduced into the German Criminal Proce-
dure Code which allows for and regulates agreements without – so it is claimed\textsuperscript{153} – infringing on the principles of the German criminal procedure.

The new provision regulates the agreement between the court, the prosecution and the defence. An agreement becomes valid when the court announces the possible content of the agreement and both prosecution and defence consent.\textsuperscript{154} It is not clear what legal status agreements have that have been made before or outside trial. §160b allows for communications between prosecution and defence before trial (“if they appear to be suitable to further the proceedings”) which need to be read into the record but it is unclear whether binding agreements between prosecution and defence without the involvement of the court are prohibited or simply not part of the new regulation.

The new provision is aimed at preserving the principle of substantive truth. Only if the court is convinced that the offence has been fully investigated and there are grounds for believing that the admission of guilt is genuine can the judgement follow. This confirms the Federal High Court of Justice ruling that a mere “formal admission” (in which the defendant only admits guilt but does not make any statement about the facts) does not suffice for a judgement.\textsuperscript{155} It follows that the settlement must not include an agreement about a verdict of guilt.\textsuperscript{156} This provision also excludes any negotiations that in the common law system would be called charge bargaining. However, charge bargaining very likely occurs before the trial between prosecution and defendant. It was shown before that the negotiation about different charges is invaluable for both defence and prosecution and it is very questionable whether §257c(2) will be able to end these kinds of negotiations.

All negotiations before and during trial have to be announced during the main trial hearing and read into the record.\textsuperscript{157} The recording of all negotiations and agreements serves transparency and furthermore ensures that all arrangements can be revised by an appeal court. According to the new §273(1a), even the absence of any agreement needs to be recorded. From now on the record of every trial needs to include clarification of whether there has been any agreement or not. This is an important step to move “plea bargaining” out of the shadow of informality into the field of regulated, transparent and controllable formal procedure.

To ensure the principle of fair trial and protect the defendant, §257c(4) rules that unless new facts emerge (be they related to the crime itself or the behaviour of the defendant after

\textsuperscript{153} Bundesdrucksache 16/13095.
\textsuperscript{154} § 257c(3).
\textsuperscript{155} 3 StR 415/02 judgement from Jan. 26, 2006.
\textsuperscript{156} § 257c(2).
\textsuperscript{157} § 273 (1) b.
the agreement), the trial court is bound by its initial prognosis of punishment.\textsuperscript{158} This stipulation protects defendant expectations but ensures that the final sentence does reflect the known facts and not merely the agreement. If the trial court feels that it cannot sentence according to its initial sentence prognosis the admission of guilt cannot be used as evidence. This rule attempts to restore the \textit{status quo} before the agreement, in particular the presumption of innocence. However, it will be very difficult for the trial court\textsuperscript{159} to disregard a confession after it had previously accepted it which it can only do if it was convinced, according to the concept of substantive truth, that it was genuine. One can easily imagine a situation in which the defendant submits a credible confession that concurs with other evidence but later new aggravating facts arise and the trial court cannot justify its initial indication of maximum sentence. In this case the agreement falls apart, the court is not bound by its promise, and the defendant’s confession is presumed not to have been made. It is not realistic to expect the court to disregard a confession which it was convinced was true now that additional aggravating facts have arisen. Even if the court is able to disregard completely the earlier credible admission of guilt, if the defendant is convicted it will be hard for them as well as the public to believe that the court was not prejudiced by the previous confession.

The second central aspect of the new law is the waiver of appeal. Following the guidelines of the Federal High Court of Justice, according to §§35a, 302(1) a waiver of appeal must not be part of any agreement. Further, whenever a judgement involves an agreement any waiver of appeal (even if it was not part of the agreement) is only valid if the defendant has received the qualified information explained above. This means if a case involves an agreement and the defendant waives their right to appeal the court has to explain to the defendant that if this waiver was part of the deal they are not bound by it.\textsuperscript{160} Only if the defendant sticks to the waiver after being thus informed by the court does it become valid. The aim of this strict rule is to ensure that agreements are open to revision by the appeal courts. It is hoped that this judiciary control will guarantee that all agreements are within the legal boundaries and thus establish legitimacy for this practice. However, like the Federal High Court of Justice before, the legislator has overlooked the flaw of this reasoning. The waiver of an appeal by the defendant has potentially two invaluable benefits for the trial judge. First, without the prospect of an appeal, the judgement does not need to be formulated with the same care as if it were open to review by a higher court. Secondly, every appeal is a challenge to the rightfulness and quality of the judge’s decision. The fewer cases of an individual judge that are reviewed by a

\textsuperscript{158} § 257c(4).
\textsuperscript{159} There is no jury in the German trial.
\textsuperscript{160} §§257c(2), 302 (1).
higher court, the fewer decisions are overruled, which is important for the judge’s career appraisals. The defence lawyer too, is unlikely to favour an appeal that will damage the trust-based working relationship with court and prosecutor and might threaten future negotiations. Thus a judicial review of cases based on informal agreements is not in the interest of the practitioners and it does not come as a surprise that this rule was regularly disregarded. It is more than questionable whether the new legislation will be able to change this.

