

PLEA BARGAINING IN MAJOR GERMAN CORPORATE CRIMINAL PROCEEDINGS - AN EMPIRICAL STUDY NEGOTIATED JUDGEMENTS

PLEA BARGAINING EM PROCESSOS ENVOLVENDO GRANDES CORPORAÇÕES ALEMÃS – ESTUDO EMPÍRICO. JULGAMENTOS NEGOCIADOS

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Abstract:

In August 2009, the German Parliament passed a law that allows for plea bargaining, a fundamental change in the German Code of Criminal Procedure. Whilst the German practice of plea bargaining is harshly criticized by academic discourse, there is little empirical knowledge on the concrete course of plea bargaining negotiations. This study seeks to provide an insight into the precise course of plea bargaining negotiations in an effort to reveal the normative order that underlies plea bargaining proceedings in corporate criminal trials. Interviews with the participants of major German corporate criminal proceedings show that trust and diplomacy characterize the beginning of plea bargaining negotiations. These negotiations mostly take place secretly, but in major corporate criminal proceedings, the general public is informed about the plea bargaining, because the legal practitioners want to maintain the public's trust in the justice system. Plea bargaining can be seen as an effort to maintain basic tenets of criminal procedure and to enforce principles of criminal law even in complex corporate criminal cases.

Keywords: Plea bargaining negotiations. Extra-legal practice. Trust. Enforcement of complex legal norms. Rationalization. Public control.

Resumo:

Em agosto de 2009, o Parlamento alemão aprovou Lei que autoriza a *plea bargaining*, uma mudança de impacto no Código de Processo Penal Alemão. Embora a *plea bargaining* seja duramente criticada por discurso acadêmico, há pouco conhecimento empírico dos reais efeitos da adoção deste modelo de negociação processual. O presente artigo visa a fornecer visão reveladora da ordem normativa subjacente aos processos de negociação nos julgamentos de *corporate crime*. Entrevistas com integrantes das principais corporações alemãs sinalizam que relações de confiança e diplomacia caracterizam o início das negociações.

Palavras-chave: *Plea Bargaining*. Resolução Alternativa de Litígios. *Accountability*. *Enforcement*. Eficácia. Racionalização.

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1. Dealing with justice?

Plea bargaining is a central issue among German criminal lawyers, especially since the parliament recently passed a law that allows for plea bargaining, which until this point has been practiced extra-legally. Plea bargaining is also discussed in the general public, since recently several major corporate criminal trials have been terminated by plea bargaining agreements. Newspapers and demonstrators argue that the justice system advantages wealthy and influential defendants, whereas other offenders are prosecuted strictly without any exception from procedural norms. Plea bargaining in Germany is said to be a deal with justice.

Thus the German Code of Criminal Procedure is based on an inquisitorial structure. According to this, the truth needs to be thoroughly investigated by a full adjudicative process. This means that the prosecutor and the defense counsel are not understood as opposing parties that struggle to convince the judge of their conception of truth, but rather as participants searching for “the” truth within the scope of their roles. Within this setting, informal communication is seen neither to be necessary nor appropriate. However, plea bargaining encompasses informal communication among the participants of a criminal proceeding, which, at first glance, is why plea bargaining seems to be alien to German criminal procedure and consequently, why it has often been subject to harsh critique. 1 Doctoral student at the International Max Planck Research School on Retaliation, Mediation and Punishment, for details visit <http://remep.mpg.de>. In the following discussion, some aspects of this critique on the German plea bargaining practice will be confronted and tested based on the results of an empirical study of plea bargaining in German corporate criminal proceedings. Corporate criminal proceedings are proceedings that deal with violations of corporate criminal norms such as fraud or misappropriation. These norms refer to crimes committed in the course of and in connection with some sort of economic activity.

2. A Model of Plea Bargaining

Up until now, an extra-legal practice of plea bargaining has been flourishing for some 20-30 years. Up to 80 % of complex corporate criminal proceedings are resolved by plea bargaining negotiations between the participants (Schünemann 1990 p. 18). Legal practitioners shorten criminal proceedings by making the following deal: The defendant confesses and in turn receives a less severe punishment. This basic model of plea bargaining is varied in many different types. For instance, the participants can also agree that the defendant will be accused only of certain pre-selected crimes in order to avoid lengthy evidential hearings.

