Chapter IV – Consensual exchanges in German criminal procedure: the practice of negotiated judgments and the crown-witness regulation

1. Introduction

The introduction of the rewarded collaboration regulation brought an important development to Brazilian law by designing a legitimate negotiation forum permitting defendants and law enforcement authorities to deal with each other and conclude written agreements on criminal proceedings.[655] Since the enactment of the Organized Crime Act in 2013, the employment of collaboration agreements has swiftly expanded, particularly in the investigation of corporate crimes and corruption acts, with major impacts on Brazilian criminal law as well as on political life.[656] The practice of collaboration agreements has developed bold consensual innovations that are not provided for in statutory text and diverge from the traditional logic of the Brazilian justice system. Over the years, legal practitioners have drawn on the rewarded collaboration regulation to develop a wide and flexible system of transactions, elaborating complex written arrangements and consensually resolving several matters within the remit of criminal justice.[657]

This situation has engendered countless judicial disputes and raised difficult legal questions for courts and scholars. Unlike the U.S. experience, where transactions with defendants – including deals to cooperate against former co-conspirators – have long since become an entrenched practice due to the peculiarities of criminal prosecution,[658] Brazilian law had until recently given little space for parties to transact over the course of criminal

655 See item I.2.b.

656 See items II.2 e II.4.

657 See items I.4.a and I.4.b.

658 On the particularities of the American criminal justice and its relationship with the development of cooperation between defendants and enforcement authorities, see Jaeger (n 3) 266-281; and Florian Jeßberger, *Kooperation und Strafzumessung* (n 1) 291-293. See also: Weinstein and Graham Hughes, 'Agreements for Cooperation in Criminal Cases' (1992) 45 Vanderbilt Law Review 1.

investigations.[659] As in other countries of Continental traditional, standard pillars and concepts of criminal procedure have strictly limited the possibilities of consensual arrangements between accused and law enforcement authorities. In 1995, the Small Claims Act established mechanisms for the consensual resolution of criminal proceedings, but only in cases related to minor offenses. Apart from that, the complete adjudicative process remained the predominant model for the majority of cases in the Brazilian criminal justice system, in a context where negotiations between parties played a minor role.

Nevertheless, the consensual innovations brought by the practice of collaboration agreements received solid support from the Brazilian judiciary, especially from higher courts, and from part of domestic legal scholarship. This support was often grounded on the understanding that collaboration agreements are part of a new system of consensual or negotiated criminal justice, with different pillars and mechanisms than the traditional Brazilian criminal procedure.[660] According to this view, the correct interpretation of collaboration agreements demanded the employment of theories and concepts normally associated with private contract law, such as the "*res inter alios acta*" principle, the protection of individual autonomy and good faith, the "*venire contra factum proprium*" doctrine and the rule of "*pacta sunt servanda*".[661]

This recent development in Brazilian law is influenced by foreign experiences, which are constantly used as a source of legitimacy for the many innovations that agreements between defendants and enforcement authorities brought to Brazilian criminal law.[662] The reference to foreign experiences with consensual mechanisms in criminal investigations has often been used to validate the practice of collaboration agreements, justifying the detachment from principles of Brazilian law, such as strict legality and compulsory prosecution, for the sake of swifter and more efficient prosecu-

659 See item I.1 and I.2.

660 See item I.4.c.

661 On the application of the *pacta sunt servanda* rule to collaboration agreements and the issue of their binding effect, see item I.4.c.i. On the application of the "res inter alios acta" principle, see item I.4.c.ii.

662 As noted by different authors. See: Vasconcellos, *Colaboração Premiada no Processo Penal* (n 39) 22-23; Dino (n 426) 516. Observing, more broadly, the U.S. influence on the recent anti-corruption efforts in Brazil, see Ana Frazão and Ana Rafaela Medeiros, 'Desafios para a efetividade dos programas de compliance' in Ana Frazão and Ricardo Villas Bôas Cuevas (eds), *Compliance: perspectivas e desafios dos programas de conformidade* (Fórum 2018) 71-104.

tion.[663] Numerous voices defended the development of a comprehensive system of transactions in Brazilian criminal law based on the understanding that the rewarded collaboration regulation of the Organized Crime Act reflects a global trend towards a new paradigm of "consensual justice".[664]

The recent worldwide expansion of consensual mechanisms in criminal procedure is a well-documented phenomenon. Several countries of Continental tradition have implemented reforms in recent decades to increase the scope for inter-party negotiations in criminal justice, which for long time have been a distinctive feature of U.S. criminal procedure.[665] In view of various social changes, European and Latin American countries have developed consensual forms of procedure that emulate, to a greater or lesser degree, the U.S. system of plea bargaining.[666] Although assuming different forms according to the specificities of each legal system, consensual mechanisms basically operate by granting benefits to offenders who confess to a crime and consent to a summary process and conviction.[667]

This chapter examines the German experience with two legal mechanisms that provide a useful perspective for examining the problems and perplexities related to the recent development, through the practice of the rewarded collaboration regulation, of a broad negotiation forum between defendants and law enforcement authorities in the Brazilian justice system. As a country of Continental tradition, Germany provides an interesting example of the contradictions and difficulties associated with the introduction of consensual mechanisms in a context where criminal procedure is understood as an official investigation aimed at correctly establishing the

663 See items II.4 e II.5.

664 See Mendonça, 'Os possíveis benefícios da colaboração premiada: entre a legalidade e a autonomia da vontade' (n 36). See also the allegations of the Federal Public Prosecution Office in the following proceedings: STF, PET 7265 [2017] and STF, PET 5779 [2015]. In the jurisprudence of the Brazilian Federal Supreme Court, see STF, PET 7074 [2017] (Celso de Mello J).

665 Schünemann, 'Zur Kritik Des Amerikanischen Strafprozessmodells' (n 25) 569-571.

666 Langer (n 28) 38. On this issue, see: Thomas Weigend, *Absprachen in ausländischen Strafverfahren: eine rechtsvergleichende Untersuchung zu konsensualen Elementen im Strafprozess* (n 24); Thaman (n 28).

667 Mirjan Damaška, 'Symposium on Guilty Plea Part I: The Theoretical Background Negotiated Justice in International Criminal Courts' (2004) 2 Journal of International Criminal Justice 1018, 1019. For a critical assessment of this type of benefits, see: Luís Greco, *Strafprozesstheorie Und Materielle Rechtskraft* (Duncker & Humblot 2015) 276-279.

facts.[668] In such a context, basic pillars of criminal justice – like the state´s commitment to search for truth and the principle of compulsory prosecution – restricted for a long time the parties' capacity to dispose of criminal cases and resolve them through consensual exchanges.[669]

Item IV.2 describes the evolution of the practice of negotiated judgments ("*Verständigung*") in German criminal justice,[670] which enabled defendants, prosecutors and courts to engage in consensual arrangements in

668 For the characterization of German criminal procedure as a system of official investigation, see: Langer (n 28) 20-26. Martin Heger observes that in German criminal procedure "the main goal is to enforce the state´s responsibility to prosecute whenever a crime has been committed. In order to achieve this goal, both the court and the district attorney are obliged to determine the objective truth of a case, because the state´s responsibility to prosecute and punish can only be enforced against a truly guilty party". See: Heger, 'Adversarial and inquisitorial elements in the criminal justice systems of European countries as a challenge for the Europeanization of the criminal procedure' (n 25) 198-205.

669 Thomas Weigend notes the incompatibility of the practice of consensual solutions with traditional principles of German criminal procedure, particularly in regard to the state´s commitment to search for truth. See: Thomas Weigend, 'Abgesprochene Gerechtigkeit — Effizienz Durch Kooperation Im Strafverfahren?' (1990) 45 JuristenZeitung 774, 775-776. On the same note, Markus Dubber and Tatjana Hörnle assert that: "Within the framework of German criminal procedure, agreements are alien and problematic". See: Markus D Dubber and Tatjana Hörnle, *Criminal Law: A Comparative Approach* (Oxford University Press 2014) 169.
For a detailed discussion of the concepts of search for truth and consent in German criminal procedure, see: Greco, *Strafprozesstheorie Und Materielle Rechtskraft* (n 668) 169-187, 261-281. According to Greco, an adequate determination of the facts, that allows for the correct application of criminal law, must be understood as the "specific purpose" of German criminal procedure, even though that does not mean a flawless and unending investigation (187).

670 The practice of consensual arrangements in the German criminal justice described in the item IV.2 has gained different designations and labels over time: "Absprache", "Deal", and "Verständigung". This thesis will refer to these arrangements by the German term "Verständigung", which is used in the statute enacted by the German Parliament in 2009 to regulate the practice. In English, the thesis will use the term "negotiated judgments" to refer to these arrangements, as suggested by Thomas Weigend and Jenia Turner, see: Thomas Weigend and Jenia Iontcheva Turner, 'The constitutionality of negotiated criminal judgments in Germany' (2014) 15 German Law Journal 81. In English literature, it is common to refer to the German practice of negotiations in criminal justice as "plea bargaining". See: Swenson (n 28); Samantha Cheesman, 'Comparative Perspectives on Plea Bargaining in Germany and the U.S.A' <https://publishup.uni-potsdam.de/opus4-ubp/frontdoor/deliver/index/docId/7457/file/S113-151_aiup02.pdf> accessed 20 September 2019 ; Vanessa Carduck, 'Quo Vadis,

criminal proceedings. This model of negotiation was developed informally in German courts in the 1970s, especially in cases involving white-collar crimes and drug trafficking.[671] Since the rules of the German Criminal Procedure Code did not authorize these kind of negotiations, negotiated judgments in German criminal procedure stood for a long time as a *praeter* or *contra legem* practice.[672] Only in 2009 did a legislative amendment add a specific section to the German Criminal Procedure Code (§ 257c StPO), establishing statutory rules for the regular development of negotiated judgments in German criminal justice.

Item IV.3 analyzes the development in German law of the crown-witness regulation ("*Kronzeugenregelung*"), which allows offenders who cooperate with law enforcement authorities in the investigation of crimes committed by other individuals to obtain certain benefits. Introduced in 1982 through an amendment to the German Narcotics Law, this mechanism gained more relevance in 2009, when an amendment to the Criminal Code (§ 46b StGB) devised a general framework for the concession of benefits to cooperating defendants.

The risks and pitfalls of comparative studies are well-known. Careless comparisons may reinforce false stereotypes or generate "legal counterfeits".[673] Incautious assessments can overlook important aspects of an intricate phenomenon. On the other hand, the simplification of complex legal institutions can be productive, since it permits the recognition of the key aspects of multifaceted realities, releasing the analysis from the "tyranny of details".[674] Comparative studies enable a critical understanding of develop-

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German Criminal Justice System? The Future of Plea Bargaining in Germany' (2013) Warwick School of Law Research Paper 2013-17, 1 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2316828> accessed 20 September 2019; Alexander Schemmel, Christian Corell and Natalie Richter, 'Plea Bargaining in Criminal Proceedings: Changes to Criminal Defense Counsel Practice as a Result of the German Constitutional Court Verdict of 19 March 2013?' (2014) 15 German Law Journal 43. However, the use of the the term "plea bargaining" in the German context can be misleading, since there are fundamental differences between the U.S. model of negotiations and the German practice. For a good comparison between the two systems of negotiation, see: Brodowski (n 24).

671 Altenhain, Dietmeier and May (n 38) 20.

672 Heger and Pest (n 37) 446.

673 Luís Greco and Alaor Leite used the term "legal counterfeit" to criticize the use by the Brazilian Federal Supreme Court of the theory of dominion of the act ("*Tatherrschaft*"), as famously developed in German criminal law by Claus Roxin and other scholars. See: Greco and Leite (n 17).

674 Mirjan Damaska, 'Structures of Authority and Comparative Criminal Procedure' (1975) 84 The Yale Law Journal 480, 482.

ments in domestic law, offering an external point of view from which important features become clearer.[675] This analytical perspective may prove helpful as long as the object of study is strictly delimited.[676]

It is important, therefore, to frame the objectives and limits of this chapter. A detailed study of the two German legal institutions is obviously a task that is beyond the boundaries of the present thesis. In recent decades, the practice of negotiated judgments was one of the most widely discussed themes in German criminal law and has been subject of various comparative law studies. The German experience with the crown-witness regulation also entails a number of specificities and controversies which cannot be reproduced in this thesis.

More than a thorough study of both mechanisms, the description of their development seeks to establish the basis for two points discussed in section IV.4. Item IV.4.a contrasts the responses provided by the practice of negotiated judgments ("*Verständigung*") and the crown-witness regulation ("*Kronzeugenregelung*") in face of the challenges posed by complex criminal investigations, particularly in the field of white-collar criminality, comparing the aspirations and functions of each legal mechanism within the German justice system. Item IV.4.b examines the tensions created by the expansion of consensual arrangements in the German justice system, their effects on the interests protected by criminal law, especially with regard to the state's commitment to an adequate process of fact-finding, and the difficulties in establishing boundaries for the development of negotiated judgments by legal practitioners. These two points will be relevant for the critical analysis of the Brazilian practice, which will be carried out in chapter V.

2. *Negotiated judgments: practice and regulation*

The development of the practice of negotiated judgments ("*Verständigung*") within criminal justice has been a longstanding and controversial theme of debate in Germany.[677] Countless books, articles and studies have been

675 Dubber and Hörnle (n 670) 4.

676 Damaska (n 675) 482.

677 According to Greco, negotiated judgments must represent "the most discussed subject in German criminal procedure scholarship over the last 20 years". See: Luis Greco, '„Fortgeleiteter Schmerz" – Überlegungen zum Verhältnis von Prozessabsprache, Wahrheitsermittlung und Prozessstruktur' (n 26) 1-15.

written on the theme since its emergence.[678] Multiple decisions of German higher courts have also dealt with the topic over the last decades.[679] The controversies regarding the practice of negotiated judgments in the German system of criminal justice have attracted international attention and prompted a large number of comparative analyses, in particular to the U.S. model of plea bargaining.[680]

The level of interest provoked by the subject is understandable. Germany has for a long time provided a remarkable example of Continental criminal justice, serving as common counterpoint to American criminal procedure.[681] The traditional German model of official investigation, like other Continental jurisdictions, presented substantial differences when compared to the U.S. party-driven justice system, particularly regarding the roles of procedural participants in the process of fact-finding and their ca-

678 See: Winfried Hassemer, 'Pacta sunt servanda - auch im Strasprozess?' (1989) 11 Juristische Schulung 890, 890–895; Schunemann, 'Gutachten, Kongressvortrag, Aufsatz | Absprachen im strafverfahren - Grundlagen, Gegenstande und Grenzen' (n 38); Weigend, 'Abgesprochene Gerechtigkeit — Effizienz Durch Kooperation Im Strafverfahren?' (n 670).; Karsten Altenhain, Frank Dietmeier and Markus May, *Die Praxis Der Absprachen in Strafverfahren* (Nomos Verlagsgesellschaft 2013) ; Mathias Jahn and Martin Müller, 'Das Gesetz zur Regelung der Verständigung im Strafverfahren – Legitimation und Reglementierung der Absprachenpraxis' (2009) 62 Neue juristische Wochenschrift 1; Heger and Pest (n 37). For studies published in English, see: Jachim Herrman, 'Bargaining justice - a bargain for German criminal justice' (1991) 53 University of Pittsburgh Law Review 755; Swenson (n 28); Thomas Weigend, 'The Decay of the Inquisitorial Ideal: Plea Bargaining Invades German Criminal Procedure' in John Jackson and others (eds), *Crime, Procedure and Evidence in a Comparative and International Context* (Hart Publishing 2008).

679 See the following rulings of the German Federal Constitutional Court: BVerfG, Beschl. v. 27.1.1987 – 2 BvR 1133/86 = NJW 1987, 2662; and BVerfG, Urt. v. 19.3.2013 – 2 BvR 2628/10 u.a. = BVerfGE 133, 168. See also two important decisions of the German Federal Court of Justice: BGH, Urt. v. 28.8.1997 – 4 StR 240/97 = BGHSt 43, 195; and BGH, Beschl. v. 3.3.2005 – GSSt 1/04 = BGHSt 50, 40.

