

Negotiated Justice—Balancing Efficiency and Procedural Safeguards

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I. INTRODUCTION

‘WHO RUNS THE world’s most lucrative shakedown operation? The Sicilian mafia? The People’s Liberation Army in China? The kleptocracy in the Kremlin?’¹ These questions were asked by *The Economist* magazine in an editorial in summer 2014, which ultimately sided with corporations over US law enforcement. It went on, stating:

If you are a big business, all these are less grasping than America’s regulatory system. The formula is simple: find a large company that may (or may not) have done something wrong; threaten its managers with commercial ruin, preferably with criminal charges; force them to use their shareholders’ money to pay an enormous fine to drop the charges in a secret settlement (so nobody can check the details). Then repeat with another large company.²

In fact, the threat of criminal prosecution and—almost unavoidably—‘negotiating justice’ has become a solid part of ‘everyday business’ for corporations, and CEOs—not only in the US. Today, global corporations will hire more than a thousand lawyers, when some decades ago 40 were enough.³

When the Swiss UBS and other major banks were confronted with alleged manipulation of foreign exchange markets in 2014, a rating agency stated that ‘uncertainty over fines and possible restrictions is “one of the biggest risks” for banks ...’⁴ The Swiss UBS announced that it is negotiating with multiple authorities

¹ *The Economist*, 30 August 2014, 10.

² *The Economist* (n 1) 10.

³ H Schöchli, ‘Wenn 1000 Hausjuristen Nötig Sind’, *Neue Zürcher Zeitung* (4 March 2015), available at <http://www.nzz.ch/wirtschaft/wenn-1000-hausjuristen-noetig-sind-1.18494738>, accessed 1 April 2015.

⁴ ‘UBS Sees Risk of Material FX Fines as Part of Settlement Talks’, available at <http://www.swissinfo.ch/eng/bloomberg/ubs-sees-risk-of-material-fx-fines-as-part-of-settlement-talks/40805634>, accessed 1 April 2015.

but ‘it can’t predict if a settlement would be reached or [on what terms]’.⁵ Yet, US officials have indicated that they might do away with special settlements for corporations that allegedly engaged in criminal activity, because—according to the reported statement of a top Justice Department official—such settlements do not keep corporations from becoming repeat offenders.⁶

Faced with such statements one wonders what the negotiation techniques are, or rather what the models and standards are, which lead to settlements in economic and financial crimes? And what is their effect on procedural safeguards?

Providing answers to these questions will require two steps: first, some parameters important for understanding ‘negotiated justice’ will be sketched; subsequently, the following questions are addressed: can negotiated justice serve as a tool to settle a dispute among counterparts (albeit unequal ones)? Under what circumstances does negotiated justice run the risk of either being tantamount to extortion or of letting big business off the hook too easily? Different models of negotiated justice will be tested. Finally, the chapter will conclude with a query.

It should be noted that this chapter will not reach a final solution for the dilemma of efficiency versus fairness, but will rather be a starting point for further debate. Furthermore, it does not touch on mediation techniques.

II. TERMINOLOGY

A. What Is Justice?

Complex questions, like what is justice in substance or how can it ultimately be achieved, cannot be addressed in the limited framework of this chapter.

For the purpose of this chapter it is accepted that prosecutors and other law enforcement authorities do engage in dealing in (big) white collar crime, including negotiating settlements of charges, realising that such deals are met with criticism.⁷ Against this background, justice is—rather pragmatically—defined as the result of a non-arbitrary process through which allegedly criminal conduct is assessed and settled, possibly by a sanction.⁸ Accepting this frame of reference,

⁵ *ibid.*

⁶ J Zarroli, ‘For Banks “Too Big To Jail”, Prosecutors Count On A Promise To Behave’, available at <http://www.npr.org/2015/03/24/394897368/not-prosecuting-companies-if-they-promise-to-behave>, accessed 1 April 2015; B Wolf, ‘U.S. warns banks it may revoke some money-laundering settlements’, available at <http://www.reuters.com/article/2015/03/16/us-banks-moneylaundering-idUSKBN0MC1ZE20150316>, accessed 1 April 2015.

⁷ See, for example, BL Garrett, *Too Big to Jail* (Harvard University Press, 2014); DM Uhlmann, ‘Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability’ (2013) 72(4) *Maryland Law Review* 1294.

⁸ See definition of ‘justice’ in the *Merriam-Webster Dictionary*, available at <http://www.merriam-webster.com/dictionary/justice>, accessed 1 April 2015.

justice can be achieved even if the classic criminal proceedings are bypassed, inside and outside of the courtroom.⁹

B. What Is Negotiated Justice?

In fact, ‘justice’ is achieved by negotiations in jurisdictions all over the world, meaning ‘negotiated justice’ comes in many shapes and sizes. Although negotiated justice does not have one fixed meaning, there is a common understanding of the term: ‘negotiated justice’ is the result generated by an exchange process of reciprocal concessions replacing the classic criminal trial.¹⁰ Thus, ‘justice’ is not achieved through a strictly top-down approach in which a court renders a decision after a contested trial and allocates a penalty. However, whether negotiated justice is in fact a countermodel to handing down a court decision or a softer form of imposing a verdict that is open for discussion is yet another question, which certainly depends on the bargaining power and skills of each side.