Another problem related to the waiver of appeal is the time limit for the defendant. If the defendant declares a waiver of appeal without receiving the qualified information and then decides to appeal after all, they can do so only within the ordinary time limits for appeals, which is one week after pronouncement of the judgement. The Federal High Court of Justice explicitly ruled that the time limit cannot be extended for defendants who have entered an agreement because this would put them in a better position than defendants who have not participated in a settlement. In practice this means that defendants who are not informed by the court that they are not bound by their initial waiver of appeal can only file an appeal if they find out that their initial waiver is invalid within one week after the judgement. If court and defence counsel agree to a settlement which illegally includes a waiver of appeal it is doubtful that they will later inform the defendant that this part of the deal is not binding. As was argued before, an appeal is not in the interest of any of the courtroom actors. The future will show if courts will take advantage of this loophole. Marsch guesses that the waiver of appeal will not end but only be made invisible.

Considering the little impact the rulings of the Federal High Court of Justice had on the practice of informal negotiations, the main question is whether the new legislation (which adds little in substance) will be followed by the courtroom actors. Since the debate of informal agreements started in Germany calls for legislative regulation of the practice have been voiced. It was argued that the legislator needed to regulate the practice and lift it out of the informality so that courtroom actors would not need to act outside the Criminal Procedure Code anymore. However, Nestler-Tremel pointed out that legality was only a theoretical problem, for in practice the defendant usually waived the right to appeal and thus withdrew the negotiations from any formal control. Besides, informal settlements were carried out long before practitioners even dared to admit it. Even if proponents later argued that informal

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161 §341(1).
162 BGH 4 StR 246/08.
163 Marsch note 8 above, at 220.
agreements would fit into the German criminal law system, initially the participants did not believe them to be legal but used them on a regular basis nevertheless.\textsuperscript{165} If the judiciary developed its own system believing the procedure to be illegal, it is doubtful they would accept legal regulations and restrictions.\textsuperscript{166} Meyer-Gossner even declared that informal agreements “are going to shape the legal everyday life with or without legislation.”\textsuperscript{167} Schünemann on the other hand disapproved of this viewpoint and called it an unrealistic insult to the German judiciary.\textsuperscript{168} However, the development of the dismissal which was repeatedly extended by the legislator to follow \textit{praetor legem} development of the informal practice by the judiciary\textsuperscript{169} supports Meyer-Gossner’s view. Bussmann’s research confirmed that the question of legality did not play a notable role for the professionals. The practitioners were led by quotidian requirements rather than by the formal law and consequently they were not particularly concerned whether the question of law should be changed.\textsuperscript{170} It was not so much that the practitioners suppress the praxis-law conflict, but rather that the formal law plays an inferior role in the daily practice. When considering whether to initiate an informal negotiation, participants calculate the benefits and drawbacks, rather than its compatibility with the law.\textsuperscript{171} Thus formal law is replaced by an informal but established code of conduct.\textsuperscript{172} Widmaier made the reality of the practice very clear: “Settlements in criminal procedure do exist. They do not need to be first legalised, nor can they be prohibited.”\textsuperscript{173} Concluding from this experience it is very questionable whether the courtroom actors will adapt their practice-driven customs to the limits of the new §257c. Meyer-Goßner points out that judges and prosecutors are less likely to ignore legislation than judge-made law because they could commit the criminal offence of perversion of justice according to §339 German Penal Code.\textsuperscript{174} However, this threat seems not to have been strong enough to prevent the judiciary and prosecutors from developing extensive informal practices outside the law of dismissal and penal order in the first place.\textsuperscript{175} Since the appeal courts have developed the rules which have become now written law, it must be expected that appeal courts will support the new legislation, but of course they will only have the opportunity to do so if the trial courts use agreements openly.

\textsuperscript{165} Herrmann note 14 above, at 57.
\textsuperscript{166} Siolek 1993, 428.
\textsuperscript{167} Lutz Meyer-Goßner, note 2 above, at 187.
\textsuperscript{168} Schünemann note 47 above, at B 159.
\textsuperscript{169} See above section 2.
\textsuperscript{170} Bussmann note 16 above, at 219.
\textsuperscript{171} Nestler-Tremel note 164 above.
\textsuperscript{172} Bussmann note 16 above, at 141.
\textsuperscript{173} Widmaier note 22 above, at 357.
\textsuperscript{174} Lutz Meyer-Goßner, note 2 above, at 190.
\textsuperscript{175} See above section 4.
The future will reveal whether the new legislation will succeed in lifting the agreements out of informality into the realm of the formal procedure. The present author has serious doubts whether the formalisation of a practice which derives its attraction from its informality can be realised.