680 See, e.g. Weigend, *Absprachen in ausländischen Strafverfahren: eine rechtsvergleichende Untersuchung zu konsensualen Elementen im Strafprozess* (n 24); Peters, *Urteilsabsprachen im Strafprozess: Die deutsche Regelung im Vergleich mit Entwicklungen in England & Wales, Frankreich und Polen* (Universitätsverlag Göttingen 2011); Brodowski (n 24). For literature in English, see Langer, *From legal transplants to legal translations: the globalization of plea bargaining and the Americanization thesis in criminal procedure* (n 28); Thaman (n 28).

681 See: John H Langbein, 'Land without Plea Bargaining: How the Germans Do It' (1979) 78 Michigan Law Review 204. Critically: Dubber (n 28).

pacity to dispose of criminal cases.[682] In this context, a striking contrast concerned the use of consensual exchanges to resolve criminal proceedings: while the American approach to criminal procedure as a dispute between prosecution and defense allowed for different types of transactions within criminal cases, the core values and basic principles of German criminal justice restricted the possibilities of inter-party negotiations[683]. Although a legislative reform in the early 1970s facilitated the use of consensual solutions in German criminal procedure, it restricted the applicability of the introduced negotiation mechanism to cases related to minor offenses.[684] In this context, the distinguished comparative scholar John Langbein, in a famous article published in 1979, applauded the German legal system for avoiding "any form or analog of plea bargaining in its procedures for cases of serious crime" and used the German experience to harshly criticize the American dependence on plea bargaining.[685]

Against this background, the revelation in the early 1980s that the practice of informal and concealed negotiated judgments had, furtively and without any legislative authorization, spread in German criminal justice, particularly in investigations of white-collar crimes, caused great surprise and perplexity.[686] This section provides a general overview of the impetuous and troubled evolution of consensual solutions in German criminal procedure. Item IV.2.a describes the conceptual pillars that hindered for a long period the development of consensual solutions in German criminal justice. Item IV.2.b examines the appearance of informal consensual solutions in German criminal practice in the final decades of the 20th century. Item IV.2.c analyzes the response from German higher courts to the devel-

682 Schünemann, 'Zur Kritik Des Amerikanischen Strafprozessmodells' (n 25) 558-562; Jaeger (n 3) 266-229; Florian Jeßberger, *Kooperation und Strafzumessung: der Kronzeuge im deutschen und amerikanischen Strafrecht* (n 1) 159-163. About this theme, see item V.2.a.

683 Langer (n 28) 35-39.

684 The reform introduced section § 153a in the German Code of Criminal Procedure, which established possibilities for prosecutors and defendants to resolve investigations of minor offenses through consensual arrangements. See: Janique Brüning, 'Die Einstellung Nach § 153a StPO – Moderner Ablasshandel Oder Rettungsanker Der Justiz?' (2015) 12 Strafrecht - Jugendstrafrecht - Kriminalprävention in Wissenschaft und Praxis 125. In English: Dubber and Hörnle (n 670) 159-161.

685 Langbein (n 682) 205 and 224-225.

686 The first article that revealed and described the practice of negotiated judgments was published in 1982. See Detlef Deal, 'Aus Der Praxis. Der Strafprozessuale Vergleich' (1982) Strafverteidiger 545.

opment of informal consensual solutions in the practice of criminal law. Item IV.2.d describes the legislative reform, approved in 2009, that sought to regulate the employment of consensual solutions in German criminal justice, through the introduction of section § 257c in the German Code of Criminal Procedure (§ 257c StPO). Item IV.2.e reports the 2013 decision of the German Constitutional Court on the constitutionality of the statutory rules that regulate consensual solutions in German criminal procedure.

a. Search for truth, compulsory prosecution and consent in the German tradition

The traditional basis of German criminal procedure provides little room for the procedural parties – prosecutors and defendants – to negotiate over outcomes of criminal proceedings.[687] Core notions of the Criminal Procedure Code, such as the principle of compulsory prosecution and the state's commitment to search for truth, limit the parties' capacity to dispose of cases in a much more rigid manner than occurs, for instance, in German civil disputes or in U.S. criminal procedure.[688] These basic premises of German criminal justice impose several restrictions on the development of consensual arrangements between the parties of criminal proceedings.[689]

According to the principle of compulsory prosecution ("*Legalitätsgrundsatz*"), prosecutors are required to press charges whenever there is enough evidence to support a conviction, and exceptions to this rule must be ex-

687 Bernd Schünemann points out that, while inter-party negotiations represent a common feature of German civil procedure and of Anglo-Saxon criminal justice, basic principles of German criminal procedure traditionally ruled out the adoption of negotiated solutions between parties. See: Schunemann, 'Die Verständigung im Strafprozeß – Wunderwaffe oder Bankrotterklärung der Verteidigung?' (n 27) 1896.

688 Thomas Weigend observes that "according to the German understanding – and in contrast to the Anglo-American concept of criminal procedure – a judicial verdict on a criminal proceeding cannot be legitimized by a mere consensual arrangement between the parties". See: Thomas Weigend, 'Neues zur Verständigung im deutschen Strafverfahren?' *in*: Jocelyne Leblois-Happe and Carl-Friedrich Stuckenberg (eds.), *Was wird aus der Hauptverhandlung? Quel avenir pour l'audience de jugement?*, (Boon University Press 2014) 199–220.

689 See Hassemer, 'Pacta Sunt Servanda - Auch Im Strafprozess?' (n 679) 892; Brodowski, 'Die verfassungsrechtliche Legitimation des US-amerikanischen „plea bargaining" – Lehren für Verfahrensabsprachen nach § 257 c StPO?' (n 24) 733–777.

pressly provided for by law.[690] The principle seeks to enforce the state's commitment to fulfill substantive law provision through criminal proceedings and, at the same time, ensure that all individuals receive equal treatment by the criminal justice system.[691] Therefore, prosecutors must strictly follow the objective criteria established by legislation and cannot dispose of the state's obligation in prosecuting suspicious acts.[692]

The parties' capacity to negotiate in German criminal procedure has also been limited by the understanding that the state has the obligation to determine correctly the facts of the investigated conduct,[693] a duty that is achieved by the assignment of a central role to the judge in the process of fact-finding.[694] The Criminal Procedure Code determines that courts must extend the gathering of evidence to all the important facts and evidence for establishing the truth.[695] This is the so-called principle of state investigation ("*Amtsermittlungsgrundsatz*"), according to which the judiciary is responsible for the conduction of a full factual investigation after the opening of a criminal proceeding.[696] This principle does not mean that investigative efforts must create absolute certainty about what has occurred, but rather that there is an obligation on the part of the judiciary to guarantee a

690 As provided in the German Code of Criminal Procedure (*StPO*), § 152 (2).

691 Thomas Weigend, 'Das „ Opportunitätsprinzip " Zwischen Einzelfallgerechtigkeit Und Systemeffizienz' (1997) 109 Zeitschrift für die gesamte Strafrechtswissenschaft 103, 104.

692 Julia Peters notes that the German Federal Constitutional Court has linked the principle of compulsory prosecution with the prohibition on arbitrary actions of state officials ("*Willkürverbot*") (See: Peters (n 680) 28-29.

693 Noting the restrictions that arise from the state's commitment to search for truth in criminal procedure, particularly in comparison the the U.S. system of plea bargaining, see: Martin Heger and Hannah Kutter-Lang, *Strafprozessrecht* (Verlag W. Kohlhammer 2013) 7-8.

694 Bernd Schunemann, 'Die Zukunft Des Strafverfahrens – Abschied Vom Rechtsstaat?' (2007) 119 ZStW 945, 946. Analyzing the German criminal procedure, Martin Heger notes that "During the preliminary investigation, the main responsibility to unearth the truth lies with the district attorney´s office. After the proceedings have entered the trial stage, this responsibility is handed over to the court. As a result, witnesses are always named and subpoenaed by the court and later questioned by the judge during trial". See: Heger (n 25) 202.

695 German Code of Criminal Procedure (*StPO*), § 244 (2).

696 As Klaus Malek points out, one of the main repercussions of the principle of state investigation regards the role of the judicial bodies in the process of fact-finding. See: Malek (470).

thorough investigation of the facts.[697] In this context, the confession of the accused is not enough to end the official investigation, which must confirm through objective means the guilt of the defendant even when he has admitted to committing the investigated acts.[698]

The traditional basis of the German criminal procedure, therefore, greatly differs from the foundations of the U.S. system of criminal justice, which is based on an adversarial model of fact-finding, and on the parties' capacity to dispose of the process.[699] The American system of dialectical opposition of alternative factual narratives presented by each of the parties contradicts, in different aspects, the continental model of assigning to law enforcement authorities, and in particular to judges, the duty to investigate the offense in the best possible manner.[700]

A main consequence of this structural differences concerns the powers of negotiation with which U.S. criminal procedure vests the prosecutors and defendants.[701] In the United States, consensual solutions are common and widespread, given that criminal proceedings are mainly understood as a conflict between prosecution and defense, mediated by a passive judge.[702] The wide for negotiation between prosecutors and defendants en-

697 On this matter, the German Constitutional Court has decided that "The criminal process has to fulfill the principle of culpability and must not depart from its intended goal of the best possible investigation of the material truth and the assessment of the factual and legal situation by an independent and neutral court." BVerfG, Urt. v. 19.3.2013 – 2 BvR 2628/10 u.a. = BVerfGE 133, 168, para 102.

698 Winfried Hassemer, 'Konsens Im Strafprozeß' in Regina Michalke and others (eds), *Festschrift für Rainer Hamm zum 65. Geburtstag am 24. Februar 2008* (De Gruyter 2009) 187. Martin Heger observes that "in Germany it is not up to the opposing parties to convince the court of a certain truth. On the contrary, the only relevant truth is an objective one that remains uninfluenced by a 'guilty plea'". See: Heger (n 25) 203.

699 For more on the subject see: Schünemann, 'Zur Kritik Des Amerikanischen Strafprozessmodells' (n 25). Similarly, Dominik Brodowski asserts that a characteristic of the U.S. criminal justice is the absence of the duty of state authorities to prosecute any known or suspected crimes. See: Brodowski (n 24) 741.

700 Jeßberger (n 1) 160. Comparing the Continental and the Anglo-american systems of criminal justice, Martin Heger highlights two fundamental differences: "1) the working relationship between the judge and the other parties to the proceedings and 2) a vastly different expectation of the court´s responsibility to ascertain the truth of a case". See Heger (n 25) 199.

701 For a thorough exam, see: Weigend, *Absprachen in Ausländischen Strafverfahren: Eine Rechtsvergleichende Untersuchung Zu Konsensualen Elementen Im Strafprozess* (n 24).

702 Langer (n 28) 35–36.

ables the conclusion of several types of agreements, with different purposes, objectives and contents.[703] The agreement may concern the types of charges the prosecutors will press, the sentence to be served by the accused and may or may not regulate the cooperation of the accused in the investigation of crimes committed by others.[704] Given the view that criminal cases are similar to disputes between parties, consensual solutions can be understood as normal and even desirable mechanisms within U.S. criminal justice.[705]

Throughout much of the 20th century,[706] German criminal procedure did not enable the creation of a negotiation forum for procedural parties to consensually define the outcome of criminal proceedings, in marked contrast to the U.S. experience with the evolution of plea bargaining,[707] which gained a prominent role in the American justice system from the beginning of the last century.[708] Given the foundations of German criminal procedure, especially the principle of compulsory prosecution and the state's commitment to search for truth, this scenario was to be expected. After all, what was the possibility of development of consensual solutions in a system of criminal justice where prosecutors could not make discretionary decisions regarding the pressing of charges, defendants could not dispose of the proceeding through a confession and courts were required to carry out, in an independent manner, a meticulous fact-finding process?

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703 According to James Whitman American prosecutors "bring the same spirit of inventiveness to their task that American business lawyers bring to the drafting of contracts". See Whitman (n 244) 387.

704 Alschuler (n 42) 3–4. Also noting, critically, the enormous space for negotiations held by the parties in American criminal justice: Greco, *Strafprozesstheorie Und Materielle Rechtskraf* (n 668) 265-266.

705 As noted by the U.S. Supreme Court: "Whatever might be the situation in an ideal world, the fact is that the guilty plea and the often concomitant plea bargaining are important components of this country's criminal justice system. Properly administered, they can benefit all concerned" (UNITED STATES, Supreme Court. Backledge v. Allison, No. 75-1693, 431 U.S. 63, 71, 1977).

706 While it is difficult to pinpoint the time when agreements became common in German criminal proceedings, the doctrine points out that the discussion about the issue only started to gain traction from the 1980s. As Julia Peters observers, prior to this period, studies on agreements in the German criminal procedure were very scarce, and jurisprudential references to the subject were also rare. See Peters (n 680) 7-8.

707 For a historical view of these contrasts, see Langbein (n 682). For a more current comparison, see Brodowski (n 24).

708 On the subject, see Alschuler (n 42).

b. Development of the practice of negotiated judgments

A surprising answer to this question appeared in 1982, in an article published by a defense lawyer under a pseudonym, which denounced the spreading of informal agreements in the German criminal justice system.[709] According to the article, in numerous complex cases, the conviction of defendants stemmed not from a thorough and public process of fact-finding, but rather from consensual solutions negotiated, in an informal manner, by prosecutors, defendants and courts. The article criticized the silence of the legal community in relation to the subject, since – according to the author – virtually all legal practitioners knew of and participated in the practice of informal negotiated judgments, but no one talked about it.[710]

The article drew attention to the development, through judicial practice, of informal negotiated judgments in the German justice system.[711] A survey conducted in 1987 with more than a thousand judges, lawyers and prosecutors indicated that a significant portion of criminal convictions were reached through informal agreements, a phenomenon that occurred especially in investigations of economic crimes, in which the defendants' legal status was uncertain and the discovery phase was lengthy.[712] Other empirical studies demonstrated the widespread existence of informal agreements and revealed the expansion of the practice of consensual solutions in the German criminal justice system,[713] particularly in cases regarding economic crimes and drug trafficking.[714]

Since these consensual solutions stemmed not from a legislative amendment or from a specific judicial decision, but rather from routines of informal communication between procedural participants, it is difficult to determine the exact moment this negotiating practice emerged.[715] Further-

709 Deal (n 687).
710 ibid 545.
711 Because of the informal nature of this practice, it is difficult to identify exactly the period of its inception. See Heger and Kuterrer-Lang (n 694) 82.
712 Schünemann, 'Die Verständigung Im Strafprozeß – Wunderwaffe Oder Bankrotterklärung Der Verteidigung?' (n 27) 1896.
713 For an overview of these studies, see: Patricia Rabe, *Das Verständigungsurteil Des Bundesverfassungsgerichts Und Die Notwendigkeit von Reformen Im Strafprozess* (Mohr Siebeck 2017) 275–277.
714 Altenhain, Dietmeier and May (n 38) 20.
715 For an overview of the first decisions examining the legality of informal agreements in criminal proceedings, see: Peters (n 681) 32-45. According to the author, the practice of negotiated judgments was only perceived with greater at-

more, given the clear incompatibility of these negotiated judgments with the formal rules of the German Criminal Procedure Code, legal practitioners opted for discretion and secrecy, preventing the identification of such practice. However, several elements indicate that, as early as the 1970s, there were cases in which the conviction of the accused was preceded by informal agreements.[716]

Given the lack of a statutory basis and the traditional structure of German criminal procedure, the practice of negotiated judgments adopted a very specific format, quite different from the U.S. system of plea bargaining. In the German model of informal transactions in criminal proceedings, the negotiation process involved not only the prosecution and the defendant, but also the judge, who would often take the initiative of starting the negotiations, playing an active role in defining the content of the agreement.[717] The agreements were discussed and concluded in private, without following defined formalities and leaving no written record. [718]

In these negotiations, the judge, with the consent of the prosecutor, offered the defendant a reduced sentence, conditional upon confession of the facts under investigation.[719] In many cases, two scenarios were presented to the defendant: in one, the defendant would enter into an agreement, confess to the crimes and obtain a reduced sentence; in the other, the proceeding would follow its regular course and could result in more severe penalties. In view of this practice, known as sanctioning scissors ("*Sanktionsschere*"), the accused would either accept the deal and secure a reduced sentence or opt for the continuance of the proceeding and face the possibility of receiving a heavier penalty in case of conviction.[720]

Although the factors that led to the development of informal consensual solutions in the German justice system are multiple and complex, a frequently mentioned cause is the increase in the number of investigations related to economic and corporate crimes.[721] The legislation regarding this

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tention when the judiciary began to encounter cases in which the dissatisfaction of the parties with the informal agreement led to judicial questions.