It should be noted, though, that the actual achievement of ‘justice’ does not appear as a primary goal in the various legal systems. Rather, the goal of negotiating justice is seen in the possibility of simplification of procedures in order to make them more efficient by settling a case quicker and with fewer resources than a contested trial.¹¹

C. What Is Efficiency?

Efficiency normally describes the ability to do something or produce something without wasting a certain resource.¹² The relevant resources deployed when engaging in negotiated justice are time, money, peace of mind of the defendant, and the reputation of the criminal justice system. For the purpose of this chapter, efficiency is defined in relation to the time and effort on the part of the participants in regular court proceedings.¹³

⁹ See definition of ‘justice’ in *The Free Dictionary*, available at <http://www.thefreedictionary.com/justice>, accessed 1 April 2015.

¹⁰ See also F Tulkens, ‘Negotiated Justice’ in M Delmas-Marty and J R Spencer (eds), *European Criminal Procedures* (Cambridge University Press, Cambridge, 2002) 644 and 673.

¹¹ G Ellscheid, ‘Noch einmal: Der “Strafbescheid” als Alternative zum Deal?’ (2000) *KritV Sonderheft* 37; G Duttge, ‘Die Urteilsabsprache als Signum einer Rechtlichen Steuerungskrise’, in R Hefendehl, T Hörnle and L Greco (eds), *Festschrift für Bernd Schünemann, zum 70. Geburtstag am 1. November 2014* (Berlin, 2014) 887 with further references.

¹² See the definition of ‘efficiency’ in the *Merriam-Webster Dictionary*, available at www.merriam-webster.com/dictionary/efficiency, accessed 1 April 2015.

¹³ A ‘criminal justice system efficiency programme’ in the UK wishes to shorten proceedings and ‘to reduce duplication between ... agencies and unnecessary attendance at court and remove on the need for inefficient paper processes; see <https://www.gov.uk/government/publications/criminal-justice-system-efficiency-programme>, accessed on 1 April 2015.

A number of factors have contributed to a demand for more efficient procedures. Among them are an increase of criminalised conduct, a growing caseload, and increasingly complex offences, the prosecution of which possibly involves various domestic and foreign authorities.¹⁴

Negotiated justice is generally expected to meet the demands of being more efficient than a courtroom trial, since both sides cooperate and have—as a general rule—an interest in swift proceedings. Thus, at least theoretically, it is a win-win situation for those actually involved in the process; neither side is weighed down by the procedural drawbacks of the top-down approach of classic criminal proceedings. However, this does not mean that the quickest mode of resolution can be selected. For instance, a judge who would offer a game of ‘rock, paper, scissors’ to a prosecutor and defendant in order to decide on a charge and thus possibly on the punishment would, in the eyes of most people, not only look foolish or desperate, but arguably incompetent and reckless. It can be assumed that even those who do not want justice to be negotiated (or who do not believe that justice *can* be negotiated) would agree that *if* such a thing as ‘negotiating justice’ were to be allowed, there would have to be set rules prior to entering into negotiation to ensure that each side gets a rational chance for a ‘fair shake’. Or phrased differently: efficiency of the procedure must be balanced with procedural safeguards.

D. Endangered Procedural Safeguards

Procedural safeguards are the rules protecting individual rights when confronted with the state’s *ius puniendi* and securing fair chances of the defendant, namely through (a) the presumption of innocence and (b) the right to a public trial, during which the defendant has (c) the right to remain silent (privilege against self-incrimination) with the burden of proof on the prosecution and (d) the right to equal treatment, including the prohibition of arbitrary detention.

The use of these rights, specifically through the challenge of a fact or point of law, or the silence of a defendant, slows down the process of settling the case. Therefore, ‘negotiated justice’ will by nature give more weight to efficiency, with a tendency to submit itself to as few rules as possible, on the one hand.¹⁵ On the other hand, if one wants to achieve justice in a negotiation process, there must be rules that ensure each side has a fair chance: Even behind closed doors, ‘rock, paper, scissors’ is not an option when negotiating a possible punishment.

¹⁴ See also T Weigend and J Iontcheva-Turner, ‘The Constitutionality of Negotiated Criminal Judgments in Germany’ (2014) 15(1) *German Law Journal* 81, 84.

¹⁵ See, for example, Tulken, ‘Negotiated Justice’ (n 10) 652.

III. BALANCING A SHAKEDOWN SYSTEM?

Negotiated justice is a reality in many jurisdictions.¹⁶ It is either explicitly provided for by law or informally done—even if the law does not provide for it. Apparently the more it has become a part of criminal law practice, the more the system of criminal justice has become dependent on it, as it is deemed much more efficient than a contested trial.¹⁷ In the US it is predicted that ‘the criminal justice system will grind to a halt if the settlement of criminal cases is barred, so that all cases must be litigated to final judgment’.¹⁸ This might be the reason why it has proved so persistent despite the critique from various sides.¹⁹ The question remains how efficient negotiations and procedural safeguards can be balanced in a system that must give priority to a pragmatic solution.