The chasm between theoretical values and practical necessities

As in England and Wales, the merits of informal negotiations for the German criminal process are highly contested. Whereas most practitioners praise the usefulness and even the necessity of informal procedures, many academics point out that this practice is not compatible with the basic values of the German criminal justice system. But there is a third essential theme which is missing in the debate. The present author argues that the development of informal procedures in Germany, as with plea bargaining in England and other common law systems, leads to the development of an informal system which runs parallel to the formal process without either Higher Courts or legislation being able to prevent or at least control it. This opens questions not only about the power of the judiciary in general but also whose role it is to close the chasm between theoretical values and practical necessities in general. The legislator in Germany had the opportunity to engage in a debate about the tension between the two but unfortunately did not address this question at all.

It has been argued above that the core reason for the start of informal settlements in Germany was the change in the nature of the substantive criminal law without adaptation of the procedural law. Both the German Penal Code and the Criminal Procedure Code date from the 19th century when crimes were comparatively simple to define and generally corresponded to the understanding of an average person. In modern society, with the increasing introduction of crimes that cause danger (rather than harm), common sense is no longer sufficient to establish the boundary between permissible and criminal conduct. The main question is often not the identity of the offender but whether an offence was committed in the first place. The conduct of the accused has not to be indentified but interpreted. For example the trial court might not need to establish whether the defendant has transferred money but whether this transaction amounted to money laundering. This means criminal law has been extended to offences which do not fit under the conventional criminal procedure law. Not surprisingly the courtroom actors have had to adapt their way of handling these cases and court behaviour has become less characteristic of criminal but typical for administrative law:

Through giving up the punitive, repressive paradigm in favour of an economic paradigm and abandonment of hierarchical, authoritarian forms of interaction in favour of cooperative, consent orientated forms of process, criminal procedures become increasingly similar to administrative law procedures, solving conflicts of interests [...] by negotiation.177

Hence, legal practice finds itself in a quandary between, on the one hand formal procedural law which is still oriented toward the principle of material truth and on the other hand substantive criminal law, which blurs the boundaries between allowed behaviour and criminal conduct and thus pushes towards formal truth on which the participants agree. As certain behaviours were transferred to the more repressive criminal law, the criminal trial itself was replaced by informal negotiations where the offender can now negotiate and avoid public stigmatisation. The fact that more and more offences have been transferred from administrative law into criminal law in order to exercise more repressive control on white-collar crime, ironically has had the effect that criminal courts increasingly might replace the trial with less repressive, consensus orientated negotiations. While this is welcome in most cases by the defendant and all courtroom actors it disregards the interest of the public in proportionate punishment and fair labelling of the crime.

The increasing re-structure of criminal law as a device of citizen protection into a flexible mechanism of state intervention is the wrong answer to the right question of how social risks can be dealt with.178

Rather than formally measuring the new substantive law against the traditional core values of criminal procedure and adapting one to the other, it has been left to the courtroom actors to square this circle. As in England and Wales, in Germany too, two law systems, i.e. the formal trial and the informal case disposition started to work alongside each other.179 This development is easier to accept in common law systems as judges are allowed and indeed asked to develop law. In civil law countries, too, the development of customary law is acknowledged to some degree. Herrmann holds that criminal justice is a “living organism” and hence it is possible to develop it against the law.180 Also, Schünemann regards the increasing use of informal settlements in Germany as a form of development of customary law.181 However, the development of customary law finds its limits in the fundamental principle of law and the rule

177 Bussmann note 16 above, at 27.
178 Calliess note 177 above, at 1338.
179 Bussmann note 16 above, at 20.
180 Herrmann note 26 above, at 776.
181 Schünemann note 31 above, at 1896.
of law. And as was shown above, the legality of informal agreements was always highly contested. But there is a more fundamental problem with informal criminal procedures, i.e. the consequences of the duality of systems. When two systems exist side by side, the crucial question is who has the power to decide which system is used in which case and which criteria are taken into account in this decision? The main argument of the proponents of plea bargaining in England and Wales and informal agreements in Germany is that the defendant has the choice between safeguards and sanction reduction. However, this argument has two crucial flaws: first, the defendant often does not have the necessary information to make this rational decision. They lack insight into the practices and routines of the court, they have no access to the prosecutor’s files, and it is seldom possible for a lay person to evaluate the strength of the prosecutor’s evidence especially in large-scale procedures. As a consequence the defendant will be dependent on the decisions made by the lawyers, who have their own interests in mind. Secondly, even if the defendants themselves have a choice, the divergence from a formal trial silences both the public (who are denied an audience at trial and whose interests are no longer represented by the prosecution, who again follow their own interests) as well as the victim. In both adversarial and inquisitorial criminal justice systems it is the legal professionals who decide which cases are ‘worthy’ of a full trial and which are to be disposed of informally. However, there are no guidelines on the criteria for this decision and it seems that this is an area of absolute uncontrolled discretion. As was shown above the criteria of selecting cases for plea negotiations are very random and more related to the person of the defendant than the interest of the public.