716 Heger and Pest (n 37) 446.

717 Brodowski (n 24) 770.

718 Schünemann, 'Die Verständigung Im Strafprozeß – Wunderwaffe Oder Bankrotterklärung Der Verteidigung?' (n 27) 1895.

719 For a description of the process of informal negotiation, see: Deal (n 687).

720 Eberhard Kempf, 'Gesetzliche Regelung von Absprachen Im Strafverfahren? Oder: Soll Informelles Formalisiert Werden?' (2009) StV 269.

721 Schünemann, 'Gutachten, Kongressvortrag, Aufsatz | Absprachen Im Strafverfahren - Grundlagen, Gegenstande Und Grenzen' (n 38) 17-18.

type of criminal behavior had undergone notable expansion since the 1970s, and increased the demands on the criminal justice system, with cases requiring a long and complex factual investigation.[722] The complexities of the fact-finding process in these situations gave rise to inquiries dubbed "monster proceedings" ("Monster-Verfahren"), that could last for years or even decades.[723] At the same time, the traditional rules of the Criminal Procedure Code allowed the defense to resort to several manoeuvres that extended the procedure and prevented an expeditious resolution of cases.

In this context, the development of a broad mechanism for consensual arrangements – which were already gaining ground in the German criminal procedure after a 1973 legislative amendment allowed investigations of minor offenses to be resolved through negotiations between the prosecutor and the accused[724] – arose as a solution for the daily problems of legal practitioners, albeit representing a clear departure from the existing statutory rules and the traditional foundations of the German system of criminal justice.

Although the practice of informal consensual solutions appeared and evolved in German criminal procedure as a *contra legem* or, at least, *praeter legem* mechanism,[725] different studies and surveys pointed to a deep entrenchment of this type of negotiation in the justice system.[726] In the field of economic criminality, the employment of consensual solutions in proceedings became so commonplace that, by the end of the 20th century, most of the cases related to this type of offense were resolved through ne-

722 Weigend, 'Abgesprochene Gerechtigkeit — Effizienz Durch Kooperation Im Strafverfahren?' (n 670) 775.

723 Bernd Schunneman, 'Zur Kritik des amerikanischen Strafprozessmodells' (n 25) 555-575.

724 The 1973 amendment introduced section § 153a in the German Code of Criminal Procedure, allowing prosecutors to resolve investigations of minor offenses through an agreement with the defendant. As observed by Martin Heger and Robert Pest, this provision is often said to be a "gateway drug for the practice of negotiated judgments". See: Heger and Pest (n 37) 449.

725 In this sense, notes Miriam Prelle: "In the past, agreements in criminal proceedings were not regulated by statute, but they existed praeter legem or contra legem (...)". See: Miriam Prelle, 'Opportunität Und Konsens: Verfahrensförmige Normsuspendierung Als Hilfe Für Die Überlast Im Kriminaljustizsystem?' (2011) 94 Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft 331, 350. In the same vein, see: Weigend, 'Abgesprochene Gerechtigkeit — Effizienz Durch Kooperation Im Strafverfahren?' (n 670) 781.

726 For a detailed empirical study, see: Altenhain, Dietmeier and May (n 38).

gotiated arrangements.[727] In this type of investigation, the establishment of criminal liability through a thorough and independent investigation of the facts ceased to be the rule and became the exception, while consensual arrangements assumed a central role in the resolution of criminal proceedings.[728]

c. Judicial acknowledgement

The exposure of the informal practice of negotiated judgments spawned intense controversy and received great attention in German legal scholarship. A famous and detailed study presented at the conference of the Association of German Jurists in 1990 not only stated that the practice of consensual solutions contradicted basic principles of the German legal system, but also held that the practitioners responsible for these negotiations were actually committing crimes.[729] The judicial reaction to the phenomenon of informal agreements, however, was not so critical, as demonstrated by the three main rulings of the German higher courts on the subject, occurred in 1987, 1997 and 2005.[730]

In 1987, the discussion regarding informal consensual solutions in criminal proceedings reached the German Constitutional Court for the first time.[731] In a short decision that clearly failed to address a number of legal questions related to the practice,[732] the Constitutional Court affirmed that

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727 Bernd Schünemann, 'Wohin Treibt Der Deutsche Strafprozess?' (2009) 114 Zeitschrift für die gesamte Strafrechtswissenschaft 1, 27. Multiple empirical studies have pointed in this direction. For an overall view, see Peters (n 680) 12-17.

728 For an empirical study regarding the use of negotiated judgments in the field of economic crimes, see Altenhain, Dietmeier and May (n 38).

729 See Schünemann, 'Gutachten, Kongressvortrag, Aufsatz | Absprachen Im Strafverfahren - Grundlagen, Gegenstande Und Grenzen' (n 38).

730 According to Patricia Rabe, the judicial acknowledgment given by German higher courts transformed a "child of the practice" into an "adoptive child of jurisprudence" . See: Patricia Rabe, *Das Verständigungsurteil des Bundesverfassungsgerichts und die Notwendigkeit von Reformen im Strafprozess* (Mohr Siebeck 2017) 1-2.

731 See BVerfG, Beschl. v. 27.1.1987 – 2 BvR 1133/86.

732 The German Constitutional Court recognized in subsequent judgements that the 1987 decision failed to resolve the constitutional controversy over the practice of informal agreements. In this regard, the following decision: BVerfG, Beschl. v. 5.3.2012 – 2 BvR 1464/11, para 21.

the principle of due process did not prevent the parties from negotiating on the status and the prospects of criminal proceedings.[733] At the same time, the Court affirmed that the practice of negotiated judgments did not relieve judicial bodies of the duty to search for truth and to apply a punishment consistent with the offender's culpability.[734]

In 1997, the German Federal Court of Justice rendered a decision of paramount importance on the issue of consensual solutions, ruling that, although the principles of German criminal procedure forbade certain forms of agreement, negotiations between parties were not intrinsically illegal as long as limits and restrictions were observed.[735] According to the decision, under no circumstances would judges be relieved of their commitment to search for the truth. The credibility of any confession obtained through an agreement must, therefore, be independently verified and could not lead to an early end to the investigation, preventing the parties from disposing of the verdict on the accused's guilt.[736] The Court understood that the defendant's confession could be a mitigating factor for determining the sentence, but that agreements could establish the exact criminal punishment, since a consensual solution cannot exempt courts from their obligation to impose a sentence consistent with the offender's guilt.

In its decision, the German Federal Court of Justice also established a series of limits on the format of inter-party negotiations, affirming that the accused's confession could not be obtained through the threat of more severe penalties (as occurred in the practice of "sanctioning scissors") or through the promise of benefits not set forth in law. The Court also determined that agreements could not compel defendants to waive the right to appeal the sentence. In relation to the procedural formalities, the decision stated that any consensual arrangement between parties should be con-

733 See BVerfG, Beschl. v. 27.1.1987 – 2 BvR 1133/86.

734 According to the ruling: "The central concern of criminal procedure is the investigation of real factual circumstances, without which the substantive principle of individual culpability cannot be fulfilled. The goal to investigate the substantive truth, and to decide on this basis on the defendant´s guilty and define the legal consequences, is a duty for both courts and prosecutors." See BVerfG, Beschl. v. 27.1.1987 – 2 BvR 1133/86.

735 See BGH, Urt. v. 28.8.1997 – 4 StR 240/97 = BGHSt 43, 195.

736 The decision stated that basic principles of German criminal procedure "exclude from the outset the possibility of an agreement on the verdict of guilty." See BGH, Urt. v. 28.8.1997 – 4 StR 240/97 = BGHSt 43, 195.

cluded at a hearing before the court and that the final agreement must be formally included in the process.[737]

The 1997 decision was not, however, able to settle all the controversies regarding the practice of informal consensual solutions in German criminal justice. Legal practitioners continued to negotiate without complying with the boundaries defined by the Federal Court of Justice.[738] In this scenario, the controversies regarding the practice of informal consensual solutions reached the Federal Court of Justice once again in 2005.[739]

In its second main ruling on the subject, the Court reaffirmed that the practice of consensual solutions was not in itself incompatible with the principles of German criminal procedure. According to the decision, without these agreements, the system of criminal justice no longer had the means to meet the social demand for the effective enforcement of criminal law.[740] Given the lack of resources caused by the rising amount of more complex cases, the functionality of the justice system could not be guaranteed if negotiated judgments were completely banned.[741] On the other hand, the Federal Court of Justice once more declared the existence of limits for the practice of negotiated judgments within German criminal procedure, since the principles of culpability and due process prevented parties from freely disposing of the state's duty to investigate offenses and from consensually defining the legal qualification of the facts and the appropriate sentence. [742]

According to the decision, a main objective of criminal proceedings is to determine the truth about suspected offenses, which is essential for the rendering of a correct judgement. Given the constitutional requirement to seek the best possible clarification of the facts ("*Gebot bestmöglicher Sachaufklärung*"), the verdict can only be determined by courts after the conclusion of the discovery phase.[743] Furthermore, the Court stated that

737 According to the ruling, the practice of informal agreements violated the principle of publicity: "When an agreement is shifted away from the main hearing and is not disclosed, the main hearing becomes just a façade (…)" See BGH, Urt. v. 28.8.1997 – 4 StR 240/97 = BGHSt 43, 195.

738 Altenhain, Dietmeier and May (n 38) 39-40.

739 This time, the case was analyzed by the "Grand Senate for Criminal Matters" ("Großer Senat für Strafsachen"), the highest criminal chamber in the structure of the Federal Court of Justice.

740 See BGH, Beschl. v. 3.3.2005 – GSSt 1/04 = BGHSt 50, 40, para 49.

741 See BGH, Beschl. v. 3.3.2005 – GSSt 1/04 = BGHSt 50, 40, para 50.

742 ibid para 37.

743 ibid para 38.

the penalty must be established based on the culpability of the offender, the seriousness of the offense and the severity of the facts.[744] The constitutional principle of the individualization of punishment would prevent the imposition, through a consensual arrangement, of penalties that are either excessively high or excessively low.

After acknowledging that informal consensual solutions were widely used and had developed deep roots in the German justice system, the Federal Court of Justice appealed to the legislature to set statutory limits and conditions for the practice.[745] According to the Court, the difficult answers to the various questions concerning the employment of consensual mechanisms in the German criminal procedure would be better provided by a legislative measure rather than by judicial decisions.

d. The legislative regulation of negotiated judgments

In 2009, four years after the Federal Court of Justice's decision, the German Parliament approved a statute regulating the use of negotiated judgments in criminal proceedings. The legislative proposal acknowledged that the practice among defendants, prosecutors and judges of negotiating over criminal verdicts and sentences had emerged informally in the German criminal system decades earlier.[746] The bill emphasized that the Constitutional Court, in 1987, and the Federal Court of Justice, in 1997 and 2005, considered the practice of negotiated judgments legitimate as long as some limits associated with traditional principles of German criminal procedure – such as the state´s commitment to search for truth, the principle of culpability and the guarantee of due process – were respected.[747] The purpose of the bill was to devise a statutory framework for negotiated judgments that provided legal certainty for the practice and, at the same time, preserved the principles of German criminal procedure.[748]

In that context, the response of the German Parliament to the demand for consensual solutions within criminal procedure was not to make struc-

744 ibid para 39.
745 ibid para 81.
746 See the bill proposed by the German Federal Government: Deutscher Bundestag, ´BT-Drucksache 16/12310´ (18 March 2009), 1.
747 ibid 7-8.
748 "According to the legislative proposal: The aim of this bill is in particular to regulate negotiated judgments so that they comply with the traditional principles of German criminal proceedings" (ibid. 1).

tural changes in the criminal justice system,[749] as had happened, for instance, in Italy.[750] The development of a statutory framework for consensual solutions in Germany occurred through the addition of specific provisions and minor amendments to the Criminal Procedure Code.[751] The legislative regulation largely reflected the guidelines present in previous judicial rulings on the practice of negotiated judgments, in particular the 2005 decision of the Federal Court of Justice. The main change was the introduction of section § 257c in the German Code of Criminal Procedure (§ 257c StPO), which allows courts to negotiate with the parties over the course and the outcome of a proceeding.[752]

Unlike the U.S. system of plea bargaining, where the negotiation of a consensual solution is primarily performed by the procedural parties (prosecution and defense) and the judge plays a passive role,[753] the model established by the German legislature gives courts a central role in conducting negotiations in criminal justice.[754] According to § 257c StPO, the court is responsible for delimiting and announcing what content an agreement may have, which can include an upper and a lower limit for the sentence.[755] After the court announces the possibilities for the conclusion of an agreement, the parties express their opinion about the proposal. When

749 According to Jahn, it is clear that the objective of the new regulation was not to introduce a new and unknown form of consensual procedure. See: Jahn and Müller (n 679) 2631.

750 On the subject, see: Stefano Maffei, 'Negotiations "on Evidence" and Negotiations "on Sentence": Adversarial Experiments in Italian Criminal Procedure' (2004) 2 Journal of International Criminal Justice 1050.

751 The impacts of the changes promoted by the new legislation were very significant. According to Heger and Pest, the regulation of negotiated judgments "represent one of the most significant modifications of the criminal procedure since 1877". See Heger and Pest (n 37) 447.

752 Luis Greco notes that this provision is the centerpiece of the statutory regulation of negotiated judgments. See Greco, '„Fortgeleiteter Schmerz" – Überlegungen zum Verhältnis von Prozessabsprache, Wahrheitsermittlung und Prozessstruktur' (n 26) 3.

753 On this matter, Maximo Langer observes that "American plea bargaining, assumes an adversarial conception of criminal procedure as a dispute between two parties facing a passive decision-maker. It makes sense in a dispute model that the parties be allowed to reach an agreement over a plea bargain. That is, the parties may negotiate in order to reach such an agreement, and if the parties agree that the dispute is over, the decision-maker should not have any power (or only a relatively minor and formal power) to reject this decision". See: Langer (n 28) 35-36.

754 Dominik Brodowski (n 24).

755 German Code of Criminal Procedure (*StPO*), § 257c (3).

they agree with the court's proposal, the agreement becomes valid.[756] In any case, the accused's confession is an essential part of the agreement.[757]

While providing for the possibility of legitimate negotiations in criminal proceedings, the 2009 legislative regulation also imposed a series of limits on the consensual resolution of criminal investigations, similar to the restrictions imposed by prior decisions by German higher courts. § 257c StPO expressly provides that the defendant's guilt cannot be defined by the agreement.[758] The legislative proposal emphasized that none of the amendments changed the provision of § 244 (2) of the German Code of Criminal Procedure, which determines that courts have the duty to seek, *ex officio*, the truth about the facts through all possible means.[759] The bill expressly rejected the possibility of creating a new procedural form based on consensual exchanges, asserting that such an option would undesirably reduce the role played by courts in the search for truth in criminal proceedings.[760] Thus, according to § 257c StPO, the conclusion of an agreement does not constitute a sufficient basis for establishing the occurrence of a crime or for the imposition of criminal punishment on the accused, which continues to depend on a comprehensive investigation into the suspicious facts.

The statutory framework for consensual solutions also forbade the definition of the exact penalty in the agreement, and allowed only for the establishment of the minimum and maximum sentence.[761] The reaching of an agreement does not exempt the court from applying the appropriate penalties on the defendant according to the general sentencing rules and the specific circumstances of each case.[762] According to § 257c StPO, the agreement will no longer be binding on the court if there are elements that indicate that the consensual arrangement leads to a sentence that is not consistent with the investigated facts or with the accused's culpability.[763] In that case, the court must immediately inform the parties and the defendant's confession can no longer be used.

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756 ibid.
757 ibid § 257c (2).
758 ibid. In this sense, the 2009 amendment did not introduce the mechanism of "guilty plea". See: Heger (n 25) 200.
759 See the bill proposed by the German Federal Government: Deutscher Bundestag, ´BT-Drucksache 16/12310´ (18 March 2009), 8.
760 ibid. 8. On this point, see Jahn and Müller (n 679) 2631.
761 German Code of Criminal Procedure (*StPO*), § 257c (3).
762 As expressly provided by the bill proposed by the German Federal Government. See Deutscher Bundestag, ´BT-Drucksache 16/12310´ (18 March 2009), 14.
763 German Code of Criminal Procedure (*StPO*), § 257c (4).