Some examples from other European legal orders shall shed light on the diversity of plea bargaining also in the German practice of criminal procedure. They

also reveal that the German concept of plea bargaining is similar to other models of plea bargaining in Europe (see for detailed depictions Gonzáles-Cuéllar Serrano 2008 p. 223, Hofmánski 2004 p. 113, Orlandi 2004 p. 120, Vogler 2004 p. 129) For instance, it contains elements of the Common Law style of bargaining. In sentence bargaining, the defense counsel makes advanced inquiries as to the penalty the judge would recommend if the defendant were to plead guilty. In fact bargaining, the facts of a case are not fully mentioned during the trial; for instance, aggravating factors are not dealt with. German plea bargaining can also encompass elements of charge bargaining. When problems relating to evidence occur, the prosecutor might accept a guilty plea to a lesser charge or might dismiss collateral charges in return for a guilty plea. These concessions can also be the subject of German plea bargaining. The main difference between a guilty plea according to the British model and a confession according to the German model stems from the divergence between the adversarial and inquisitorial legal systems: A confession rather than a guilty plea appears to better suit the criterion of finding “the” truth in the German inquisitorial system.

The *conformidad privilegiada* in Spanish criminal law allows for a discount of sentence of one third when the defendant confesses and accepts the recommended sentence without a public trial. The German plea bargaining system does not provide for such a discount determination and does not fully omit a public trial. But the underlying principles are quite similar. The Italian *patteggiamento* (i.e. the sentence is provided on application of the prosecutor or the defense counsel) and *guidizio abbreviato* (i.e. the defendant waives aspects of their motion to take evidence and their right to a public hearing) are further plea bargaining examples. These models of plea bargaining are based on the principle that a defendant who waives certain procedural rights will receive a mitigated punishment in return. This idea also underlies the German model of plea bargaining, although not explicitly in order to stick to the demands of a full adjudicative proceeding.

3. Critiques on Plea Bargaining in Academic Discourse

The practice of plea bargaining is harshly criticized by academics in Germany (exemplarily: Bussmann & Lüdemann *Klassenjustiz* 1995 p. 214 ff; Hassemer 2009 p. 222; Schünemann 2009 p. 104; Weichbrodt 2005 p. 148 ff). Some academics explain the development of plea bargaining in Germany as a paradigm shift or at least as a modernization of criminal procedure (Bussmann 1991 p. 23, Schünemann 2005 p. 29 Weigend 1990 p. 780; Weßlau 2002 p. 106 ff): The proceeding is no longer geared towards abstract principles of the Criminal Code of Procedure and no longer stands for abstract justice based on truth in its material sense. Instead, the German inquisitorial style of criminal procedure seems to be turned into an adversarial structure (Trüg 2003 p. 198; see for Italy: Orlandi 2004 p. 120).

Concerning the German practice, plea bargaining is said to suspend the formal procedure and therefore to clash with basic tenets of the German criminal procedure in several respects. For instance, the presumption of innocence can be infringed upon if the defendant is asked or even forced to make a confession in an effort to receive a less severe punishment. This can also infringe the principle of legality, because if the prosecutor only relies on the defendant's confession, he or she neglects his duty to investigate the truth. The principle of legality ensures that every case is prosecuted regardless of possible political issues and that the truth is investigated by an objective institution and not by potentially unequal parties. The principle of public trial can be harmed, because main decisions are made without public control that is supposed to protect the defendant from a possible misuse of the state's power. Furthermore, the principle of fairness might be infringed, if plea bargaining is not applied in all cases, so that only certain offenders, namely business offenders, receive plea bargaining offers, whereas other defendants do not get this chance of a less severe punishment. Criticism of plea bargaining in other European countries refers to quite similar points: Plea bargaining weakens the basic principles of the criminal justice system, for example, the obligation to search for the truth, the presumption of innocence and the proportionality of sentences. As in the German debate, plea bargaining is also criticized for disregarding the victim's interests through a full adjudicative trial (for further details see Orlandi 2004 p. 120; Vogler 2004 p. 140). Nevertheless, critique in these countries does not appear to be as harsh and intense as in Germany. Other countries do not seem to be that reluctant to balance a need for both contemporary techniques for complex trials and traditional principles of the criminal procedure. Moreover, in many of the other European countries, plea bargaining is integrated into the legal system since several years.