The editorial published in *The Economist* mentioned at the beginning of this article is sceptical, as it explains:

The amounts [gained by negotiations] are mind-boggling. So far this year, Bank of America, JPMorgan Chase, Citigroup, Goldman Sachs and other banks have coughed up close to \$ 50 billion for supposedly misleading investors in mortgage-backed bonds. BNP Paribas is paying \$ 9 billion over breaches of American sanctions against Sudan and Iran. Credit Suisse, UBS, Barclays and others have settled for billions more, over various accusations. And that is just the financial institutions.²⁰

A. Laying Out the Ground

Does negotiated justice lead to ‘mind-boggling’ results in the field of economic and financial crimes? Is it different if used against corporations and white collar

¹⁶ For a comparative analysis, see, for example, D Brodowsky, ‘Die verfassungsrechtliche Legitimation des US-amerikanischen “plea bargaining”—Lehren für Verfahrensabsprachen nach § 257c StPO?’ (2013) *ZStW* 733–77; T Laliashvili, *Abspracheverfahren im deutschen, US-Amerikanischen und georgischen Strafverfahrensrecht in Vergleichender Sicht* (Europäische Hochschulschriften, Oxford, Peter Lang, 2012); for a general overview with comparative aspects, see Tulkens (n 10) 641–87.

¹⁷ On the dependence of the US criminal system on plea-bargaining, see *Santobello v New York*, 404 US 257, 260 (1971). Weigend and Turner, for example, notice in respect of a decision of the German Federal Constitutional Court: ‘After decades of negotiating judgments, the German system of criminal justice has become so dependent on the practice that an outright ban would have had unforeseeable and unmanageable consequences’: Weigend and Iontcheva-Turner, ‘Constitutionality of Negotiated Criminal Judgments’ (n 14) 81.

¹⁸ RA Epstein, ‘Deferred Prosecution Agreements on Trial: Lessons from the Law of Unconstitutional Conditions’, in AS Barkow and RE Barkow (eds), *Prosecutors in the Boardroom: Using Criminal Law to Regulate Corporate Conduct* (New York University Press, New York, 2011) 39.

¹⁹ On such critique see, for example, P Darbyshire, ‘The Mischief of Plea Bargaining and Sentencing Rewards’ (2000) *Criminal Law Review* 895; Duttge, ‘Die Urteilsabsprache als Signum einer Rechtlichen Steuerungskrise’ (n 11) 875–890; Garrett, *Too Big to Jail* (n 7); Uhlmann, ‘Deferred Prosecution’ (n 7).

²⁰ *The Economist* (n 1) 10.

suspects than if used in petty crimes or in international criminal law settling a case of war crimes?²¹

It is easy to imagine that the bargaining power of a petty thief or a person caught with a smoking gun over a dead body is different from, and more difficult than, that of a bank CEO heading the foreign trade implicated in an investment fraud or rigging system. But is the latter worse off, as suggested by *The Economist*?

Basically three features seem to be crucial:

- criminal provisions aiming at white collar crimes are becoming increasingly vague;
- white collar suspects tend to have better resources for an efficient (or from the perspective of law enforcement, conflicting) defence, and are more sophisticated in negotiation techniques;
- white collar suspects are more fearful because even just an indictment—regardless of the outcome of the procedure—can ‘be tantamount to a death sentence for business entities.’²² If found guilty, white collar criminals today face the risk of harsher penalties, certainly when compared with 20 years ago. Maximum criminal penalties for economic crime have gone up and judges are willing to hand out such penalties.²³

These features may affect the negotiating process, putting white collar suspects in a disadvantaged position from the outset. The vagueness of criminal provisions gives prosecutors a rather easy tool to start investigations, in theory. At the same time, law enforcement authorities often face difficulties as soon as they look for ‘hard’ evidence: there is no ‘smoking gun’ or ‘dead body’. Sometimes there is no tell-tale evidence at all for an economic or financial crime, only rumours. Furthermore, evidence to substantiate a suspicion might have to be gathered in a high social class of inner circle corporate and bank industry. Looking for information, the prosecution authorities must always keep in mind that, at least in theory, in the end they must have valid information capable of establishing an accusation beyond a reasonable doubt in court. At first glance, this scenario may look like it creates a strong incentive for the prosecution to enter into negotiations if factual or legal points are hard to prove, after many hours of investigation resources.

Thus, the alleged white collar criminal could sit back and wait, and if no good deal presents itself, go to trial with little to fear. At the same time, however, it appears

²¹ For a critical review on negotiated justice in cases of war crimes, see A Petrig, ‘Negotiated Justice and the Goals of International Criminal Tribunals’ (2008) 8 *Chicago-Kent Journal of International and Comparative Law* 1.

²² PJ Larkin Jr, ‘Funding Favored Sons and Daughters: Nonprosecution Agreements and “Extraordinary Restitution” in Environmental Criminal Cases’ (2013) 47 *Loyola Law Review New Orleans* 1, 18, available at <http://digitalcommons.lmu.edu/llr/vol47/iss1/1>, accessed 1 April 2015.

²³ LE Dervan, ‘White Collar Over-Criminalization: Deterrence, Plea Bargaining, and the Loss of Innocence’ (2013) 110 *Kentucky Law Journal* 723, 745.

that in the corporate world of today, a settlement is often believed to be the better solution. The prevailing notion seems to be that if a company or their managers were to opt for the courtroom, they risk being convicted and sentenced with even harsher punishment.²⁴ Furthermore an indictment is likely to be accompanied by large collateral consequences such as customers and investors who abandon the firm. A conviction can lead to the loss of licences necessary for the business in question, resulting in huge financial losses that might even result in bankruptcy, bringing about substantial harm to innocent shareholders, employees, and pensioners. Such consequences cannot be undone anymore even if an appellate court later overturns the conviction.²⁵ These can be strong incentives for companies as well as for allegedly wrongdoing individuals to resort to negotiation and forego the public, contested trial to which they are entitled.