The legislative regulation also provided that a waiver of the defendant's right to appeal cannot be established in the agreement.[764] In addition, whenever a negotiation occurs, the court must expressly inform the accused that he or she still has the right to appeal against the decision.[765] According to bill that introduced the regulation, these provisions seek not only to guarantee the individual rights of the accused, but also to ensure effective judicial control by higher authorities.[766]

Lastly, the 2009 statutory rules sought to change the informal and oral nature of the practice of negotiated judgments, through the establishment of duties regarding the documentation and written record of the negotiation process. To this end, the existence and result of a negotiation must be recorded in the proceeding, even when the parties have not reached an agreement.[767] The court's chairperson has the duty to publicly announce and record the existence of negotiations for a possible agreement.[768] In the event that an agreement is concluded, this must be expressly stated in the court's final decision.[769]

The legislative regulation of consensual solutions provoked differing reactions: while some critics perceived that the new rules legitimized a mechanism that contradicted the essence of the German criminal procedure, maximizing the relevance of consensual arrangements while ignoring various known risks, [770] others argued that the statutory rules merely represented belated approval of an entrenched practice that, in addition to being legitimate, urgently needed to be regulated[771]. Due to the intense controversies regarding the practice of consensual solutions and their legislative regulation, it was only a matter of time before challenges regarding the constitutionality of the 2009 statutory rules reached the German Constitutional Court, which eventually occurred in 2013.

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764 ibid § 302 (1).
765 ibid § 35 a.
766 See Deutscher Bundestag, ´BT-Drucksache 16/12310´ (18 March 2009), 2.
767 German Code of Criminal Procedure (*StPO*), § 273 (1a).
768 ibid § 243 (4).
769 ibid § 267 (5).
770 For example: Karsten Altenhain and Michael Hairmel, 'Die gesetzliche Regelung der Verständigung im Strafverfahren – eine verweigerte Reform' (2010) 65 JZ 327, 336-337; Malek (n 470) 565-567.
771 See: Matthias Jahn and Martin Muller, 'Das Gesetz zur Regelung der Verständigung im Strafverfahren – Legitimation und Reglementierung der Absprachenpraxis' 62 Neue juristische Wochenschrift 1; Similarly, but less emphatic: Heger and Pest (n 37) 485-486.

e. The 2013 ruling of the German Constitutional Court

In 2013, the German Constitutional Court was requested to rule on the constitutionality of the statutory framework for consensual solutions in criminal proceedings. The judgement examined constitutional complaints brought by defendants convicted by the Regional Courts of Berlin and Munich after entering into agreements based on § 257c StPO.[772] The complaints argued, in short, that the lower courts had failed to comply with the requirements of § 257c StPO and, simultaneously, violated constitutional rights, such as the principle of due process and the right against self-incrimination. In a detailed decision, the German Constitutional Court decided that the agreements violated the rights of the accused and compromised constitutional guarantees.

Regarding the ruling of the Regional Court of Munich, the Constitutional Court affirmed that the agreements were void due to a violation of the defendant's right to be informed of the limited binding effect of the agreement.[773] The Constitutional Court emphasized that § 257c StPO creates a situation where the defendant can influence the outcome of the proceedings and, in such a circumstance, the expectation concerning the binding effect of an agreement becomes the basis of the accused's decision to confess. Therefore, the defendant must previously know that the bond created by the agreement upon the judicial bodies is not absolute and the duty to inform this circumstance, as established by § 257c StPO, represents not only a procedural rule, but also a true constitutional safeguard of the principle of fair trial and of the fundamental right against self-incrimination.[774]

With respect to the rulings of the Regional Court of Berlin, the Constitutional Court established that decisions violated the principle of individual culpability and the state's duty to search for the truth, since the convictions were fundamentally based on the defendants' confessions.[775] According to the Constitutional Court, § 257c StPO did not exempt the courts from the obligation of verify the credibility of a confession through the conduction of a full investigation of the facts. Criminal punishment represents a reaction of the state to blameworthy conduct performed by an indi-

772 See BVerfG, Urt. v. 19.3.2013 – 2 BvR 2628/10 u.a. = BVerfGE 133, 168.
773 ibid para 124.
774 See BVerfG, Urt. v. 19.3.2013 – 2 BvR 2628/10 u.a. = BVerfGE 133, 168, para 125-126.
775 ibid para 128.

vidual and, without clear and objective evidence regarding the guilt of the defendant, the imposition of criminal punishment violates the principles of human dignity and rule of law.[776]

In order to assess the compatibility of the practice of negotiated judgments under § 257c StPO with the constitutional principles underlying the German criminal procedure, the Constitutional Court used an empirical study conducted in 2012 by scholars, at the request of the Court itself, with judges, prosecutors and lawyers.[777] The study showed a delicate scenario in the practice of consensual solutions in the German system of justice, revealing a standard pattern of widespread disregard of the statutory rules by legal practitioners.[778] For instance, more than half of the judges interviewed believed that the majority of cases settled by agreements did not meet the legal requirements established by § 257c StPO.[779] A large portion of the respondents stated that they had not always verified the veracity of a defendant's confession and admitted using the practice of "sanctioning scissors".[780] The study also revealed serious problems concerning the transparency rules and the duty to register the negotiations.[781]

Despite this situation, the Constitutional Court did not rule the provisions of § 257c StPO unconstitutional.[782] In the decision, the Court affirmed that the 2009 legislative regulation did not represent the creation of "a new consensual procedural model", but rather an attempt to adjust the practice of agreements without abandoning the constitutional principles of the German criminal procedure.[783] For the Court, the main idea of the statutory framework for consensual solutions was precisely to impose lim-

776 ibid para 54-55.

777 The study was conducted between April 17 and August 24, 2012, almost 3 years after the enactment of legislative regulation on negotiated judgments. 190 judges from the criminal court, 68 public prosecutors and 76 criminal attorneys were interviewed. A detailed analysis of the empirical study is presented in Altenhain, Dietmeier and May (n 38).

778 For a summary of this scenario, see Altenhain, Dietmeier and May (n 38) 181-184.

779 See BVerfG, Urt. v. 19.3.2013 – 2 BvR 2628/10 u.a. = BVerfGE 133, 168, para 49.

780 Altenhain, Dietmeier and May (n 38) 90-94 and 122-125.

781 In scenarios where no agreement was reached, 54.4% of the judges stated that, in their opinion, it was not important to formally register the negotiation. When an agreement was concluded, 46.7% did not report the agreement in their decision, contradicting the provision set forth in the stop. See BVerfG, Urt. v. 19.3.2013 – 2 BvR 2628/10 u.a. = BVerfGE 133, 168, para 49.

782 See BVerfG, Urt. v. 19.3.2013 – 2 BvR 2628/10 u.a. = BVerfGE 133, 168, para 64.

783 ibid para 65-67. Praising this part of the decision, Luis Greco asserts that it represented "a definitive rejection of any consensual lyric". See Greco, '„Fortgeleit-

its on a tool which had gained importance in the judicial system, but which needed clear legal requirements to avoid compromising traditional pillars of the German justice system. According to the decision, the compatibility of the agreement practice with the legal system must be understood within the strict limits of § 257c StPO, which safeguard the constitutional principles of the search for truth and culpability.[784]

Consequently, although understanding that the legislative regulation of consensual solutions itself was not unconstitutional, the Constitutional Court rejected the legality of several practices observed by the empirical study. First, the Court affirmed that agreements could never be used as a sole basis for the defendants' conviction. As explicitly stated in the legislation, the judicial bodies remain bound by the duty to seek for truth even after an agreement has been signed. According to the ruling, criminal penalties are responses to blameworthy conduct, and, without solid proofs of a defendant's guilt, the imposition of criminal punishment is incompatible with human dignity.[785] Thus, the search for truth remains a core notion of the criminal proceeding, preventing the parties from manipulating the fact-finding process and the legal qualification of the investigated conducts.[786]

Moreover, the Constitutional Court emphasized that the defendant had the right not to testify against himself and that the defendant must decide freely whether to enter into an agreement. Therefore, the defendant must be fully informed of the requirements and consequences of a consensual solution, in order to make a conscious decision about the process. Upon receiving a proposal for a maximum penalty from the judge, the defendant must be informed that the agreement is not absolutely binding upon judicial bodies and in which cases the sentence may not reflect the proposal.[787]

The Constitutional Court also stressed that the negotiation of an agreement must comply with the principle of transparency and with the duty of documentation. According to the decision, the registry requirements established in the legislation are not mere formalities, but rather an essential guarantee to enable adequate control of the practice of consensual solu-

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eter Schmerz" – Überlegungen zum Verhältnis von Prozessabsprache, Wahrheitsermittlung und Prozessstruktur' (n 26) 11.

784 See BVerfG, Urt. v. 19.3.2013 – 2 BvR 2628/10 u.a. = BVerfGE 133, 168, para 75-76.

785 ibid para 54.

786 ibid para 65.

787 See BVerfG, Urt. v. 19.3.2013 – 2 BvR 2628/10 u.a. = BVerfGE 133, 168, para 125.

tions by higher courts.[788] Thus, the conduction of negotiations that fail to observe the rules of transparency and documentation leads to the nullity of the agreement.[789]

Furthermore, the Court affirmed that an agreement can only generate effects in relation to the investigated facts in the process in which it was concluded. [790] As a result, the Court determined that "package deals" ("*Gesamtlösungen*"), a common practice in investigations of economic crimes that allowed for the settlement of different criminal proceedings through a single agreement, were illegal.[791]

At the end of the decision, the German Constitutional Court called the attention of the legislature to the deficit of implementation of the legislative regulation of consensual solutions.[792] According to the court, if judicial practice continues to disregard the material and formal limits set forth in the statute, the legislature must take the necessary measures to solve this problem. In different parts of the decision, the Court indicated that the continuance of the implementation deficit may lead to a future decision declaring legislative regulation of negotiated judgments to be unconstitutional.[793]

3. The general crown-witness regulation

In 2009, the year of the enactment of the statutory framework for consensual solutions in criminal justice, the German parliament approved another controversial proposal: the so-called general crown-witness regulation ("*allgemeine Kronzeugenregelung*"), which amended the German Criminal Code to expand the possibilities for granting benefits to offenders who cooperate in the investigation of crimes committed by other individuals.[794]

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788 ibid para 96
789 ibid para. 97
790 ibid para. 79.
791 For an analysis of the decision´s impacts on the prosecution of economic crimes, see Andreas Mosbacher, 'Praktische Auswirkungen Der Entscheidung Des BVerfG Zur Verständigung' (2013) 2 BvR 201, 204.
792 See BVerfG, Urt. v. 19.3.2013 – 2 BvR 2628/10 u.a. = BVerfGE 133, 168, para 121.
793 Somewhat skeptical on the practical effects of this statement, see Heger and Pest (n 37) 485-486.
794 See the bill proposed by the German Federal Government: Deutscher Bundestag, ´BT-Drucksache 16/6268´ (24 August 2007).

The approval of the legislation came after a long debate, both in the German legislature and in legal scholarship.[795]

As with the evolution of consensual solutions in German criminal justice, the introduction of the general crown-witness regulation in German criminal law faced several obstacles. Unlike the U.S. criminal system, where cooperation between defendants and law enforcement authorities has developed into a common practice due to peculiarities of the party-driven criminal procedure, basic pillars of German criminal justice have for a long time hindered the development of these cooperative relationships.[796] A recurrent objection raised against the employment of cooperating defendants in Germany stemmed from the principle of compulsory prosecution, aimed at securing a thorough enforceability of substantive criminal law as well as safeguarding the uniformity of criminal prosecution.[797] Given that the granting of benefits leads to a clear differentiation of treatment between the cooperator and other defendants, the practice inevitably raises concerns regarding the guarantees of equal treatment and of prohibition of arbitrary action that constitute core principles of German criminal justice.[798]

Despite the constraints arising from the structure of German criminal procedure, the employment of cooperating defendants has, in the final decades of the 20th century, gained ground in specific fields and, since the enactment of the 2009 general crown-witness regulation, is regulated in the German Criminal Code. This section examines this evolution and highlights some crucial aspects of the German experience with the development of cooperative relationships between defendants and law enforcement authorities. Item IV.3.a gives a brief overview of the development of the crown-witness regulation in modern German criminal law, from the 1982 amendment of the German Narcotics Law to the recent introduction, in 2009, of the general crown-witness regulation in the German Criminal Code. Item IV.3.b analyzes the structure of the exchange between the state

795 See Buzari (n 12) 45-46.

796 On this point, see Jaeger (n 3) 274; Jeßberger, *Kooperation Und Strafzumessung: Der Kronzeuge Im Deutschen Und Amerikanischen Strafrecht* (n 1) 153-154.

797 The principle of compulsory prosecution has been often cited as a major obstacle to the development of leniency policies in Germany criminal law. See Hassemer, 'Kronzeugenregelung Bei Terroristischen Straftaten Thesen Zu Art. 3 Des Entwurfs Eines Gesetzes Zur Bekämpfung Des Terrorismus' (n 11) 552; Jaeger (n 3) 54-65.

798 Jeßberger, *Kooperation Und Strafzumessung: Der Kronzeuge Im Deutschen Und Amerikanischen Strafrecht* (n 1) 111-113.

and defendants under the crown-witness regulation. Item IV.3.c lays out the circumstances in which the crown-witness regulation may be employed and presents the concept of 'investigative emergency' ("*Ermittlungsnotstand*"). Item IV.3.d advances the concepts of 'investigatory achievement' *("Aufklärungserfolg")* and 'essential contribution' *(´wesentlicher Beitrag")* as central vectors in the German experience with cooperating defendants. Item IV.3.e describes the 2013 legislative amendment that introduced the connection requirement ("*Konnexitätserfordernis*") in the general crown-witness regulation, limiting the granting of benefits to inside cooperators ("*interne Kronzeuge*").

a. Development

In the last decades of the 20th century, there has been a growing preoccupation in German criminal law with new forms of offenses, in particular with organized crime and terrorism.[799] Terrorist acts on German soil encouraged legislative reforms to enable a more efficient reaction from public officials.[800] The emergence of criminal groups dedicated to committing serious offenses in a professional, stable and business-like manner prompted demand for new investigative tools.[801] This movement led to a gradual change in various parts of German criminal law, both in its substantive and procedural aspects, in order to empower law enforcement authorities in the investigation and prosecution of these new forms of crime.[802]

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799 Concerns with organized crime and terrorism have represented the central reasons for the development of the crown-witness regulation in Germany. See Schlüchter (n 495) 69; Buzari (n 12) 29-32; Frahm (n 482) 25-30.

800 For a description of this scenario, see Breucker and Engberding (n 11) 11-16. For a critique regarding this trend, see: Hassemer, 'Kronzeugenregelung Bei Terroristischen Straftaten Thesen Zu Art. 3 Des Entwurfs Eines Gesetzes Zur Bekämpfung Des Terrorismus' (n 11).

801 Klaus von Lampe, , 'Bekämpfung Der Organisierten Kriminalität' (2010) 3 SIAK-Journal – Zeitschrift für Polizeiwissenschaft und polizeiliche Praxis 50, 788.

802 Tatjana Hörnle, in a very critical way, notes that the alleged need to combat terrorism and organized crime constituted the main grounds for several changes in the criminal justice system, both in material and procedural aspects. See: Tatjana Hörnle, 'Die Vermögensstrafe: Ein Beispiel für die unorganisierten Konsequenzen von gesetz- geberischen Anstrengungen zur Bekämpfung organisierter Kriminalität' (1996) 108 Zeitschrift für die gesamte Strafrechtswissenschaft 333.

It is in this context that, in 1982, a legislative amendment was approved and introduced: section § 31 in the German Narcotics Law (§ 31 *BtMG*), allowing the granting of benefits to offenders who cooperate with law enforcement authorities in the investigation of other individuals.[803] This is the first crown-witness regulation (*Kronzeugenregelung)* in modern German criminal law, although there were already prior experiences in judicial practice of granting benefits to offenders who cooperated in prosecutions against accomplices.[804] With the objective of allowing law enforcement authorities to penetrate the sealed structures of drug trafficking organizations,[805] the legislative amendment restricted the employment of the crown-witness regulation to the investigation of crimes under the German Narcotics Law.[806]

The crown-witness regulation introduced in 1982 allowed courts to reduce the sentences of offenders who voluntarily disclosed their knowledge to law enforcement authorities, contributing to exposing crimes that had already occurred or to the prevention of offenses not yet committed.[807] The regulation did not set specific limits for this reduction, but it explicitly allowed courts to refrain from applying any criminal punishment in cases where the imprisonment penalties were three years or less.[808] Nor did it allow prosecutors to dispose of the criminal procedure in order to encourage the cooperation of the offender, unlike what had been proposed in previous bills that were not approved.[809]

The 1982 crown-witness regulation established a tool to be used mainly by judicial bodies.[810] Thus, it did not foresee the possibility of written

803 For a thorough analysis of the changes and challenges brought by the 1982 amendment to the German Narcotics Law, see Jaeger (n 3).