4. Implementation of the Plea Bargaining Law

Interestingly, the Spanish Code of Criminal Procedure was already open to a sort of plea bargaining from 1882 onwards due to its *conformidad privilegiada*. Italy passed its first plea bargaining law in 1988. In Poland, penal law plea bargaining has existed since 1998. In comparison, it was only in August 2009 that the German Parliament passed a law that allowed for plea bargaining (“Gesetz zur Regelung der Verständigung im Strafverfahren”). In so doing, the legislator sought to enhance communication among the participants, to provide transparency and control to the practice and to better use the finite resources of the justice system (Niemöller, Schlothauer & Weider 2010 p. 24). The core of the 2009 German law, § 257 c of the German Code of Criminal Procedure, enables the court to recommend a minimum and a maximum (but no exact) penalty if the defendant is ready to confess. The court is bound by this agreement to a certain degree. Furthermore, the new law forces participants to record their bargaining actions and to announce them

in the public hearing. It forbids bargaining over a waiver of appeal. The new law can be seen as the legislator's admission to the reality of criminal proceedings. But like the plea bargaining laws of other European countries such as Spain or Italy, the German plea bargaining law has been criticized for not being well-grounded and clearly regulated (see for example Orlandi 2004 p. González-Cuéllar Serrano 2008 p. 225, Schünemann 2009 p. 104). German legal practitioners have leveled the criticism that the law seems to be alien ("aufgepropft") to the German Code of Criminal Procedure because it lacks a dogmatic grounding. The opinion has also been expressed that the legislator only pretended to meet the Code of Procedure's requirements and that the law allows for consensual elements in the finding of truth without having regard to the problems surrounding the principle of legality (Meyer-Goßner 2009 p. 8). Due to the law's shortcomings (e.g. incorrect terms, disregarding the Code's system), critics have gone so far as to question whether the law has any practical use at all (Niemöller, Schlothauer & Weider S. V, 24). An indication of this is that the new law is based on rules established by the Federal Court of Justice in 1997 (BGHSt 43, 195) that were already hardly obeyed (Theile 2009 p. 223). Accordingly, the practitioners interviewed in the study are skeptical about whether they will obey the new rules, because the law appears to be naive of the informal rules they have established in the last 20-30 years. For instance, the forbidden waiver of appeal is in practice a main element of plea bargaining agreement, the existence of which goes without saying. The duty to record plea bargaining negotiations is in general estimated to grant safety and trust concerning the compliance with a plea bargaining. However, practitioners doubt whether they will always write down the most delicate parts of their accord.

II. Empirical Study on Plea Bargaining

1. Goal: Structural Principles of Plea Bargaining Agreements

While there is an intense debate on theoretical questions evolving from penal practice, there is very little empirical research on plea bargaining in criminal proceedings in Germany. Moreover, the few previous studies in this field have been limited to proving the existence and the frequency of plea bargaining (Schünemann 1990) and its course from a plain legal point of view (Altenhain, Hagemeyer, Haimerl & Stammen 2007). But since it is known that plea bargaining takes place out of the terms of the Code of Criminal Procedure, it would thus be of interest to learn what else provides the normative groundwork for plea bargaining. Which set of norms shapes a "second code" (Trüg 2003 p. 4.) for negotiated judgments? Therefore, the main purpose of this study is to provide an insight into the precise course of plea bargaining negotiations in order to reveal the normative order that underlies plea bargaining proceedings in corporate criminal law. The primary focus is on the importance of consent for penal dispute settlement in situations, when purely authoritative legal decisions are not available due to highly complex legal

cases that create evidence difficulties. The aim is to look for structural principles of justice in situations when the Code of Criminal Procedure seems to be inappropriate to cope with the difficulties of corporate criminal law.