A further reason why companies tend to opt for a negotiated settlement is that in any given economic crime, there are quite often at least two defendants: the company and the individual wrongdoer. Thus rather than oppose government investigations, a corporation may decide to help build the case against the individual defendant, hoping at the same time to settle the claim against the corporation itself. US corporations conduct rigorous internal investigations and require their officers and employees to cooperate, because it is generally to the corporation's advantage to inform the government of the relevant information and negotiate a settlement that avoids or minimises the entity's criminal liability and limits damage to the company's reputation.²⁶

B. Examples

In the following four examples of negotiated justice—two from the US jurisdiction of common law, two other from the German system in continental Europe will be introduced. The four examples depict opposing models of how justice can be negotiated and how they can have different effects on bargaining over the settlement of allegations in the economic and financial sector.

Although negotiated justice is common all over the world today, the US is still the criminal justice system with the most visible negotiation techniques. The courts have accepted negotiating justice as 'an essential component of the administration of justice',²⁷ and seen to it that the parties complied with agreements.

²⁴ *ibid*, 745.

²⁵ AS Barkow and RE Barkow, 'Introduction' in Barkow and Barkow (eds), *Prosecutors in the Boardroom* (n 18) 2.

²⁶ SH Duggin, 'Internal Corporate Investigations: Legal Ethics, Professionalism and the Employee Interview' (2003) *Columbia Business Law Review* 859.

²⁷ *Santobello v New York*, 404 US 257, 260 (1971).

1. *Deferred Prosecution Agreements and Guilty Pleas in the US*

a. *Deferred Prosecution Agreements*

For many people in Europe, the classic form of negotiated justice is a guilty plea—the US way. With regard to white collar crime, however, lately in the US more and more cases have been settled with deferred prosecution agreements (DPA).²⁸

A DPA is a deal between a prosecutor and a potential criminal defendant which imposes a provisional deferral of ongoing litigation. It allows a corporation to avoid both an indictment and a conviction.²⁹ As opposed to plea bargains, a DPA is not a final settlement of the case. Instead, the defendant must comply with the terms of the agreement, otherwise the criminal proceedings will be resumed. The sword of Damocles thus remains hanging over the defendant. Only upon full compliance with the terms agreed to in the DPA will the prosecution finally be terminated.³⁰ A corporation that allegedly committed various offences, for example, might consent to a DPA in which it agrees to pay restitution, implement corporate reforms and fully cooperate with the investigation.

DPAs are meant to achieve several purposes. Among them are the avoidance of significant collateral consequences of a corporate conviction for innocent third parties, the promotion of compliance with applicable law, the prevention of recidivism, and the attainment of prompt restitution for victims.³¹ It is expected that DPAs ‘can help restore the integrity of a company’s operations and preserve the financial viability of a corporation that has engaged in criminal conduct, while preserving the government’s ability to prosecute a recalcitrant corporation that materially breaches the agreement’.³²

Information charging the offence and the DPA are filed with, and must be approved by, a federal district court.³³ However, American scholars claim that courts only cursorily review DPAs and that no court has ever rejected a DPA.³⁴

²⁸ Since 2000, the United States Department of Justice has entered in more than 300 publicly disclosed DPAs and Non-Prosecution Agreements (NPAs) and it is thought that there have been others that were not publicised; Gibson, Dunn & Crutcher LLP, ‘2014 Year-End Update on Corporate Non-Prosecution Agreements (NPAs) and Deferred Prosecution Agreements (DPAs)’ (6 January 2015), available at <http://www.gibsondunn.com/publications/pages/2014-Year-End-Update-Corporate-Non-Prosecution-Agreements-and-Deferred-Prosecution-Agreements.aspx>, accessed 1 April 2015.

²⁹ BL Garrett, ‘Globalized Corporate Prosecutions’ (2011) 97(8) *Virginia Law Review* 1776, 1778.

³⁰ RA Epstein, ‘Deferred Prosecution Agreements on Trial’ (n 18) 38.

³¹ *United States Attorneys’ Manual*, Title 9-28.1000, available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcr.htm#9-28.1000, accessed 1 April 2015.

³² *ibid.*

³³ Gibson, Dunn & Crutcher LLP, ‘2009 Year-End Update on Corporate Deferred Prosecution and Non-Prosecution Agreements’ (7 January 2010), available at <http://www.gibsondunn.com/publications/pages/2009YearEndUpdateCorpDeferredProsecutionAgreements.aspx>, accessed 1 April 2015.