**Squaring the circle**

Informal agreements have spread so widely to all types of crime because the work pressure of under-resourced courts and prosecution offices have led to a change of priorities in the values of the criminal process. It is now the maxim of efficiency that often has to assume first priority in decision making by legal professionals. Since negotiations among the professionals have turned out to be much more efficient than contesting the case, traditional values of fair trial and proportionate sentencing have to make place for the new value of ‘process economy’. The new legislation claims to square the circle of plea bargaining, making it possible to profit from all the advantages of informal agreements while at the same time upholding the main principles of the formal criminal trial. However, it is doubtful whether the

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182 And unresearched for that matter.
183 Lüdemann/Bussmann note 28 above, at 68.
184 Prozeßökonomie.
new procedure can combine the benefits of informal agreements while preserving the safeguards of the formal procedure at the same time. First of all, the new legislation focuses on agreements between all parties during the trial whereas in reality many deals are struck before the main hearing and often without the participation of the court. Thus a great number of negotiations fall outside the new legislation. Secondly, as the confession is not sufficient to establish the defendant’s guilt automatically, the court is expected to study the dossier carefully and satisfy itself that there are no legal or factual obstacles to the agreed outcome. It has to be seen to what extent the validity of the confession will be examined by the courts. As one of the main reasons for the development of informal agreements was the shortening of proceedings it is open to question whether courtroom actors are now inclined to lengthen them. One could argue that a hearing which examines the validity of the admission of guilt is still shorter than a full trial but experience shows that courtroom actors often do not feel that they can afford the time to check the validity of the confession. Thus, with hindsight it is not surprising that courtroom actors repeatedly disregarded the Federal High Court of Justice rulings and continued to extend the use of informal negotiations. Legislation which reiterates rules that have proven to be unacceptable to courtroom actors will hardly be able to change a well-established practice.

Last, but by no means least, the question of appeal, which opens the practice to supervision of the higher courts, has not been addressed appropriately by the legislator. There is no disagreement that undue pressure, be it threats or inappropriate promises, are forbidden and render any agreement void. The essential question is how the authenticity of the confession can be tested. It is the informality of the negotiations, where the courtroom actors can speak literally off the record without having to fear to offer reason for appeal that makes informal negotiations so attractive. The informality is the reason why the attempts to render negotiations and agreements more visible by the Federal High Court of Justice rulings were opposed by the practitioners and waivers of appeals are made regularly part of the settlement. It is doubtful whether this procedure can combine the benefits of informal agreements while preserving the safeguards of the formal procedure at the same time.

It has been shown throughout the paper that informal agreements have been developed as a response to the growing gap between theoretical values of the formal process and the practical demands on the courtroom actors. The development of an informal practice which has been developed outside the written law and outside the explicit rulings of both the Federal

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185 BGH NJW 2005, 1440 (1442).
Constitutional Court and the Federal High Court of Justice proves how wide this gap is. On the one hand substantive criminal law, which today is used to solve different social problems from when the Penal Code was first written in the nineteenth century, has changed its function. On the other hand, the notion of criminal procedure and the role of punishment have shifted. Neither is reflected in the development of the formal criminal trial. The irreconcilability between traditional criminal procedure and modern criminal law seems to have been an overlooked side effect of reforms in material criminal law. Considering how much weight is given to the core values and how much pride is placed in the term ‘rule of law’, a departure from such values has to be consciously considered. Rather than leaving it to the courts to cope with the strains of new procedures, the elected legislature as well as civil society has to decide how to reconcile material and procedural criminal justice. The solution for this enormous task cannot be found in criminal law and criminal procedural law alone,186 but by taking a broader look on an inter-disciplinary basis, for example by considering options such as the reform of tax law and accounting law, a re-transfer of certain offences to administrative law, and a reconsideration of the criminalisation of certain offences of risk creating, etc.

The rules, which the Federal High Court developed and the legislator reiterated, neither discussed these underlying tensions nor did they succeed in formulating a procedure that would help the courtroom actors to serve the demands of both procedural and substantive criminal law. It seems that both the Federal High Court of Justice and the legislator assume the problems are solved as soon as they give the courtroom actors the extra freedom they are demanding. This approach demonstrates a lack of understanding of the underlying conflict between the different demands on the legal practitioners. Although regulation of previously informal negotiations in criminal law is welcome, unfortunately the legislator failed to debate of the role of modern criminal law.

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186 As what seems to be done by the main German academic discourse regarding informal settlements.