2. Hypothesis: Plea Bargaining as a Method to Cope With Complex Legal Situations

This query is based on the following main hypothesis: Consensual resolutions come to the fore when there are serious difficulties in putting the regular Code of Criminal Procedure into practice. Obstacles to the regular proceedings can, for instance, result from capacity overload of courts or highly intricate corporate criminal law norms (such as fraud or misappropriation). In order to enforce criminal law, legal practitioners might change the pure legal mode of decision making in an effort to open the proceeding up to informal communication. Plea bargaining might change the proceedings' normative frame of reference. Beyond the code of criminal procedure there might exist a set of informal norms for negotiating and proceeding in consensual decision making (Hassemer 1982 p. 382). This "second code" of corporate criminal trials probably is not geared only towards efficiency and expediency as is frequently criticized by academic discourse. Rather, plea bargaining could be a method to make decisions and to impose sentences in intricate legal cases in a more rational way. Plea bargaining could offer a solution to cope with the problems the traditional Code of Criminal Procedure is confronted with by new economic developments. Thus plea bargaining offers a possibility to talk about the legal problems of the case, which otherwise would be hidden behind the formal rules of evidence and in the formal style of communication.

3. Method: Interview-Guideline to Reveal Situational Logic of Plea Bargaining

The empirical analysis of the plea bargaining phenomenon in German Corporate criminal trials is based on grounded theory (Strauss & Corbet 1996) and the concept of situational logic (Popper 1975). In an effort to ensure valid results, the perspectives of all three professional participants were explored in a qualitative network analysis. Judges, defense counsels and prosecutors were interviewed in an effort to find out about the criteria that guide practitioners in the course of plea bargaining negotiations. After a pretest concerning minor corporate criminal trials with 5 interviewees, 12 participants of 3 major (i.e. well-known defendants, high amount in dispute, intensive media coverage) German corporate criminal law proceedings (case-related) and 8 further legal practitioners that do plea bargaining in minor corporate criminal trials (not case-related, all of them with plea bargaining agreement) were interviewed. In addition, 3 counsels for private suits (Nebenklage-Vertreter) were interviewed as well. According to the interview manual, they were asked about their roles in the plea bargaining proceedings, the atmosphere in the bargaining situation, the defendant's position and how they dealt

with the intensive media coverage. Except for minor modifications due to specifics of the respective professions, the same interview guideline was used for all interviews. Each interview required on average one hour.

III. Selected Results

1. General Course of a Plea Bargaining Proceeding in Corporate Criminal Trials

The defendant himself or herself never participates in plea bargaining negotiations. She or he is not seen as an adequate negotiating partner, because due to personal involvement he or she lacks legal knowledge and he or she could affect the businesslike atmosphere of the discussion (Altenhain, Hagemeyer, Haimerl & Stammen 2007 p. 91 ff). A very first step towards a plea bargaining agreement is the defendant's decision for a consensual instead of a litigious solution of the legal case. Some of the interviewed defense counsels reported how difficult it can be to convince a client of the advantages of a plea bargaining agreement. Especially defendants with a high reputation are at first reluctant to confess, because they lack *mens rea*. From their point of view, the penal charges are not justified, because they have been working hard on their company's benefit in accordance with their understanding of how business works. It is not until the defense counsel's warnings of the risks a regular trial might involve (costly and time consuming proceeding, loss of reputation due to media coverage) that defendants begin to contemplate the idea not to try to prove their (alleged) innocence or fight for their rights on principle, but rather to accept a type of proceeding that guarantees a predictable outcome. Some defendants ask their counsels for a proceeding that will minimize their appearance at trial. With the approval of his or her client, the defense counsel (according to German law counsels are both representatives of the defendant's interests and an institution of judicature) might ask the prosecutor if there is an option for terminating the proceeding by a plea bargaining agreement. This would be quicker and cheaper for all participants. He carefully indicates that – in case of a verdict of not guilty – his client would like to terminate the proceeding as soon as possible in order to lose neither time and money nor reputation. Maybe the prosecutor (who has to investigate all of the facts of a case – also in favor of the defendant) and cannot agree to an acquittal because of legal concerns or because then the state would have to pay for the proceeding. Instead, he offers a suspension of sentence on probation. When the defense counsel and the prosecutor agree on how to terminate the case, they present their suggestion to the judge.