804 Jeßberger, 'Nulla Poena Quamvis in Culpa: Ammerkungen Zur Kronzeugenregelung in § 46StGB' (n 2) 1155.

805 Buzari (n 12) 33.

806 More specifically, the crimes provided for in German Narcotics Law (*BtMG*) 1981, § 29 para 3, § 29a para 1, § 30 para 1, § 30a para 1, which generally cover the most serious forms of crimes provided for in German drug trafficking legislation.

807 German Narcotics Act (*BtMG*) 1981, § 31.

808 German Narcotics Act (*BtMG*) 1981, § 31.

809 A bill proposed by the Nordhein-Westfallen State in 1975 sought to allow the Public Prosecution Office to dispose of criminal procedure as a reward to cooperating defendants in the prosecution of terrorist acts. However, the bill was rejected by the German Parliament. See Deutscher Bundestag, "Drucksache 7/4005" (1 September 1975).

810 Jaeger (n 3) 152.

agreements between the offender and law enforcement authorities, nor did it establish any role for the police or the Public Prosecution Office in the granting of benefits to cooperators. It also did not set any procedural rule by which the cooperation of the offender should occur, nor define the procedural moment at which such cooperation should take place. [811]

Throughout the 1980s, there was a growing debate on the need to extend the crown-witness regulation to other fields of criminality. In 1989, an autonomous legislation was approved – the Crown-Witness Act (*Kronzeugengesetz*) – which allowed the granting of benefits to offenders who cooperated with investigations of terrorist activities.[812] Besides allowing the courts to reduce the penalties of cooperators, the legislation also allowed prosecutors to dispose of criminal proceedings in cases where the cooperation provided by the offender was of great relevance.[813] In 1994, as part of broad legislative reform of criminal law and criminal procedure aimed at providing more effective control of new forms of crime, the 1989 Crown-Witness Act was amended to enable its use in the investigation of organized crime, and not only terrorist acts. [814] In 1999, amidst criticism regarding the compatibility of the crown-witness regulation with German law and its lack of practical usefulness, the Crown-Witness Act expired.[815]

After the expiration of the Crown-Witness Act, various parliamentary initiatives sought to introduce wider possibilities for granting benefits to offenders who cooperated with official investigations.[816] In 2009, ten years after the expiration of the Crown-Witness Act, a bill was approved establishing a more extensive mechanism for granting benefits to offenders who cooperate with criminal prosecution. Before its approval, the bill was harshly criticized by the legal community. Several organizations of lawyers and judges questioned the initiative, stating that the bill undermined the objectives pursued by criminal law, affected the interests of victims and

811 Harald Hans Körner, 'Der Aufklärungsgehilfe Nach § 31 BtMG' (1984) Strafverteidiger 217, 218.
812 German Crown-Witness Act (*StGBuaÄndG*) 1989.
813 German Crown-Witness Act (*StGBuaÄndG*) 1989, art 4 §§ 1- 2.
814 For a description of the legislative debates regarding this legislative changes, see Breucker and Engberding (n 11) 14-16.
815 Buzari (n 12) 31.
816 For instance, see the bill proposed by the German Federal Council (*Bundesrat*) in 2004: Deutscher Bundestag, ´BT-Drucksache 15/2771 ´ (24 March 2004).

generated unjustified disparities in the application of criminal penalties.[817] However, the introduction of a broader system of cooperation with offenders found strong backing from police authorities and public prosecutors, who had long believed that such a tool was needed for the prosecution of new forms of crime, especially organized criminality.[818] This support from law enforcement authorities was essential for the approval of the bill, which met a longstanding demand from such agencies.[819]

The 2009 legislative amendment introduced a new section to the German Criminal Code (§ 46b StGB), which avowedly sought to solve the problem of lack of incentives for cooperating defendants to share information and evidence with law enforcement authorities.[820] Unlike previous legislation, which had been aimed at specific types of offenses, § 46b StGB established generic rules applicable to different forms of crimes, being, therefore, known as the "general crown-witness regulation".[821] The 2009 regulation clearly sought to extend the scope of the crown-witness regulation in comparison to the legislation that had expired in 1999. The bill expressly cites, for instance, serious corporate crimes and corruption as offenses in which cooperation with offenders is necessary to enable effective prosecution.[822] The expansion of the applicability of the crown-witness regulation to these offenses had already been advocated by different scholars, in light of the inherent difficulties in the investigation of corrup-

817 See the joint declaration of the German Judges Federation, German Bar Association, German Federal Bar and the German Association of Defense Lawyers: ´Gemeinsame Erklärung des Deutschen Richterbundes, des Deutschen Anwaltvereins, der Bundesrechtsanwaltskammer und der Strafverteidigervereinigungen´ (Berlin 2006) <https://www.brak.de/w/files/stellungnahmen/August_Gemeinsam_Straf-2006.pdf> accessed 18 July 2018.

818 Jens Peglau mentions a survey in which more than 90% of the police authorities, Public Prosecutor's Office and criminal judges interviewed accepted the need for a broader "Kronzeugenregelung". See Jens Peglau, 'Überlegungen zur Schaffung neuer „Kronzeugenregelungen"'(2001) 34 Zeitschrift für Rechtspolitik 103.

819 In this sense, Stefan König states that § 46b StGB was a legislative amendment requested by enforcement authorities and designed for them. See: Stefan König and Geringfügig Fassung, 'Kronzeuge – abschaffen oder regulieren?' (2012) Strafverteidiger 113.

820 See the bill proposed by the German Federal Government: Deutscher Bundestag, ´BT-Drucksache 16/6268´ (24 August 2007), 1.

821 Malek (n 481) 201.

822 See Deutscher Bundestag, ´BT-Drucksache 16/6268´ (24 August 2007), 1 and 9.

tion[823] and economic crimes,[824] and the great damage that such practices can cause.[825]

b. Structure

The 2009 general crown-witness regulation (§ 46b StGB) designs a relationship of exchange between offenders and the state, in which offenders provide information about unlawful activities committed by other individuals and receive in return a partial or full reduction of their criminal punishment.[826] The statutory provision foresees two different situations where this exchange can occur: the first regards offenders who contribute to the exposure of a crime already committed;[827] the second relates to situations where the offender cooperates with authorities to prevent the occurrence of a crime. [828]

In both cases, the benefits obtainable by the offender are the same: partial or full reduction of criminal punishment. The general crown-witness regulation does not provide further benefits for the cooperating defendant, such as limited civil liability, unlike what occurs, for instance, within the German antitrust leniency program.[829] The structure of § 46b StGB largely replicates the model of cooperation with offenders established by section § 31 of German Narcotics Law (§ 31 *BtMG*), but with broader scope.[830]

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823 See Lejeune (n 12) 88. Also Dölling (n 12) 354–355.

824 Jeßberger, *Kooperation Und Strafzumessung: Der Kronzeuge Im Deutschen Und Amerikanischen Strafrecht* (n 1) 305.

825 On the damages caused by such wrongdoings, see item II.3.c.

826 Jeßberger, 'Nulla Poena Quamvis in Culpa: Ammerkungen Zur Kronzeugenregelung in § 46StGB' (n 2) 1153.

827 German Criminal Code (*StGB*), § 46b (1) 1.

828 ibid § 46b (1) 2.

829 A reform of the German Competition Act in 2017 allowed beneficiaries of antitrust leniency to obtain benefits in the definition of civil damages. Basically, the reform has determined that leniency beneficiaries can only be sued in civil justice by their own clients (while the other offenders can be sued by anyone harmed by the cartel). See German Competition Act (*GWB*), § 33e. This privilege aims to increase incentives for offenders to leave the cartel and cooperate with public authorities. See the explanation notes in the bill that introduced the reform: Deutscher Bundestag, ´BT-Drucksache 18/10207´ (7 November 2016), 40.

830 König and Fassung (n 820) 113.

According to the text of the general crown-witness regulation, the granting of benefits must be carried out taking into account the nature and scope of the disclosed facts, their relevance to the discovery or prevention of criminal offenses, the degree of assistance provided and the seriousness of the investigated crime.[831] The stated goal of the bill that introduced the § 46b StGB is to enable law enforcement authorities to penetrate the sealed structures of criminal organizations and to overcome the difficulties met in the investigation of new forms of crime.[832]

Thus, the reduction of penalties offered by the crown-witness regulation is based on different factors than those considered in other circumstances under which German law allows the reduction of criminal punishment, such as in cases of regret and reparation of damages.[833] Genuine regret is not expected from the cooperating defendant and the psychological motives that lead him to cooperate are irrelevant.[834] In the context of the crown-witness regulation, the reduction of penalties is related mainly to the effects that the defendant's cooperation has on offenses committed by third parties, and not on the crimes committed by him.[835]

According to § 46b StGB, the offender's cooperation cannot be confined to his own acts.[836] A simple confession of the accused is consequently not enough to justify the obtainment of benefits under the crown-witness regulation; the cooperator must submit information and evidence that strengthens the prosecution of other perpetrators.[837] From the defendant's point of view, the crown-witness regulation opens a third form of procedural behavior,[838] which differs from both the traditional defensive stance and from the conclusion of an agreement through a simple confession. The cooperating defendant provides information and evidence regarding wrongdoings of other individuals, which are not identical to the conducts carried out by the cooperator. In this respect, the crown-witness regulation

831 German Criminal Code (*StGB*), § 46b (2) 1.
832 See Deutscher Bundestag, ´BT-Drucksache 16/6268´ (24 August 2007), 2.
833 Mehrens (n 11) 33–34.
834 Malek, 'Die Neue Kronzeugenregelung Und Ihre Auswirkungen Auf Die Praxis Der Strafverteidigung' (n 481) 201.
835 Jeßberger, *Kooperation Und Strafzumessung: Der Kronzeuge Im Deutschen Und Amerikanischen Strafrecht* (n 1) 88.
836 German Criminal Code (*StGB*), § 46b (1).
837 Buzari (n 12) 55.
838 Franz Salditt, 'Allgemeine Honorierung Besonderer Aufklärungshilfe' (2009) Strafverteidiger 375.

resembles other investigative strategies, such as the use of undercover agents.[839]

§ 46b StGB engenders a specific type of exchange between defendants and the state: the exposure by a defendant of a crime committed by another individual is rewarded with a penalty reduction.[840] The crown-witness regulation exhibits, thus, a clear consensual aspect for both public authorities and defendants.[841] For public authorities, the granting of benefits to the cooperating defendant is tied to the enhancement of the prosecution of other individuals, resulting from the obtained assistance; for the cooperator, the reduction of penalties appears as a consideration for the disclosure of relevant information and the sharing of evidence against third parties.[842] Notwithstanding this consensual feature, there is no formal transaction under the crown-witness regulation. § 46b StGB stipulates that cooperating defendants must disclose their knowledge voluntarily, but does not provide for a written agreement between the cooperator and public authorities.[843]

Given the structure of German criminal procedure, the development of the exchanges between law enforcement authorities and cooperating defendants occurs in a very different way than in American criminal justice.[844] U.S. prosecutors have broad discretionary powers regarding charging decisions, which gives them the capacity to make promises to cooperators and honor these commitments through the dropping of charges or their adjustment to less serious accusations.[845] This scenario is entirely distinct from the traditional structure of German criminal justice, where the principle of compulsory prosecution requires prosecutors to bring charges strictly according to the criteria established in law and judicial bodies play an active role in ensuring a sufficient establishment of the facts, their correct legal qualification and, in case of conviction, the appropriate punishment of the offender.[846]

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839 Mehrens (n 11) 29.
840 Jeßberger, 'Nulla Poena Quamvis in Culpa: Ammerkungen Zur Kronzeugenregelung in § 46StGB' (n 2) 1153-1154.
841 Salditt (n 839); König and Fassung (n 820) 114.
842 Frahm (n 482) 128.
843 German Criminal Code (*StGB*), § 46b.
844 Jaeger (n 3) 266.
845 Practice known as "charge bargaining". James Whitman speaks of the "inventive discretion" held by American prosecutors. See Whitman (n 244) 387.
846 Ver item V.II.a

In the context of German criminal procedure, the crown-witness regulation designs a consensual exchange in which the public bodies that obtain the offender's cooperation are not the same authorities responsible for defining and granting the benefits.[847] In accordance with the rules set by § 46b StGB, whereas cooperating defendants must provide assistance to the law enforcement authorities, it is up to courts to determine the cooperators' punishment and the appropriate reductions. Although the statutory regulation establishes some boundaries, judicial bodies can – within these limits – assess different elements in defining the penalties and applying the appropriate benefits.[848] The 2009 crown-witness regulation did not set any provision authorizing public prosecutors to dispose of criminal charges to favor cooperators.[849] The granting of benefits, therefore, occurs basically through a judicial decision that acknowledges the relevance and effectiveness of cooperation provided in the prosecution of other individuals, defining the appropriate reward for the cooperating defendant.

The general crown-witness regulation also established a detachment between the moment of cooperation and the moment of obtainment of benefits. According to § 46b StGB, privileged treatment is only possible when defendants share their knowledge before the formal beginning of the criminal proceeding.[850] After this moment, the disclosure of any information cannot lead to the benefits provided for in the crown-witness regulation, but only to other minor advantages established in criminal legislation.[851] This boundary seeks to give law enforcement authorities enough time to examine the usefulness of the shared material and prevent defendants from withholding information for strategic reasons.[852] While the information and evidence held by the offender must be shared with public authorities at an early stage of the criminal investigation, the definition and granting of benefits occurs only at the sentencing phase.

Therefore, cooperation with law enforcement authorities, albeit entailing consensual elements, does not create a strict "*do ut des*" relationship

847 Malek, 'Die Neue Kronzeugenregelung Und Ihre Auswirkungen Auf Die Praxis Der Strafverteidigung' (n 481) 203.
848 German Criminal Code (*StGB*), § 46b (2).
849 As previously done by the 1989 Crown-Witness Act (*Kronzeugengesetz*).
850 German Criminal Code (*StGB*), § 46b (3).
851 Buzari (n 12) 56.
852 As stated in the bill proposed by the German Federal Government that introduced the provision. See Deutscher Bundestag, ´BT-Drucksache 16/6268´ (24 August 2007), 14.

similar to private contracts.[853] Even though it relies on a voluntary action by the cooperating defendant, the crown-witness regulation – given the central position of judicial bodies in the definition of the criminal sentence and the appropriate benefits – cannot establish a synallagmatic correlation between the acts of cooperation and the concession of benefits.[854] The obtainment of a penalty reduction by the cooperating defendant is conditional upon a combination of factors that will be assessed by a judicial body at the end of the proceeding, which inevitably creates a degree of uncertainty in the exchange negotiated by the accused and the investigative authorities. [855]

c. Scope of application: investigative emergencies

The 2009 general crown-witness regulation sets clear limits on the situations in which benefits may be granted to cooperating defendants. The regulation restricts the applicability of the benefits to perpetrators of crimes of medium and high severity, excluding the possibility that individuals responsible for minor offenses become cooperating defendants.[856] In addition to the restriction on the type of crime committed by the cooperator, § 46b StGB also establishes conditions for the categories of wrongdoing to be investigated with the aid of the cooperating defendant. According to the statutory text, the crown-witness regulation in only applicable for the investigation of serious criminal offenses.[857]

This position reflects the longstanding view in Germany that cooperation with offenders represents an unusual measure to deal with the formidable obstacles that exist in the prosecution of specific types of crimes, and not a normal routine within the criminal justice system.[858] Given that the granting of immunity or penalty reductions to offenders

853 Malek, 'Die Neue Kronzeugenregelung Und Ihre Auswirkungen Auf Die Praxis Der Strafverteidigung' (n 481) 203.
854 Frahm (n 482) 132.
855 Jeßberger, 'Nulla Poena Quamvis in Culpa: Ammerkungen Zur Kronzeugenregelung in § 46StGB' (n 2).
856 Frahm (n 482) 35.
857 The cooperation must concern investigations of the offenses provided in the catalog of the § 100a para 2 of the German Code of Criminal Procedure (*StPO*), which lists the crimes against which law enforcement authorities are authorized to use wiretapping.
858 Ver: Jung (n 442) 41-42.