³⁴ Uhlmann (n 7) 1328, citing BL Garrett, ‘Structural Reform Prosecution’ (2007) 93 *Virginia Law Review* 853, 893.

b. Guilty Pleas

Apparently DPAs are only supposed to be available to corporations domiciled in the US while foreign corporations typically appear to plead guilty and receive a conviction.³⁵ The options, however, certainly also depend on the severity of the charges. After investigations against BNP Paribas for having violated US sanctions against Sudan, Iran and Cuba,³⁶ the prosecutors sent the message that no bank is immune from criminal charges, despite lingering concerns that financial institutions have grown so large and interconnected that they are ‘too big to jail’. BNP Paribas was not exempted from punishment, but pleaded guilty and apparently agreed to pay nearly \$9 billion. Again, *The Economist* published an article entitled: ‘Capital punishment’.³⁷ What is the legal framework of such guilty pleas?

In the US framework, at least according to the law on the books, guilty plea negotiations take place in a regulatory framework. Either the prosecution or the defence initiates a negotiation, which may aim at either bargaining on the charge, on the facts or on the sentence. During a fact or charge bargaining the parties agree on certain facts or points of law and thus determine the action that could be the subject of a prosecution to begin with. During a sentence bargaining the parties negotiate on a certain penalty if the defendant pleads guilty, but the prosecution determines and establishes the charge. The prosecutor recommends the negotiated penalty to the judge(s). However, the judge(s) are not bound by it, because sentencing is in their sole responsibility. Arguably, judges in the US approve the negotiated penalty.³⁸

Guilty pleas result in convictions and thus courts are involved in the plea-bargaining process.³⁹ However, guilty pleas generally require an admission of guilt to the charge. This statement relieves the court of the responsibility to ‘seek the truth’ (or rather to check the facts), but also ‘relieves’ it of any power or responsibility with regard to the outcome of a guilty plea.

c. ‘Shakedown Risk’: Balancing Efficiency Versus Procedural Safeguards?

White collar suspects have become a steady clientele for negotiated justice. As indicated above, the reasons identified by scholars are manifold, but basically embrace the following arguments:

On the one hand, the US ‘over-criminalisation’ has hit the field of economic criminal law after the Enron scandal and the financial crises with (a) increased

³⁵ Garrett, ‘Globalized Corporate Prosecutions’ (n 29) 1779.

³⁶ J Ax, A Viswanatha and M Nikolaeva, ‘U.S. imposes record fine on BNP in sanctions warning to banks’, available at <http://www.reuters.com/article/2014/07/01/us-bnp-paribas-settlement-idUSKBN0F52HA20140701>, accessed 1 April 2015.

³⁷ ‘Capital punishment’, available at <http://www.economist.com/news/finance-and-economics/21606321-frances-largest-bank-gets-fined-evading-american-sanctions-capital-punishment>, accessed 1 April 2015.

³⁸ G Gilliéron, *Strafbefehlsverfahren und Plea Bargaining als Quelle von Fehlurteilen* (Schulthess Verlag, Zürich, 2010) 63–64 with further references.

³⁹ Larkin Jr, ‘Funding Favored Sons and Daughters’ (n 22).

maximum criminal penalties for white collar offences and (b) the creation of vague and overlapping criminal provisions in areas already criminalised.⁴⁰ On the other hand, internal investigations very often bring in the necessary information.⁴¹

That this may have an effect on negotiating justice seems plausible: The vagueness of criminal provisions gives prosecutors an easy tool to start investigations. The burden on the prosecution when proving an accusation is facilitated if the internal investigation brings to light possible wrongdoing of individuals. Furthermore, the recent increase in gravity of possible punishments⁴² may give an incentive for defendants to resort to a DPA or a guilty plea and forego a contested trial.

As discussed at the start of this chapter, *The Economist* has claimed that the US system of ‘negotiated justice’ with corporations and/or white collar suspects is ‘the world’s most lucrative shakedown operation’.

One crucial difference between a shakedown and a criminal trial concerns procedural safeguards granted to the defendant.

However, if a defendant negotiates justice in the US, he or she forgoes classic procedural safeguards, such as the presumption of innocence with the possibility of being acquitted, and the right to a public trial, during which he or she has the right to remain silent with the burden of proof on the prosecution. Albeit, these rights may be useless anyway, in cases in which the ‘competition of two defendants’—corporate and individual—render them void by way of an ‘internal investigation’.

On balance, all the defendant may get is a swift trial, while also avoiding the risk of collateral damages and the risk of incurring a harsh(er) punishment. Furthermore rapid procedures save public resources and provide certainty for defendants quite quickly, which can be added as a ‘plus’. But they often take place behind closed doors, and probably beyond the formal rules.

With the loss of classic procedural safeguards, the balance rather tips to the shakedown side. In theory the US model of negotiated justice allows for an opportunity for both sides to meet in the middle. But in practice, it appears that companies, banks and white collar suspects pay the price. Even if some scholars argue that they get off cheaply because the terms of negotiated deals are only vaguely defined and there is no independent monitoring over their fulfilment,⁴³ other scholars point out that the agreements negotiated by prosecutors:

abound with regulations that go far beyond simple commands to companies to stop disobeying the law or to pay for prior violations. These agreements insist on new business

⁴⁰ Dervan, ‘White Collar Over-Criminalization’ (n 23) 745.

⁴¹ See, for instance, I Zerbis, ‘Unternehmensinterne Untersuchungen’ (2013) *ZStW* 551–72 and the examples provided by H Silverglate, *Three Felonies a Day: How the Feds Target the Innocent* (Encounter Books, New York, 2009) 90, 116, 144.