Usually, the judge consents with this proposal. Still, a successful plea bargaining agreement depends on the lay judges' approval.

In the main hearing, the judge informs the audience that some negotiations have taken place beforehand. Then he interrupts the trial. Together with the lay judges, all professional participants decide on the plea bargaining agreement in the judge's

bureau where the participants discuss the necessary items that remain to be done during the official trial. So all participants know approximately what will happen during the following short trial and what will be its outcome. Through the plea bargaining agreement, the participants have regained the predictability of the trial and the sentence, which was lost due to the complex structure of corporate criminal proceedings. Their negotiation is recorded in shorthand. Back in the courtroom, the judge briefly explains the reasons for the plea bargaining agreement and typically announces that the court will sentence the defendant to a maximum of two years on probation, if the defendant is ready to make a confession. The defendant will use his or her usually rudimentary confession as a means of exchange for a lenient sentence. This act of self-condemnation is seen to help facilitate the official investigation and as a reward for having saved the justice system's resources, the defendant receives a more lenient punishment. Finally, and most importantly, the defendant waives his right to appeal. This ensures that there will not be any control by higher courts so that the legal case is definitely terminated.

2. Details of the Course of Plea Bargaining Proceedings

a) Starting Phase: Diplomacy

Although most of the judges, prosecutors and defense counsels are very familiar with plea bargaining, they proceed in an extremely cautious manner when initiating a plea bargaining negotiation. Several interview partners reported that they changed very carefully from the regular proceeding to a plea bargaining proceeding. With much diplomacy, they signaled their willingness to negotiate about the course and outcome of the legal cases.

They describe their actions with terms like “to scope out” (“*beschnuppert*”), and “to creep up on” (“*heranpirschen*”) their colleagues. Their decision for a plea bargaining and against a regular proceeding is very vague and non-committal: Most of them emphasized their willingness to keep the door open to the possibility of carrying on a regular proceeding.

A plea bargaining agreement is usually initiated by the defense counsel and the prosecutor. The defense counsel either asks for an appointment with the prosecutor or just meets him in the court building. This depends on whether the defense counsel wants to get in personal contact with the prosecutor (as is often the case in major trials) or to hide his and his client's interest in a plea bargaining in order to scale down the prosecutor's expectations concerning the scope of the confession or of the monetary fine. The defense attorney and the prosecutor carefully check out whether they can find a consensual resolution for the case. This depends first and foremost on the precondition that their appraisal of the case and its legal difficulties are not too different.

The judge is only rarely involved in the very beginning of a plea bargaining, because she or he is afraid of being biased. When he or she is asked whether he or she agrees with the ideas of prosecutor and defense counsel, he or she usually refers to the lay judges. At that time, it is not yet known, who will be the lay judges. Therefore the judge cannot promise that the court will decide exactly in the bargained way, because of the lay judges' decision-making power (two laymen with the same voting right like the 1 to 3 judges). A necessary condition for a positive reaction towards the attorneys' proposal is that the judge is familiar with the facts of the case. The judge will refuse to comment on the case if not enough time has been provided to examine the files.

b) Trust and Exchange - Main Conditions for Successful Negotiations

The interviews suggest that once a plea bargaining negotiation has started, there is a strong degree of trust on both sides. This trust encompasses that the participants will keep their promises and will waive their right to appeal. A previous study found that this trust is based on professional dependencies (Bussmann p. 71). This is affirmed by this study, the interview partners explained that they would lose the option of participating in further plea bargaining agreements if they misused information received during plea bargaining negotiations. Further information was gathered that trust already exists in the period preceding these negotiations. The participants of plea bargaining perceive themselves as trained lawyers rather than opponents. All of them act against the background of similar legal ideas and values. Still, this basic trust needs to be refreshed in every new case. For instance, the defense counsel can generate trust by providing information concerning his client. This trust in advance creates a proof of trust in return, so that the information provided (especially the announcement of a confession) will not be used against the defendant. This leads to a second central characteristic of plea bargaining: Exchange is a mechanism to ensure trust. The main "goods" of exchange are the confession and the discount of the penalty. But there are several minor positions that are dealt with in terms of exchange, like a waiver of hearing of witnesses, the conditions of imprisonment or the acceptance of a civil claim for damages.