clashes with several principles of German criminal law and procedure, it can only be justified in special situations, commonly referred as 'investigatory emergencies' (*"Ermittlungsnotstand"*).[859]

The reduction of a cooperator's penalties distorts the proportionality that should exist between the commitment of a crime and the application of the penalties provided for in the law.[860] In this sense, the use of cooperating defendants affects the substance of the principle of compulsory prosecution *("Legalitätsprinzip")*, insofar as granting benefits to an offender implies that the penalties resulting from her criminal behavior will be lesser than those established in criminal law.[861] The reduction of the cooperator's penalty breaks the automatic correlation that must exist between crime and punishment and leads to a gradual departure from the principle of compulsory prosecution.[862] This departure from the consequences provided for in criminal law appears to be particularly grave when it comes to serious offenses that generate strong social damages.[863]

In this context, the development of the crown-witness regulation can only be justified in the investigation of specific forms of crime, in which there are exceptional obstacles to the enforcement of criminal law.[864] Even though the granting of benefits to offenders represents a departure from the ideal enforcement of criminal law, the occurrence of investigatory emergencies requires a punctual relaxation of basic pillars of German criminal procedure, in order to guarantee minimal effectiveness of criminal prosecution in particular circumstances.[865] Thus, the granting of benefits to offenders is legitimate in scenarios where the existence of serious investigative deficits leads to unacceptable situations of impunity,[866] insofar as it allows for the prosecution and punishment of grave criminal conduct that would otherwise remain without an adequate response from the state.[867] In contrast, the granting of benefits to cooperating offenders in normal sit-

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859 Jeßberger, *Kooperation Und Strafzumessung: Der Kronzeuge Im Deutschen Und Amerikanischen Strafrecht* (n 1) 304.
860 Nicolas Kneba, *Die Kronzeugenregelung Des § 46 b StGB* (Duncker 2011) 36.
861 Hoyer (n 442) 235.
862 Frahm (n 482) 170.
863 Hassemer, 'Kronzeugenregelung Bei Terroristischen Straftaten Thesen Zu Art. 3 Des Entwurfs Eines Gesetzes Zur Bekämpfung Des Terrorismus' (n 11) 552.
864 Jung (n 442) 41-42.
865 Hoyer (n 442) 239-240.
866 Jeßberger, *Kooperation Und Strafzumessung: Der Kronzeuge Im Deutschen Und Amerikanischen Strafrecht* (n 1) 304.
867 Frahm (n 482) 171-172.

uations is unacceptable, since it contradicts the state's duty to adequately hold the perpetrators responsible for crimes and, thus, adversely affects the deterrence and preventive effect of criminal law.[868]

Thus, unlike U.S. criminal procedure, where cooperation with offenders presents itself as a natural option within the broad discretionary powers held by prosecutors,[869] in Germany this mechanism is understood as an exceptional one that can be used only in restricted cases.[870] While the employment of cooperating defendants occurs as an everyday practice in American criminal justice, the German crown-witness regulation can only be implemented in a limited manner to address specific situations of investigatory emergencies ("*Ermittlungsnotstand*"), characterized by remarkable obstacles in the collection of evidence and severe social consequences of the criminal conduct.[871]

In this way, the granting of benefits to cooperators must rigorously adhere to the legislative rules, which set the specific conditions under which this tool can be used.[872] On this point, the 2009 general crown-witness regulation, although establishing various restrictions, adopted a broader approach than previous statutes that authorized the use of cooperating defendants in German criminal law. The 1982 amendment of the German Narcotics Law limited the use of cooperating defendants in the investigation of wrongdoings related to drug trafficking. The 1989 Crown-Witness Act originally allowed the granting of benefits to defendants only in investigations of terrorism and was amended, in 1994, to encompass the activities of criminal organizations. The reach of the 2009 general crown-witness regulation is clearly more comprehensive than these previous experiences, authorizing the use of cooperating defendants in the investigation of various types of offense.

An interesting development is the legislative concern with the challenges associated with the prosecution of white-collar criminality: the bill that introduced the general crown-witness regulation specifically asserts that the investigation of "serious corporate crimes" poses a situation where the employment of cooperators is necessary, due to the hermetic nature of these criminal structures. [873] The bill also mentions corrupt practices as

868 Hoyer (n 442) 235.
869 Jaeger (n 3) 266.
870 Jung (n 442) 42.
871 Jeßberger, *Kooperation Und Strafzumessung: Der Kronzeuge Im Deutschen Und Amerikanischen Strafrecht* (n 1) 304.
872 Schlüchter (n 495) 69.
873 See Deutscher Bundestag, ´BT-Drucksache 16/6268´ (24 August 2007), 9.

crimes that require the use of this investigatory tool for effective prosecution.[874] This expansion of the scope of the crown-witness regulation to encompass white-collar wrongdoings reflected a growing concern in German criminal law with the losses caused by corporate and governmental misbehavior and with the major difficulties in the appropriate prosecution of these crimes. [875]

d. Investigative achievements, essential contributions and positive balances

According to the bill that introduced § 46b StGB, the offender's cooperation should lead to an investigatory achievement *("Aufklärungserfolg")*, that will be observed if the provided material contributes to the establishment of criminal liability of other individuals, regarding conduct that was previously unknown or unclear.[876] The provision of generic information or of evidence already held by the authorities, the mere speculation on facts and the assertion of versions of events that cannot be proven are, therefore, insufficient to justify granting benefits to cooperators.[877]

The crown-witness regulation engenders a system of exchange between public authorities and offenders in which the latter must not simply confess to their crimes, but also assist in the investigation of criminal conduct attributed to third parties.[878] The benefits granted to the cooperating defendant result not from the mitigation of damages caused by him or her, but of the ability to effectively assist law enforcement authorities to investigate conduct practiced by third parties.[879]

The crown-witness regulation is a mechanism of utilitarian nature, in which the interest of the state in the negotiation with a cooperating defen-

874 ibid. 1.

875 For a defense of the use of crown-witness regulation in cases of corruption, see: Lejeune (n 12) 88. And also: Dölling (n 12) 354–355. In the same sense, in cases of economic crimes: Jeßberger, *Kooperation Und Strafzumessung: Der Kronzeuge Im Deutschen Und Amerikanischen Strafrecht* (n 1). 305; Buzari (n 12) 112.

876 See Deutscher Bundestag, ´BT-Drucksache 16/6268´ (24 August 2007), 12.

877 Buzari (n 12) 52.

878 Jeßberger, 'Nulla Poena Quamvis in Culpa: Ammerkungen Zur Kronzeugenregelung in § 46StGB' (n 2) 1153 and 1154.

879 Mehrens, *Die Kronzeugenregelung als Instrument zur Bekämpfung organisierter Kriminalität: Ein Beitrag zur deutsch-italienischen Strafprozessrechtsvergleichung* (n 11) 33–35.

dant is only achieved after obtaining solid results in the prosecution of third parties. For this purpose, the cooperation provided within the scope of the crown-witness regulation must be concrete and precise in order to increase useful knowledge of the law enforcement authorities about other offenders and their participation in criminal acts.[880] The mere disclosure of information, albeit relevant, is not in itself sufficient to constitute an investigatory achievement, since this depends on an actual impact of the provided cooperation upon the prosecution of other agents.[881] Thus, the intention and efforts of the offender to help in the investigations do not justify, *per se*, the granting of benefits provided for in § 46b StGB; to substantiate the privileged treatment established by the crown-witness regulation, it is necessary to provide information that effectively assists the criminal prosecution of specific conducts committed by identifiable individuals.[882]

In this context, the sharing of information which only confirms the knowledge that the authorities already have or which concerns minor details of the investigated conduct is insufficient. [883] The assistance provided by the offender must represent an essential contribution *(" wesentlicher Beitrag")* for the criminal investigation, which means that without the material obtained through cooperation, serious criminal conduct would not otherwise have been exposed, at least not in its entirety.[884] It is insufficient, therefore, that the information provided by the cooperator to the authorities be truthful, since veracity is not sufficient to ensure an investigatory achievement, which depends on the existence of a verified causal link between the cooperation provided by the offender and a substantial increase in the possibility of conviction of other suspects.[885]

The requirement regarding the achievement of a clear investigatory progress imposes multiple constraints on the employment of the crown-witness regulation. First, it restricts the possibility of granting of benefits to cases where the defendant has valuable material to share with law enforcement authorities.[886] In cases in which the accused cannot produce relevant evidence of crimes committed by other individuals, there is no space

880 Kneba (n 861) 66.
881 Frahm (n 482) 51.
882 Malek, 'Die Neue Kronzeugenregelung Und Ihre Auswirkungen Auf Die Praxis Der Strafverteidigung' (n 481) 201.
883 Frahm (n 482) 54-55.
884 Kneba (n 861) 66.
885 Hoyer (n 442) 238.
886 Stephan Cristoph observes that requirement of an investigatory achievement prevents the granting of benefits to cooperating defendants who are unable to

for the use of the crown-witness regulation. Secondly, the requirement of an investigatory achievement may lead to a race between co-conspirators to be the first to cooperate with law enforcement authorities, since the sharing of redundant information cannot validate the privileges established by the crown-witness regulation.[887]

Besides generating an investigatory achievement, the employment of the crown-witness regulation must maximize the state's capacity to hold the perpetrators of serious crimes accountable. The differentiated treatment of the cooperating defendant is justified only if it brings the level of imposed penalties closer to the ideal established in criminal legislation.[888] Although the crown-witness regulation leads to reduction of the cooperator's penalty, it should – in an overall view of the criminal justice system – lead to an enhancement of criminal punishment, through the effective and appropriate prosecution of co-conspirators.[889] Consequently, the reduction of the cooperator's penalties must be compensated by a significant increase in the punishment imposed on other perpetrators who would otherwise remain unpunished. Ultimately, the use of the crown-witness regulation must generate a positive balance in the enforcement system of criminal law.[890]

There is, thus, an inextricable link between the granting of benefits under § 46b StGB and the obtainment of unambiguous results stemming from the offender's cooperative behavior in a context of investigatory emergency. It is the attainment of such outcomes that legitimizes a punctual departure from the principle of compulsory prosecution and constitutes the legal basis for the differentiation between cooperative and non-cooperative defendants.[891] Although the veracity and quality of the shared material represent indispensable prerequisites for reaching these results, they are by themselves not enough: multiple factors that are not related to

provide substantial evidence and information regarding crimes committed by other agents. See: Christoph (n 1) 100-101.

887 Buzari (n 12) 52.

888 In order to achieve the goal of "optimale Sanktionierungsrate", according to Heike Jung, in: Jung (n 442) 40.

889 Hoyer (n 442) 236.

890 Jeßberger, *Kooperation Und Strafzumessung: Der Kronzeuge Im Deutschen Und Amerikanischen Strafrech*t (n 1) 102-103.

891 Frahm (n 482) 196; Jeßberger, *Kooperation Und Strafzumessung: Der Kronzeuge Im Deutschen Und Amerikanischen Strafrecht* (n 1) 113.

the defendant's behavior stand between the adoption of a cooperative stance and an investigatory achievement.[892]

The actual result of the cooperative effort can only be verified at the end of the criminal proceeding and will be assessed by a different public authority (a judicial body) than the one that received initially the shared material (law enforcement officials).[893] As in any criminal investigation, the success of an inquiry that relies on cooperating defendants will depend on multiple variables, which makes the use of the crown-witness regulation an uncertain venture for cooperators, who will face alone a large part of the risks in case of any setback.[894]

e. Inside and outside cooperators: the issue of the connection requirement

The 2009 legislative reform that introduced the general crown-witness regulation did not require a connection between the crimes committed by cooperators and the wrongful conduct denounced by them. The cooperation provided by the offender could relate to offenses in which he did not take part, but which he knew of for other reasons. In this context, the offender could help law enforcement authorities in the investigation of a set of offenses and receive the benefits of the crown-witness regulation in a completely different crime. The bill that gave rise to the 2009 reform expressly rejected the establishment of this sort of connection, since the aim was to create a model of broad application for cooperating defendants.[895]

Therefore, the original wording of § 46b StGB allowed two distinct groups of offenders to obtain the benefits provided for in the general crown-witness regulation: inside cooperators ("interne Kronzeuge"), who are to some extent accountable for the conducts investigated, and outside cooperators ("externe Kronzeuge"), who help the authorities in investigating crimes in which they did not take part at all.[896] The knowledge that outside cooperators have about criminal practices may result from diverse

892 Jeßberger, Nulla Poena Quamvis in Culpa: Ammerkungen Zur Kronzeugenregelung in § 46StGB' (n 2) 1162.
893 Malek, 'Die Neue Kronzeugenregelung Und Ihre Auswirkungen Auf Die Praxis Der Strafverteidigung' (n 481) 203.
894 Jeßberger, 'Nulla Poena Quamvis in Culpa: Ammerkungen Zur Kronzeugenregelung in § 46StGB' (n 2) 1163.
895 See Deutscher Bundestag, ´BT-Drucksache 16/6268´ (24 August 2007), 10.
896 Buzari (n 12) 80-81.

situations, for example, members of criminal organizations that have specific information about the operation of rival groups.[897]

This initial legislative choice was subject of much criticism, both for a possible violation of the principles of German criminal justice as well as the credibility issues of the aid provided by outside cooperators. Regarding the first point, the criticism mainly pointed to an incompatibility of the outside cooperator with the principle of individual guilt, since the absence of a connection requirement would completely erase any relation between the penalty imposed on the cooperator and the degree of his guilt in the crime he committed. [898] Besides this, the existence of a close relationship between the crime committed by the cooperator and the other offenses investigated should reduce the risk of false statements and ensure that law enforcement authorities obtain detailed inside knowledge of the conduct investigated.[899]

The criticism of the original wording of § 46b StGB also resulted from the case law of the German Federal Court of Justice (*Bundesgerichtshof-BGH)*, regarding the 1982 crown-witness regulation provided for in the German Narcotics Law (§ 31 *BtMG*). Although the text of § 31 BtMG did not establish the connection requirement between the cooperator's crime and the investigated conducts of third parties, several decisions of the German Federal Court of Justice indicated that the legal mechanism could only be used when there was this factual connection.[900]

In response to such criticisms, a legislative amendment was approved in 2013 to limit the employment of the general crown-witness regulation to situations where the crime committed by the cooperator and the conduct denounced by her are connected.[901] The amendment was geared to avoid excessive reductions in the penalties of the cooperator, which would be unacceptable from the perspective of the victims of the crime she committed,

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897 Johannes Kaspar, 'Stellungnahme Zum „Entwurf Eines…Strafrechtsänderungsgesetzes - Beschränkung Der Möglichkeit Zur Strafmilderung Bei Aufklärungs- Und Präventionshilfe" (BT-Drucks. 17/9695)' (2012) 86135 Augsburg 1, 5.

898 On this subject, see König and Fassung (n 820) 376.

899 For a deeper analysis of this debate, see Stephan Christoph, ´Die „nicht mehr ganz so groBe" Kronzeugenregelung - Anmerkungen zum 46. Strafrechtsanderungsgesetz und zur Auslegung der Konnexitat im Rahmen des neugefassten § 46b StGB´ (2014) 97 KritV - Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft 82.

900 Frahm (n 482) 46.

901 Following a bill proposed by the German Federal Government: Deutscher Bundestag, ´BT-Drucksache 17/9695´ (18 May 2012).

as well as to favor the use of the crown-witness regulation in cases in which the cooperator is close to the conduct which she informs against.[902]

Since 2013, therefore, the use of general crown-witness regulation is restricted to cases in which the crime committed by the cooperator is directly related to the investigations in which he assists the law enforcement authorities. According to the bill that restricted the application of § 46b StGB, the fact that two crimes were committed by the same organization is insufficient to justify the employment of the crown-witness regulation; for this purpose, the commitment of the two crimes must share more common features than simply the group of perpetrators.[903] Although the specific limits brought by the legislative amendment are subject to debate, it is clear that the benefits of the general crown-witness regulation can only be granted when there is an "intrinsic and direct relationship" *(" ein innerer und verbindender Bezug")* between the offenses committed by the cooperating defendant and the conducts of third parties that will be investigated with her assistance.[904]

4. Points of analysis

Until recently the Brazilian system of criminal justice conceded little space for negotiations between public officials and defendants. Traditional pillars of criminal procedure – such as the principle of compulsory prosecution, the state's commitment to search for truth and the active role played by courts throughout the criminal process – limited the possibility of interparty transactions to cases related to minor offenses, and the full official investigation remained the prevailing model for resolution of criminal cases. The 2013 Organized Crime Act modified this scenario through the introduction of the rewarded collaboration regulation, which created a negotiation forum between law enforcement authorities and defendants willing to cooperate with the investigation.