⁴² Madoff received 150 years in prison for his Ponzi scheme, where potential investors were wooed with promises of unusually large returns, wrongly attributed to Madoff’s skill. However, the returns were paid out of new investors’ principal, not from profits. This worked out as long as new investors lined up with cash and old investors did not try to withdraw too much of their money at once.

⁴³ Garrett (n 7); Uhlmann (n 7).

models and practices, and they have contained regulations that have covered everything from personnel decisions to the rates companies charge customers.⁴⁴

2. *The German Examples: ‘Negotiated Agreement’ and ‘Provisional Terminations of Proceedings’*

a. Negotiated Agreements

In Germany, negotiating justice is provided for by § 257(c) of the German Code of Criminal Procedure, entitled ‘Negotiated Agreement’.⁴⁵ The relevant German law was introduced in 2009, when the parliament finally aimed at legalising a negotiation practice in the criminal justice system, which had been widespread and uncontrolled. More than 25 years before the German lawmaker addressed the problem, a defence lawyer—signing the anonymously written article in a law journal with ‘Detlev Deal’—depicted the state of affairs between the prosecution and defence lawyers as the ‘wild wild West’ with friendly fire hitting defendants and victims alike.⁴⁶

The introduction of § 257(c) into the German Code of Criminal Procedure was objected by many scholars and still is an issue of controversy.⁴⁷ The German Constitutional Court upheld the constitutionality of this provision in 2013, emphasising that the search for truth, the proportionality of punishment and transparency of negotiation proceedings must be respected even in the context of such negotiated agreements.⁴⁸ § 257(c) of the German Code of Criminal Procedure allows that ‘in suitable cases’ the court reaches an agreement with the participants on ‘the further course and outcome of the proceedings’. In doing so, the court must still ‘search for truth’, or put differently: it must still check the facts. According to German law, there is no bargaining on the facts or charge: the ‘subject matter of [any] agreement may only comprise the legal consequences that could be the content of the judgment’.

If negotiations take place, the court will announce what content the negotiated agreement could have, and it will indicate an upper and lower sentence limit.

⁴⁴ RE Barkow, ‘The Prosecutor as Regulatory Agency’, in Barkow and Barkow (eds), *Prosecutors in the Boardroom* (n 18) 177.

⁴⁵ For an English translation of this article, see http://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html#p1718, accessed 1 April 2015.

⁴⁶ HJ Weider, ‘Detlev Deal aus Mauschelhausen, Der strafprozessuale Vergleich’ (1982) *StV* 545–52.

⁴⁷ See, for example, Meyer-Gossner, ‘Was nicht Gesetz werden sollte’ (2009) *ZRP* 107–09; U Murrmann, ‘Reform ohne Wiederkehr? Die gesetzliche Regelung der Absprachen im Strafverfahren’ (2009) *ZIS* 526–38; B Schünemann, ‘Ein deutsches Requiem auf den Strafprozess des liberalen Rechtsstaates’ (2009) *ZRP* 104–07.

⁴⁸ See Weigend and Iontcheva-Turner (n 14) 82, citing paras 67, 95–96, 104–05 of the decision of the German Federal Constitutional Court of 19 March 2013, BVerfG, 2 BvR 2628/10, BvR 2883/10, 2 BvR 2155/11.

The latter must be proportionate to the blameworthiness of the defendant. The participants have the opportunity to make submissions. The negotiation is completed when the defendant and the prosecution agree to the court's proposal. However, the defendant retains the right to appeal the judgment, as it cannot be waived. The court is not bound to the agreement, if a legal (!) or factual circumstance has been 'overlooked' and therefore the prospective sentencing range appears 'no longer appropriate' to the gravity of the offence or the degree of guilt. In such a case, a confession made by the defendant cannot be used as evidence. One can have some doubt as to whether this is of actual value for the defendant, as evidence derived from the defendant's confession is admissible and the same judges who had participated in the failed negotiations will judge the case in court.⁴⁹

The legislator strived to spell out all conditions of a binding agreement in 2009; a study conducted in 2012, however, found that in practice a substantial number of judges deviated from the legal rules. Although the study's focus is not on economic crime, but on everyday criminal proceedings in German courtrooms, it sets the scene for understanding how negotiating justice works in judges' minds: According to the information provided by the judges, only half of the agreements entered into had been negotiated following the law; the rest were conducted 'informally'.⁵⁰ The study did not include information on how judges proceed when not following the rules. Maybe they could have played rock, paper, scissors as well?

In the agreements that had been negotiated following the law, in hardly any of these cases did the judges challenge the confessions of the defendants. If they did, they mostly relied on the content of the file without making any further effort to search for the truth.⁵¹ In most cases, the court will tell the defendant what penalty it is willing to hand out if a confession is provided right away, and what sanction awaits the defendant if found guilty after a classic criminal trial.⁵² In doing so, the judge opens a 'sanction spread' (*Sanktionsschere*) marking the difference between the sanction that would result following a confession and no contested trial as opposed to what would follow if no confession were made and a full trial resulting in a guilty verdict took place. The latter might disturb the principle of proportionality between the defendant's blameworthiness and the punishment imposed: reducing the punishment in the sole interest of achieving a swift proceeding or increasing it just because the defendant chooses to insist on a full trial is highly problematic, because such punishment does not reflect the blameworthiness of the defendant.⁵³ Clearly, rational defendants will weigh their chances of success at trial and may confess to crimes they did not commit.