Knowing and trusting each other is a main condition of successful plea bargaining agreements, because this allows for an open communication atmosphere. However, successful plea bargaining does not imply that the participants have met before. Interview partners explained that knowing each other beforehand certainly facilitates negotiations. But in contrast to the criticism that plea bargaining occurs *because* the participants know each other well, the interview partners emphasized that plea bargaining is used only for businesslike reasons. Especially well-known defense counsels work all over Germany, so that they come to courts where they are not familiar with the judges and the prosecutors from previous trials. In order to check whether a plea bargaining

agreement could be initiated, the attorney might visit the judge before trial starts, just to say “Hello” and to initiate a basic personal relationship. A short conversation might reveal options for plea bargaining. The prosecutor might ask his or her colleagues about the lawyer’s attitudes and abilities. Due to their mutual trust, the participants can discuss legal issues without being forced to stick to their professional rules as e.g. prosecutor.

c) Coping with Expectations of the General Public

The secrecy of plea bargaining proceedings – the fact that important decisions are made outside the public courtroom – is one of the most heavily criticized aspects of this practice. It is said that the public hearing loses its function as a means of finding the truth (Schünemann 1989 p. 1902.). Instead, the public hearing is but a scenery (Harms 2006 p. 293.), because its course and outcome are already fixed. Due to the waiver of appeal, plea bargaining agreements usually are not revised by higher courts. The practice of plea bargaining seems to be a secret proceeding that excludes public control. But there is a striking difference between trials against members of small-scale companies and trials where well-known companies are involved: Their understanding of their position, the intense media coverage and the public debate about the latter trials drive the participants, namely the judges, to explain and justify their decision for plea bargaining in a certain case. In minor cases, they simply do not do so, because there is little attention paid to these proceedings amongst the general public. While defense counsels are indeed interested in avoiding a public hearing that harms their client (loss of reputation by media coverage; loss of working time), prosecutors and in particular judges attach great importance to transparency in plea bargaining in major corporate criminal proceedings. This is to avoid the impression of class justice (preferential treatment of white-collar-offenders) and of a secret wheeling and dealing (“*Mauschelei*”). In the main hearing, the legal practitioners emphasize that they intensely discussed the legal problems of the case and finally came to an appropriate judgment. The judges and the prosecutors yield to maintain the public’s trust in the justice system and therefore explain and justify plea bargaining agreements. The risk of insufficient control due to the desire for quick trials exists in regular proceedings as well. This risk is not implied by plea bargaining per se. Although a proceeding terminated with a plea bargaining agreement is certainly excluded from control by a higher court whereas a regular proceeding *can* be checked if a participant appeals, plea bargaining is not excluded from any control. Rather, it changes the mechanisms of control. There is no factual possibility to an appeal, but the judges’ influence on the decision making is weakened in favor of a legal discourse of all three participants. Within this internal public forum, arguments and rationales must be disclosed so as to make them accessible to critique. This legal discourse is hardly publicized in order to protect the defendant (and the interests of the business company involved) and to enable

a legal discourse that is concentrated on the legal issues concerned. Furthermore, the judge can control the preliminary negotiations between prosecutor and defense counsel by not consenting to their suggestion. In addition, plea bargaining appears to be a means to protect a defendant from overwhelming damages concerning his reputation which may unwittingly be brought up by a criminal trial. For instance, a defendant who is the head of a business company could go bankrupt just by being forced to spend several weeks attending the public hearing that shall but prove his guilt or innocence. Furthermore, a full adjudicative trial can reveal the defendant's income, his affairs and other embarrassing aspects that are not necessarily essential to a legal solution of the case, but help to weaken the defendant's position. This might refer to a change in the importance of public control of trials. Some of the interviewees complain that charges of corporate criminal law cannot be presented and explained to the public in a sufficient manner. This could be one of the reasons that turn the idea of public control into one of public threat (Eser 1992 p. 375, Theile p. 277).

d) Debating and Solving Legal Problems

In the interviews it was further explored as to what extent legal and factual problems can be dealt with in plea bargaining procedures. Critiques argue that plea bargaining is strongly geared towards efficiency and therefore evades a thorough clarification of theoretical problems.