The swift expansion of the practice of collaboration agreements raised multiple questions regarding the boundaries for the negotiation of consensual arrangements within Brazilian criminal justice. Over recent, legal practitioners have drawn on the rewarded collaboration regulation to set

902 ibid 1.
903 ibid 8.
904 On this point, see the following decision of the German Federal Court of Justice: BGH, 20.03.2014 - 3 StR 429/13, StV 2014, 619.

up – particularly in the context of complex investigations related to white-collar crimes – a broad system of transactions, resolving various aspects of criminal proceedings through consensual arrangements. The birth through judicial practice of audacious innovations pushed the limits of the negotiation forum far beyond the provisions of the Organized Crime Act. These novel developments received solid support from Brazilian judiciary and from a section of legal scholarship.

In this context, the German experience with the crown-witness regulation, established in § 46b StGB, and with the system of negotiated judgment, regulated in § 257c StPO, offer rich elements for a more nuanced analysis of the recent evolution of the rewarded collaboration regulation in Brazilian law. For this purpose, this section examines two topics that will underlie the critical appraisal of the Brazilian practice of collaboration agreements, carried out in Chapter V.

Item IV.4.a compares the objectives and functions of the crown-witness regulation and of negotiated judgments within German system of justice. First, it analyzes the similarities and divergences between the crown-witness regulation and the framework of negotiated judgments (IV.4.a.i) and, secondly, it highlights the different role played by each mechanism in the process of truth-finding in criminal justice, particularly in the context of complex criminal investigations (IV.4.a.ii).

Item IV.4.b examines the German experience with the *praeter legem* expansion of consensual solutions within the criminal justice system. It highlights the continual pressure put by legal practitioners on the limits of the negotiation forum established by the statutory framework for consensual solutions (IV.4.b.i). It also asserts that the expansion of the negotiation forum may bring benefits for the procedural participants, while producing negative externalities for society and other agents (IV.4.b.ii). Finally, it assesses the ruling of the German Constitutional Court regarding the constitutionality of the legislative regulation of consensual solutions, in a context of widespread disrespect for statutory rules (IV.4.b.iii).

a The prosecution of economic crimes: between consent and search for truth

i. Negotiated judgments and crown-witness regulation: parallels and differences

The legal rules laid down in § 257c StPO, which established a statutory framework for negotiated judgments in the German criminal justice system, and in § 46b StGB, which introduced a general crown-witness regulation in the German Criminal Code, have clear similarities.

Both provisions impact the traditional dynamic of German criminal procedure, broadening the field of action of procedural participants and allowing them to assume a more active role in criminal proceedings through the adoption of cooperative behavior and the development of consensual exchanges with public officials.[905] § 257c StPO creates a negotiation forum that allows the parties to deal with each other and reach an agreement concerning the course and the outcome of the criminal proceeding.[906] The regulation set by § 46b StGB, although not providing for a formal agreement between the parties, also entails consensual elements, designing a communication channel between law enforcement authorities and defendants to carry out an exchange: the provision of information or evidence in return for a penalty reduction.[907]

Another common feature of the the legal rules established by § 257c StPO and by § 46b StGB relates to the design of new possibilities for the defendant to reach more favorable results in the criminal proceeding. In both situations, the attainment of these favorable outcomes is only possible if the defendant adopts cooperative behavior during the proceeding, dialoguing with law enforcement authorities and waiving traditional proce-

905 As noted by Klaus Malek: Malek, 'Abschied von Der Wahrheitssuche' (n 470) 561. Florian Jeßberger observes that both the crown-witness regulation and the system of negotiated judgments open new possibilities for procedural participants, increasing their room for maneuvers in criminal procedure, see: Jeßberger, *Kooperation Und Strafzumessung: Der Kronzeuge Im Deutschen Und Amerikanischen Strafrecht* (n 1) 140-143. For a detailed analysis of the relationship between the two legal mechanisms, see: Kerstin Labs, *Die Strafrechtliche Kronzeugenregelung - Legitimation Einer Rechtlichen Grauzone?* (Tectum Wissenschaftsverlag 2016) 69-79.

906 See item I.2.d.

907 Frahm (n 482) 128.

dural rights, such as the right to silence.[908] The two legal regulations design positive incentives for accused to confess to the conduct under investigation, drawing a clear distinction between defenders willing to adopt cooperative behavior, who therefore may benefit from penalty reductions, and offenders who remain in the traditional defensive position, and will be prosecuted and tried according to conventional criteria, without obtaining any advantages.[909]

Although the provisions are similar in this regard, a more detailed analysis also reveals great differences between them. A main difference concerns the nature of the exchange that justifies the granting of benefits to confessed offenders. In the crown-witness regulation, the favorable treatment stems from the defendant's capacity to cooperate with the authorities in clarifying facts regarding crimes committed by others.[910] The benefits granted to the defendant are directly related to the significance of the cooperation in the investigation and prevention of crimes committed by other individuals, who would likely otherwise remain unpunished.[911] The cooperative behavior of the defendant is not restricted to his own acts, and must necessarily include offenses committed by third parties.[912] The cooperating defendant provides law enforcement authorities with information and evidence on crimes that do not coincide with the acts performed by himself.[913]

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908 Regarding the crown-witness regulation, Florian Jeßberger asserts that the differentiated treatment between cooperative and non-cooperative defendants is the "motor" of the legal mechanism. See: Jeßberger, 'Nulla Poena Quamvis in Culpa: Ammerkungen Zur Kronzeugenregelung in § 46StGB' (n 2) 1161.

909 The alleged incompatibility of the crown-witness regulation with the constitutional principle of equal treatment has often been cited as a major obstacle to the development of the crown-witness regulation in German criminal law. See: Christoph (n 1) 159-172. In the practice of negotiated judgments, the problems of inequality arise particularly in the issue of the so-called sanctioning scissors ("Sanktionsschere"), which create a wide gap between the punishment imposed on cooperative and non-cooperative defendants. For an empirical assessment of this practice, see: Altenhain, Dietmeier and May (n 679) 178-190.

910 Tobias Mushoff notes that the crown-witness regulation "may only constitute a legitimate instrument of criminal prosecution when it can contribute to the determination of truth". See: Tobias Mushoff, 'Die Renaissance Der Kronzeugenregelung' (2007) 90 Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft 366, 370.

911 Jeßberger, 'Nulla Poena Quamvis in Culpa: Ammerkungen Zur Kronzeugenregelung in § 46StGB' (n 2) 1159.

912 As expressly provided for in the German Criminal Code (*StGB*), § 46b 3.

913 Mehrens (n 11) 29.

This scenario is completely different from the legal framework of negotiated judgements established in § 257c StPO, which provides for consensual arrangements based essentially on the granting of a penalty reduction in exchange for a confession by the defendant that accelerates the criminal proceeding, [914] a transaction that does not directly affect other accused. In the crown witness regulation of § 46b StGB, the accused's confession does not suffice to justify the granting of legal benefits, which can only be conferred if the accused effectively contributes to the prosecution of crimes committed by third parties.[915]

While the negotiation provided in § 257c StPO occurs through quite simple exchanges, the use of the crown witness-regulation is more complex, since it always involves other accused. In the crown-witness regulation, the reduction of the cooperator's penalties must be accompanied by concrete results in the investigation against third parties, in order to generate an overall positive effect from the point of view of the state's prosecution capacity.[916] The granting of benefits represents a deviation from the correct punishment applicable to the cooperating defendant, and this situation can only be justified if compensated by an increase in the state's capacity to prosecute other offenders.[917] Thus, unlike the negotiated judgments provided in § 257c StPO, the exchange between public authorities and defendants foreseen in the crown-witness regulation cannot be performed when there is no third party to be investigated.

The differences between the two regulations are also clear in the objectives sought by each one. In the 2005 decision that requested the German legislature to regulate the practice of informal negotiated judgments, the Federal Court of Justice argued that, given the shortage of resources, the German criminal justice system could not respond to the current demand in a socially acceptable manner through traditional criminal proceed-

914 Luis Greco notes that the primary goal of the granting of benefits under the framework of § 257c StPO is to allow for the abbreviation of the criminal process. See: Greco, „Fortgeleiteter Schmerz" – Überlegungen zum Verhältnis von Prozessabsprache, Wahrheitsermittlung und Prozessstruktur' (n 26) 5. Klaus Malek observers that the exchange of a confession for a penalty reduction in the penalty is an essential part of the framework of negotiated judgments. See: Malek (n 470) 565.

915 Buzari (n 12) 55.

916 Jeßberger (n 1) 102-103.

917 Hoyer (n 442) 236.

ings.[918] According to the decision, should negotiated judgments be forbidden, the proper functioning of the German judicial system would be seriously compromised and lead to a situation incompatible with the principles of procedural economy ("*Grundsatzes der Prozeßökonomie*") and celerity ("*Beschleunigungsgrundsatz*"), which require the existence of procedural mechanisms for the timely rendering of judgments.[919]

The need to save the resources of the justice system through faster proceedings was expressly accepted as one of the bases of the bill that led to the regulation of the practice of negotiated judgments.[920] This reasoning is in accordance with the main line of defense of consensual solutions in German criminal law, which perceives procedural economy and celerity, in a context of resource scarcity, as the core values embodied by the practice of negotiated judgments.[921]

These goals are clearly very different from those sought by the crown-witness regulation, which main function is to enable public authorities to discover facts and obtain evidence in specific areas, such as terrorism, organized crime and economic criminality, where traditional investigative tools are ineffective.[922] The objective of the crown-witness regulation is not to save the resources of the judicial system or to accelerate the resolution of criminal cases, but rather to increase the state's capacity to investigate, prosecute and punish sophisticated and hermetic criminal structures. [923]

A third difference between the regulations established by § 257c StPO and by § 46b StGB concerns their impact on criminal procedure. In the framework of negotiated judgments set by § 257c StPO, consensual arrangements between procedural participants lead to the shortening of the

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918 See BGH, Beschl. v. 3.3.2005 – GSSt 1/04 = BGHSt 50, 40, para 49-50. For more details of the decision, see item IV.2.c.

919 ibid para 50-51. Regarding the importance of the principle of celerity ("*Beschleunigungsgrundsatz*"), see Heger and Kuterrer-Lang (n 694) 76-79.

920 See Deutscher Bundestag, ´BT-Drucksache 16/12310´ (18 March 2009), 7.

921 As Julia Peters observes, the defense of the practice of negotiated judgments in Germany has been made primarily on the grounds of procedural economy. See: Peters (n 680) 17. Several authors question whether the goal of the practice of agreements in the German legal system was to overcome the lack of resources of the Judiciary. In this regard, see Malek, 'Abschied von der Wahrheitssuche' (n 470) 565.

922 As can be seen from the bill that introduced the crown-witness regulation. See Deutscher Bundestag, ´BT-Drucksache 16/6268´ (24 August 2007), 1.

923 ibid 9.

phase of fact-finding and gathering of evidence.[924] The conclusion of an agreement allows the outcome of the investigation to be influenced, to a greater or lesser extent, by an agreement between the parties. The defendant's confession brings an important element of legitimacy for the imposition of criminal punishment,[925] allowing for a reduction of the investigative efforts carried out in the official investigation. On the other hand, the use of the crown-witness regulation expands, rather than abbreviates, the fact-finding phase. The main activity of the cooperator is to provide authorities with new information and evidence relevant to the criminal prosecution of other individuals. If the offender lacks the capacity to broaden the body of evidence, there is no legal basis for drawing on the crown-witness regulation.[926]

ii. Consent and search for truth: different answers to similar questions? Disenchantment and re-enchantment with truth-finding in criminal procedure

The framework of negotiated judgments set by § 257c StPO and the general crown-witness regulation introduced by § 46b StGB expand the field of action of procedural participants and confer benefits for defendants who confess to the investigated acts and adopt a cooperative attitude. Despite these similarities, the two provisions are clearly different regarding the purposes they fulfill in the enforcement system, the impacts they have on criminal proceedings and the nature of the exchanges they create between public authorities and confessed offenders.

In fact, the two regulations can be perceived as different – and, in a sense, opposite – manners of dealing with new challenges faced by the German criminal justice system from the late twentieth century, particularly in relation to the appearance of new forms of criminal structures in society and the establishment, in substantive criminal law, of new types of criminal offenses.[927]

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924 Greco, „Fortgeleiteter Schmerz" – Überlegungen Zum Verhältnis von Prozessabsprache, Wahrheitsermittlung Und Prozessstruktur' (n 26) 5.

925 As noted critically by Hassemer, 'Konsens Im Strafprozeß' (n 698) 180.

926 Christoph (n 1) 100-101.

927 Bernd Schünemann notes that a large part of the recent developments in German criminal procedure represent reactions to changes in society and in German criminal law. The author speaks of a "modernization of criminal procedure" caused by the "modernization of the structures of anomalous behavior".

The practice of informal agreements was initiated in the late 1970s, in the context of large and complex criminal investigations, mainly in the prosecution of white-collar crimes and drug trafficking.[928] The increasing demand for the services of the criminal justice system, especially in proceedings requiring enormous investigative efforts, created a situation with high incentives for the use of consensual solutions that shortened the official inquiry.[929] The evidentiary complexities and the extended length of the so-called "monster proceedings" ("*Monster-Verfahren*") put an enormous burden on both the judicial bodies and defendants.[930] Given the extravagant costs associated with this type of investigation and the difficulties in distinguishing regular activities from criminal behavior, the development of negotiated judgments, which deliver a secure outcome and spare resources, appeared as a practical solution for all the involved parties.

The crown-witness regulation, on the other hand, appears not as a mechanism of process management in a scenario of resource scarcity, but rather as a fact-finding tool that allows law enforcement authorities to expand investigations into conducts perpetrated by sophisticated and hermetic structures.[931] In order to obtain the benefits provided by the crown-witness regulation, the defendant must present new evidence regarding acts committed by other individuals.[932] The granting of favorable treatment is directly related to the defendant's capacity to assist law enforcement authorities in overcoming situations of "investigative emergencies", characterized by the elevated cost of evidence collection and the high damages arising from criminal behavior.[933] The defendant´s confession is not sufficient to guarantee obtainment of the benefits, which will only be granted if the material provided leads to effective prosecution of specific crimes committed by identifiable individuals.[934]

See: Schünemann, 'Die Zukunft Des Strafverfahrens – Abschied Vom Rechtsstaat?' (n 695) 947.

928 Altenhain, Dietmeier and May (n 38) 20.

929 Weigend, 'Abgesprochene Gerechtigkeit — Effizienz Durch Kooperation Im Strafverfahren?' (n 670) 775.

930 Bernd Schünemann, 'Zur Kritik des amerikanischen Strafprozessmodells' (n 25) 570-571.

931 Affirming that the legitimacy of the crown-witness regulations arises from its capacity to ascertain the truth, see Mushoff (n 910) 370.

932 Buzari (n 12) 55.

933 Jeßberger, *Kooperation Und Strafzumessung: Der Kronzeuge Im Deutschen Und Amerikanischen Strafrecht* (n 1) 304.

934 Malek (n 481) 201.

In view of the evidentiary challenges to the establishment of criminal liability in complex investigations, both the statutory framework of negotiated judgments (§ 257c StPO) and the general crown-witness regulation (§ 46b StGB) design procedural solutions based on exchanges between defendants and law enforcement authorities. However, while a negotiated judgment means the interruption or reduction of the fact-finding process, in the crown-witness regulation the exchange implies an expansion of the efforts to determine the relevant facts and collect evidence. While the practice of negotiated judgments emerged due to the complexities of "monster proceedings" and in a context of "disenchantment" with the idea of searching for truth,[935] the crown-witness regulation reinforces the state's commitment to apply criminal law through a thorough inquiry, in what may be seen as "re-enchantment" with the notion of truth-finding in complex investigations.