⁴⁹ See *ibid* 91–92.

⁵⁰ K Altenhain, F Dietmeier and M May, *Die Praxis der Absprachen in Strafverfahren* (Nomos, Baden-Baden, 2013) 36–37.

⁵¹ *ibid* 98–106.

⁵² *ibid* 122–36.

⁵³ Weigend and Iontcheva-Turner (n 15) 85.

b. Negotiating Justice with the Aim of Dropping a Case—the German Example

More than 40 years ago, the German legislature introduced the possibility of provisional terminations of proceedings in § 153(a) of the German Code of Criminal Procedure. If it is applied, proceedings for a formal ‘negotiation agreement’ (§ 257(c) of the German Code of Criminal Procedure) do not come into play at all.

§ 153(a) of the German Code of Criminal Procedure provides for a discretion for prosecutors and courts to drop misdemeanour cases. With this type of outcome of the procedure, there is no ruling on guilt or innocence, but prosecutors or courts can agree to terminate proceedings in exchange for a payment (to the state or a charitable organisation), service of a non-profit nature, reparations or other conditions ‘if the degree of guilt does not present an obstacle’. Bernie Ecclestone’s ‘settlement’ of his bribery case for \$100 million is probably the most prominent example of 2014,⁵⁴ with the dropping of Sebastian Edathy’s case also gaining much media attention. Sebastian Edathy, a former member of the German parliament (Bundestag), faced allegations of possession of child pornography. The case was dropped after he paid €5,000 Euro (about \$5,400) to a youth fire department association. The fact that such ‘settlements’ do not involve an admission of guilt was important to Ecclestone and Edathy: Ecclestone had acknowledged that he made an illegal payment, but claimed he did so under duress. Edathy had admitted that he downloaded images of naked minors but claimed that the images were not illegal.⁵⁵

There are no legal rules governing the negotiations prior to dropping a case. Judges are involved in such settlements, though prosecutors can initiate the provisional termination of proceedings. If that is the case, it is the prosecutors who determines the specific conditions and requirements that have to be met in order to drop the proceedings.⁵⁶ In the Ecclestone case, the \$100 million figure emerged from negotiations between Ecclestone’s lawyers and prosecutors, and was endorsed by the judges hearing the case. There is neither set formula on how much a defendant pays, nor any figure to reflect the degree of possible guilt. In Ecclestone’s case, the judges believed that \$100 million represented ‘a significant portion’ of his wealth without overburdening him.

Many questions have been discussed after the Ecclestone decision in Germany: can rich white collar defendants buy their way out of legal troubles in Germany, and dealing in this way only serves their self-interest? Or do they help preserve common resources by admitting guilt and agreeing to accept a certain penalty? Are white collar suspects even in a vulnerable position after all?

⁵⁴ ‘F1 boss Bernie Ecclestone pays to end bribery trial’, available online at <http://www.bbc.com/news/world-europe-28656050>, accessed 1 April 2015.

⁵⁵ ‘Wrong, but legal,’ says ex-German lawmaker Edathy, facing child porn trial’, available online at <http://www.dw.de/wrong-but-legal-says-ex-german-lawmaker-edathy-facing-child-porn-trial/a-18139310>, accessed 1 April 2015.

⁵⁶ SK-StPO-*Wesslau*, § 153a Rn. 6, 27. Aufbau-Lfg. (August 2002).

c. 'Shakedown Risk': Balancing Efficiency versus Procedural Safeguards?

The Economist has not denounced the German system, yet. The basic question whether the offer to close down a criminal case can grow into a 'lucrative shake-down operation' may look like an obvious concern in all criminal justice systems. The manifest risk, however, differs greatly depending on the details of the respective framework. In contrast to the US plea-bargaining system, the German negotiated agreement and the provisional terminations of proceedings neither bypass the court nor all proceedings on the merits. Thus, depending on the legal basis of the negotiations (§ 153(a) or § 257(c) German Code of Criminal Proceedings) not all of the classic procedural safeguards are given up.

Negotiated agreements (§ 257(c) German Code of Criminal Procedure) between the accused and the prosecution are initiated by the court.⁵⁷ Thus, in contrast to the US Model, the court, or rather the professional judge, plays a central role in German negotiated agreements. However, the prosecutor retains a veto-position: only if the prosecutor (and the accused) agrees to the court's proposal does the negotiated agreement come into existence.⁵⁸ The court can also indicate the maximum and minimum sentencing, which is often displayed as a concrete *Sanktionsschere*, ie a reference to the difference of sanctions looming with a confession and no contested trial. Such a *Sanktionsschere* must not be palpably disproportionate.⁵⁹ The negotiations often take place before or beyond the course of the main hearing and hence without the public and without a serious trial.⁶⁰ Thus, the defendant has disposed of (a) the right to a public trial, as well as the right to remain silent. In most cases, a concession to the *Sanktionsschere* infringes on the right to remain silent; (b) since the defendant has not entirely disposed of the presumption of innocence, leaving some burden of proof on the prosecution insofar as the court must check all facts, challenge a confession and evaluate evidence, at least in theory.⁶¹

Provisional terminations of proceedings (§ 153(a) German Code of Criminal Procedure) need the consent of the court (and the accused) but the prosecutors may initiate them.⁶² They take place without the public and there is no contested trial.⁶³

Thus the defendant has disposed of (a) the right to a public trial as well as the possibility of being acquitted or rather of not incurring a sanction at all. There is (b) furthermore a risk that fundamental rights such as equal treatment and prohibition of arbitrariness are not safeguarded, because there are no restrictions

⁵⁷ HK-GS-König/Harrendorf, § 257c Rn. 17, 3. Aufl. Baden-Baden 2013.