According to the German academic discourse, efficiency is the main reason for the development of plea bargaining proceedings: courts suffer from capacity overloads and plea bargaining saves the justice system's resources, because the defendant's early confession shortens the taking of evidence. (Weichbrodt 2005 p. 124; Ransiek & Hüls 2009 p. 182).

Indeed it appears to be doubtful whether the problems of a complex corporate proceeding can be dealt with in a plea bargaining negotiation that according to the interview partners does not take longer than 1-2 hours (plus a short public hearing). The interview partners pointed out that they do not talk about these questions during the public hearing in the aftermath of a plea bargaining. All interviewed defense counsels and judges underlined the importance of being familiar with the files before starting a plea bargaining proceeding. In many cases, they have prepared the ground for a plea bargaining agreement with pleadings that consider the intricate legal problems of a case. Against the background of their knowledge of the files and the legal difficulties, they agree to terminate the proceeding without deciding on this question. The interviewees explained: Regardless of how long they would have argued and regardless for how many opinions they would have asked, they could not have come to a definite solution which terminates the highly litigious proceeding in a sufficient manner, because the experts were strongly

polarized. Therefore they use plea bargaining as a means to bypass a decision of a highly litigious question and to terminate the proceeding all the same. The interviewees assumed that the degree of penalty they agreed upon was about the same as a full adjudicative proceeding would have yielded.

IV. Conclusion

From these findings, the following conclusions can be drawn: The answers concerning plea bargaining negotiations in trials against members of big and small sized companies do not reveal major differences (except for the endeavor of a higher degree of transparency in major proceedings). This leads to the assumption that legal practitioners have established a strong normative order for plea bargaining proceedings. This frame of reference seems to be applied to negotiations in all corporate criminal cases, regardless of the collective affiliations of the defendants or the size of the company or a high public interest in a legal case. The normative order of plea bargaining seems not to deviate as much from the Code of Criminal Procedure as critics fear. Plea bargaining can be seen as an effort to maintain the basic tenets of criminal procedure and enforce principles of criminal law even if there are difficulties arising from complicated legal norms, highly intricate facts of corporate criminal law cases and considerable problems of evidence that cannot be dealt with by the traditional Code of Criminal Procedure. Thus the structural principles of plea bargaining negotiations appear to be based on consent, transparency and rationalization of complex legal cases. Although German criminal procedure in principle is based on an authoritative way of deciding criminal cases, it contains consensual elements (Weßlau 2002 p. 197). The new consensual aspects of plea bargaining are strongly concerned with the finding of the truth. Possibly, a consensual understanding of truth becomes more important the more complex a legal case is. Under certain circumstances, consent might offer the best approach to truth whereas it is doubtful whether it is possible to find truth in a full adjudicative proceeding (Theile 2009 p.268). Consent does not allow for a solution that definitely answers complex legal questions, but it allows for terminating highly litigious proceedings. The importance of rationalization is supported by the result that the final decision on the finding of justice is no longer left only to the judges, but is subject to discussion among all three legal professions. During the plea bargaining negotiation, judges, prosecutors and defense counsels have to argue about the case and to give reasons for their positions. This is the principle of regular proceedings too, but corporate criminal trials tend to be too complicated so that this discourse cannot be achieved within the usual framework of a formal hearing. The trustful and professional communication atmosphere of plea bargaining provides an opportunity to regain predictability of the course and the outcome of criminal trials and to cope with their complexity without neglecting fundamental legal values of the criminal proceeding. Plea

bargaining slightly changes the mechanisms of control. However, the legal practitioners endeavor to outweigh restraints of the public trial principle by transparency. This example shows that the participants are quite aware of the Criminal Code of Procedure's principles and their importance. Therefore, only they slightly deviate from these principles but in order to fulfill the proceeding foreseen by the Code of Criminal Procedure despite of the challenges of complex corporate criminal trials. In this sense, "dealing with justice" (Schmidt-Hieber 1990 p. 1886) seems to be admissible to a modern corporate criminal procedure.

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