⁵⁸ C Roxin and B Schünemann, *Strafverfahrensrecht*, 28. Aufl. 2014, § 44 Rn. 62.

⁵⁹ Meyer-Gossner/Schmitt § 257c Rn. 19, 57. Aufl. München 2014.

⁶⁰ Altenhain, Dietmeier and May, *Die Praxis der Absprachen in Strafverfahren* (n 50) 61–65.

⁶¹ C Roxin and B Schünemann, *Strafverfahrensrecht*, 28. Aufl. 2014, § 44 Rn. 64.

⁶² HK-GS-Pfordte, § 153a Rn. 9, 3. Aufl. Baden-Baden 2013.

⁶³ For a critical assessment of the 'veil of secrecy', see W Kargl and S Sinner, 'Der Öffentlichkeitsgrundsatz und das öffentliche Interesse in § 153a StPO' (1998) *Jura* 231.

on the possible conditions and instructions that the defendant must fulfil for the case to be dropped.⁶⁴ The defendant, however, has not disposed of his right to remain silent as a confession is not required. Rather the burden of proof remains with the prosecutors. It is required that the degree of suspicion rose to a level that warrants indictment. In theory a case cannot be dropped according to § 153(a) of the German Criminal Procedure Code if there is doubt about the evidence of the case. Practice shows, however, that § 153(a) of the German Criminal Procedure Code is applied nevertheless in complex cases when proof is difficult to establish.⁶⁵

Overall, the German models leave less room for a bargain when settling charges of economic and financial crime, especially because charge bargaining is not an option, or rather not an official option, since the court must check the facts. There is, however, leeway in practice, as long as the criminal statutes are vague, and the evidence presented does not point to one specific direction.

Furthermore, the German model may hold another plus for companies and white collar suspects: the bargaining takes place according to the underlying notion of the ‘professional trial’ if negotiations are not successful, in contrast to the US where a jury trial represents the courtroom alternative. However, it is unclear whether professional judges are more likely to decide in favour of defendants in cases of alleged economic or financial crimes after a negotiation process has failed.

IV. CLOSING REMARKS

It appears clear that the ‘shakedown risk’ is biggest when a defendant must negotiate in a framework without rules binding on the prosecution, or on the courts. It would probably be too far-reaching to claim that in such situations the defendant is not fair game, but instead an unprotected species. *The Economist* in its editorial stated that:

[i]n many cases, the companies deserved some form of punishment: ... but justice should not be based on extortion behind closed doors. The increasing criminalisation of corporate behaviour in America is bad for the rule of law and for capitalism.⁶⁶

In order to meet the challenges posed by ‘negotiated justice’ to companies and white collar defendants, it appears necessary:

- to provide a convincing regulatory framework: adequate regulation must ensure that negotiated justice is neither a *carte blanche* for the prosecutor’s convenience⁶⁷ in punishing alleged crimes, nor a ticket for big corporations to buy their way out; and

⁶⁴ SK-StPO-*Wesslau*, § 153a Rn. 17, 27. Aufbau-Lfg. (August 2002).

⁶⁵ SK-StPO-*Wesslau*, § 153a Rn. 25, 27. Aufbau-Lfg. (August 2002).

⁶⁶ *The Economist* (n 1) 10.

⁶⁷ Weigend and Iontcheva-Turner (n 15) 96–97.

- to ensure that defendants will not lose all procedural safeguards when entering a negotiation. The court's obligation to check facts before giving a green light to a 'negotiated agreement' (which is the case in Germany, for instance) preserves some of the protection for the defendant provided by the presumption of innocence, and thus appears superior to US plea bargaining. However, this is a product of Continental European procedure, and perhaps cannot be transplanted to other jurisdictions.

Interestingly, all models share one flaw: the lack of transparency of negotiations for the public, along with the exclusion of individual and collective 'victims' in general. Lack of transparency of negotiations also means that the defendants have no references to other negotiation proceedings and the public (including the press) cannot observe them.⁶⁸

Therefore, the best way to ban the suspicion that criminal justice systems have established lucrative 'shakedown operations' on the one hand, or that the big fish get away with too little real punishment on the other hand, would perhaps be to open the doors and let the public consider for itself whether efficient negotiations and procedural safeguards are in fact balanced. Indeed, transparency of the process of negotiation is the very first step needed to conduct further research on how to balance negotiated justice with procedural safeguards. Whether opening the doors would be a step to building confidence in this alternative mode of settling criminal charges is yet another question. It may well be that quite a few stakeholders will find—for their very own reasons—that negotiations in criminal proceedings must remain behind a curtain of opacity in order to be accepted as a binding deal by all.

⁶⁸ Tulkens (n 10) 680.