This fundamental difference between the framework of negotiated judgments and the crown-witness regulation in German law has clear practical implications. The legislative proposals that led to the introduction of § 257c StPO and 46b StGB in 2009 placed much emphasis on the necessary differentiation between the two legal institutions.[936] According to the legislative debates, the main function of the crown-witness regulation was to clarify and prevent serious criminal conduct and it should not be transformed into a form of negotiated judgment.[937] To establish a strong limit between the framework of negotiated judgments and the crown-witness regulation, the German legislature designed a temporal restriction:[938] while the crown-witness regulation can be used only before the beginning of the formal criminal proceeding, a negotiated judgment can be achieved

935 According to Bernd Schunemann, "both the modern findings of social sciences and the practical experiences with monster proceedings led to the disenchantment with the objective of criminal procedure as searching the substantive truth through the main hearing (…)". See: Schünemann, 'Die Verständigung Im Strafprozeß – Wunderwaffe Oder Bankrotterklärung Der Verteidigung?' (n 27) 1898.

936 Frahm (n 482) 128.

937 See the legislative debates that preceded the enactment of the general crown-witness regulation: Deutscher Bundestag, ´BT-Drucksache 16/13094´ (20 May 2009), 5.

938 Buzari (n 12) 89.

only after this moment.[939] This rule of the general crown-witness regulation prevents an overlap with the framework of negotiated judgments.[940]

At this point, a plain contrast between the U.S. and the German experiences with cooperating defendants becomes clear: while in the U.S. system the granting of benefits to cooperators is a common aspect of the wide discretionary powers granted to prosecutors, in Germany the crown-witness regulation appears as a momentary departure from traditional principles of criminal procedure in situations of investigative emergencies.[941] In the American party-driven system, cooperation agreements are part of a wide range of consensual arrangements that can be freely negotiated,[942] leading to a situation where partnerships between defendants and law enforcement authorities to prosecute other individuals are recurrent in several types of investigation.[943] In Germany, the use of cooperating defendants can occur only in a very narrow manner and under strict conditions: for the granting of benefits to cooperating defendants to become the rule instead of the exception, the criminal justice system would have to be fully restructured on a completely different basis.[944] Whereas in the U.S. both the system of plea bargaining and the granting of benefits to cooperating defendants are by-products of a structure of criminal procedure that confers near-total control of criminal cases to the parties, the framework of negotiated judgments (§ 257c StPO) and the general crown-witness regulation (§ 46b StGB) have different foundations and fulfill diverse functions within the German justice system.

939 As provided in the German Criminal Code (*StGB*), § 46b para 3, and in the German Code of Criminal Procedure (*StPO*), § 257c.

940 Kneba (n 861) 162.

941 Jeßberger, *Kooperation Und Strafzumessung: Der Kronzeuge Im Deutschen Und Amerikanischen Strafrecht* (n 1) 304.

942 Jaeger (n 3) 266.

943 On the widespread use of cooperating defendants in the American criminal justice, see Weinstein (n 3) 564-565.

944 Jung (n 442) 40.

b. Expansion of the negotiation forum, externalities and abstinence from the search for truth

i. The tension over the boundaries of the room for negotiation and the troublesome taming of negotiated judgments

The German experience with the practice of negotiated judgments is marked by attempts - both repeated and unsuccessful - to regulate the negotiation practices developed by legal practitioners. After the unveiling of the widespread use of informal agreements, German higher courts sought to "tame" the negotiations between parties through decisions that, while refusing to declare the practice completely illegal, imposed a series of limits to guarantee that the agreements were in accordance with the principles of the German legal system.[945] This position can be found in the ruling of the German Constitutional Court of 1987[946] and in the judgments of the Federal Court of Justice of 1997[947] and 2005,[948] which affirmed the need for consensual solutions to respect the state's commitment to search for truth and the principles of culpability, due process and transparency.[949] Legal practitioners, however, refused to acknowledge the boundaries defined by these judicial decisions and continued to conclude agreements without taking into account the requirements imposed by the courts.[950]

The legislative regulation introduced in 2009 sought to rescue the practice of negotiated judgments from an environment of complete informality, inserting into the German Code of Criminal Procedure (StPO) a statutory framework with requirements and restrictions very similar to those defined by the Federal Court of Justice in its 2005 ruling.[951] The introduction of § 257c StPO was based on the expectation that, faced with clear statutory rules, legal practitioners would restrict their transactions to the

945 Claus Roxin and Bernd Schunemann, *Strafverfahrensrecht: Ein Studienbuch* (C.H. Beck 2017) 100.
946 See BVerfG, Beschl. v. 27.1.1987 – 2 BvR 1133/86 = NJW 1987, 2662.
947 See BGH, Urt. v. 28.8.1997 – 4 StR 240/97 = BGHSt 43, 195.
948 See BGH, Beschl. v. 3.3.2005 – GSSt 1/04 = BGHSt 50, 40.
949 On the judicial acknowledgment of the practice of negotiated judgments, see item IV.2.c.
950 For a comprehensive analysis of the matter, see: Altenhain, Dietmeier and May (n 38).
951 König classifies the regulation as an attempt of "taming the negotiated judgments" ("*Bändigung der Verständigung*"). See: König and Fassung (n 820) 114.

boundaries defined by the legislature and by the traditional principles of the German legal system. This expectation proved to be ill-founded, and the situation of flagrant disregard for the limits imposed on the bargaining practices remained unchanged.[952]

The most recent attempt at taming the use of consensual solutions in the German criminal justice system occurred in the 2013 decision of the Constitutional Court, which examined the constitutionality of § 257c StPO.[953] In its ruling, the Court, confronted with the fact that the practice of informal negotiated judgments was widespread and deeply entrenched in the German judiciary, basically reaffirmed the need for procedural participants to comply with the legal standards established by the Code of Criminal Procedure.[954]

The German experience demonstrates that, in the pursuit of a swift and satisfactory end to criminal proceedings, procedural participants tend to continually expand the space for negotiation beyond the statutory boundaries. Particularly in situations where the outcome of the investigation is uncertain and the process of fact-finding and collection of evidence is costly, as in cases of "monster proceedings" in the field of white-collar criminality, all legal practitioners – defendants, prosecutors and judges – have incentives to find a consensual solution that saves resources and leads to fast and secure outcomes.

In this context, the introduction of a legitimate and restricted room for negotiation tends to represent a "gateway drug" ("*Einstiegsdrog*e") for legal practitioners,[955] who are increasingly inclined to use this communication channel to solve the judicial day-to-day problems in a consensual manner. The establishment of a legitimate room for negotiation in the criminal justice system allows the procedural parties to communicate with each other in order to reach possible agreements that meet their interests. Over time, the reiterated interactions between legal practitioners and the development of trust-based relationships enable the design of new and unexpected forms of consensual arrangement, pushing the boundaries of the negotiation forum established by the statutory regulation.

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952 See: Altenhain, Dietmeier and May (n 38).

953 See BVerfG, Urt. v. 19.3.2013 – 2 BvR 2628/10 u.a. = BVerfGE 133, 168.

954 See item IV.2.e.

955 Martin Heger and Robert Pest note that section § 153a StPO, which established possibilities for inter-parties negotiations in cases of minor offenses, is frequently depicted as a ´gateway drug´ ("Einstiegsdroge") for the development of informal negotiated judgments. See: Heger and Pest (n 37) 449.

In the German practice of negotiated judgments, the parties not only negotiated arrangements that are openly contrary to the 2009 legislative regulation, such as agreements that waved the right to appeal and defined the exact sentence to be imposed on the defendant.[956] They also designed increasingly comprehensive and sophisticated solutions, which include a wide range of clauses that have no relation to the statutory rules. An empirical study carried out in 2012 at the request of the German Constitutional Court revealed a variety of examples, such as agreements dealing with the immigration status of the accused.[957]

A point that draws attention is the conclusion of an agreement, in a criminal proceeding, that also affects other investigations. This type of negotiation – known as "package deal" ("*Gesamtlösungen*") – was developed as a way to reduce the parties' costs in resolving interconnected cases, especially in the fields of corporate and economic crime.[958] In some situations, agreements not only resolved other charges faced by the accused, but also ended investigations into conduct attributed to third parties, usually relatives of the accused. In one case, the defendant agreed to serve a higher sentence in exchange for the granting of parole to his wife so that she could take care of their children at home. [959]

ii. Negative externalities and abstinence from the search for truth

The introduction of negotiation forums into the criminal justice systems of Continental tradition countries engenders a hard-to-solve contradiction between the objectives sought by the legislator and the daily reality of the procedural parties. From the legislator's perspective, the permission for certain types of agreement is deemed a necessary response to the practical demands and the limited resources of the judicial system.[960] Nevertheless, given the state's commitment to the search for truth and to the protection

956 The 2009 legislative regulation expressly forbade parties from defining the exact punishment and from dispensing with the right of appeal. As noted by the 2013 ruling of the German Constitutional Court, these rules were often circumvented by legal practitioners. See BVerfG, Urt. v. 19.3.2013 – 2 BvR 2628/10 u.a. = BVerfGE 133, 168, para 48-49, 73-74 and 94-95.

957 Altenhain, Dietmeier and May (n 38) 77-78.

958 Schemmel, Corell and Richter (n 671) 63.

959 See BVerfG, Urt. v. 19.3.2013 – 2 BvR 2628/10 u.a. = BVerfGE 133, 168, para 49.

960 See the justification of the proposal that introduced the legislative regulation of negotiated judgments: Deutscher Bundestag, ´BT-Drucksache 16/12310´ (18

of other values enshrined in criminal law, the validity of consensual arrangements is conditioned to a range of statutory requirements that limit the parties' capacity to dispose of criminal cases. In this context, the statutory rules appear as fixed boundaries that the procedural actors must strictly comply with, under penalty of violating several principles of criminal procedure law.[961]

In day-to-day judicial practice, by contrast, procedural participants have incentives to constantly expand the limits of the forum for negotiations, in an attempt to achieve satisfactory outcomes and spare resources. The design of a legitimate sphere of communication and the development of bonds of trust between practitioners allow the design of new forms of consensual arrangements not foreseen by the legislator. The legislative regulation, intended to be a ceiling for the possibilities of agreements, becomes the ground level for the construction of increasingly bold and innovative solutions, with widespread effects on the justice system.

A clear consequence of this development is the reduction of the state's commitment to assessing the guilt of the defendant through a comprehensive investigation of the suspicious conduct.[962] Consensual mechanisms enable the replacement of the long and costly fact-finding process with an agreement that quickly defines the outcome of a criminal case, which comes with the accused's consent and, therefore, with an apparent aura of legitimacy.[963]

By allowing procedural participants to negotiate over the outcome of criminal proceedings, consensual mechanisms entail the risk that the official investigation will be prematurely terminated and that a guilty verdict will arise from an inter-party arrangement, rather than from the collection

March 2009), 7-8. Julia Peters notes that the main argument for the development of negotiated judgments in Germany is the scarcity of resources. See Peters (n 680) 17. Similarly, Mirjan Damaska observes: "In the end, practical usefulness or necessity turns out to be the only persuasive justification for negotiated justice". See Damaška (n 668) 1030.

961 As affirmed by the German Constitutional Court in its 2009 ruling on the constitutionality of the regulation of negotiated judgments. See BVerfG, Urt. v. 19.3.2013 – 2 BvR 2628/10 u.a. = BVerfGE 133, 168, para 65-75.

962 Tatjana Hornle, 'Unterschiede Zwischen Strafverfahrensordnungen Und Ihre Kulturellen Hintergründe' (2006) 117 Zeitschrift für die Gesamte Strafrechtswissenschaft 801.

963 As Winfried Hassemer observes, the accused's acceptance of the outcome of the criminal proceeding brings a valuable element of legitimation for the exercise of the state's power. See: Hassemer (n 699) 180.

of hard evidence proving criminal behavior.[964] Given that criminal convictions generate harsh consequences for the whole society, the requirement for criminal punishment to have a strong factual basis is relevant not only for the guarantee of the defendant's rights, but also for the protection of various other interests protected by criminal law.[965] The consensual resolution of criminal cases generates several collateral effects that impairs the interests of other agents who do not take part in in the negotiations.[966]

Interested in minimizing the risks and costs imposed by a criminal investigations, procedural participants have incentives to constantly expand the negotiation forum designed by the legislation. As with transactions that create negative externalities, the parties that enter into consensual arrangements in criminal cases do not assume all the costs arising from such negotiations, leading to a permanent tension on the limits defined by law.[967] This expansionist movement poses serious risks for traditional values inherent to the Continental tradition, particularly to the state's commitment to search for truth through criminal proceedings.[968]

The imposition of criminal punishment embodies the public message that the accused has willingly adopted wrongful behavior; the legitimacy of this message depends on the collection of solid evidence of the crime, and not on the consent of the accused.[969] The preservation of the public interest and the very legitimacy of the criminal justice system rely, thus, on the execution of a thorough investigation to ascertain the offenses and the responsible individuals.[970] In the long run, the spreading and proliferation of increasingly innovative and sophisticated consensual solutions may lead

964 As Greco notes, the restriction of the fact-finding phase is the main reason why the judicial system adopts the Verstandigung mechanism. Greco, '„Fortgeleiteter Schmerz" – Überlegungen zum Verhältnis von Prozessabsprache, Wahrheitsermittlung und Prozessstruktur' (n 26) 5.

965 Weigend, 'Unverzichtbares Im Strafverfahrensrecht' (n 23) 304; Schünemann, 'Zur Kritik Des Amerikanischen Strafprozessmodells' (n 25) 557-562.

966 Greco, *Strafprozesstheorie Und Materielle Rechtskraf* (n 668) 277-278.

967 Mirjan Damaska notes that "It is indeed unlikely that the parties will take into account the full cost that their transaction imposes on others with whom they have no immediate relationship". See: Damaška (n 668)1028.

968 Wesslau (n 25) 563-564.

969 Greco, *Strafprozesstheorie Und Materielle Rechtskraf* (n 668) 273-274.

970 Schünemann, 'Zur Kritik Des Amerikanischen Strafprozessmodells' (n 25) 559; Weigend, 'Unverzichtbares Im Strafverfahrensrecht' (n 23) 304.

to a model of "systematic abstinence" from the state's task of truth-searching, with deep repercussions throughout the legal system.[971]

iii. The 2013 ruling of the German Federal Constitutional Court and the case-law of the U.S. Supreme Court: unnoticed virtues?

Confronted with the problem of defining the limits for consensual solutions within the criminal justice system, the German Constitutional Court sought an intricate balance between the traditional pillars of Continental criminal procedure, such as the state's commitment to search for truth, the principle of individual culpability and the rules of publicity, formal documentation and transparency, and the entrenched practice of negotiated judgments in the German judiciary. In view of a scenario of massive and widespread disregard for the statutory framework set by § 257c StPO, the Court decided to not rule the legislative regulation of negotiated judgments unconstitutional, opting instead to harshly censure the routines used by legal practitioners to resolve criminal cases through innovative consensual arrangements.[972]

The decision was harshly criticized from different sides of the debate.[973] From the legal practitioners' point of view, the ruling created excessive burdens and uncertainties for the conclusion of consensual arrangements and could end up rendering them useless.[974] For critics, the decision was another lost chance to develop effective control over the practice of negoti-

971 As noted by Hassemer regarding the proliferation of consensual solutions in German criminal justice . See: Winfried Hassemer, ' Human dignity in the criminal process: the example of truth-finding' (2011) 44 Israel Law Review 185, 198.

972 See BVerfG, Urt. v. 19.3.2013 – 2 BvR 2628/10 u.a. = BVerfGE 133, 168, para 116-127.

973 As noted by Rabe: Rabe (n 714) 35-36.

974 According to Schemmel: "The increased demands of evidence collection and the lack of a binding effect of "package deals" therefore significantly complicate the settlement process in commercial criminal law. The significantly-tightened situation can therefore hardly be overcome without multiplying judicial resources because, from a judicial perspective, a settlement is almost useless if the time required is not significantly reduced because the disputable procedures have the same requirements for clarification". See: Schemmel, Corell and Richter (n 671) 63.

ated judgments and reconcile it with the requirements of the German Constitution.[975]

Such reactions were to be expected, given the fragility of the balance sought by the German Federal Constitutional Court. As Luis Greco points out, the ruling leads to an insoluble trilemma: if the matter of the confession is not verified throughout the proceeding, the objective of procedural shortening is accomplished, but the constitutional guarantees that the Constitutional Court tried to safeguard will remain unprotected; if the confession has to be proven in a full discovery phase, the negotiated judgments lose their function; if the option is for an intermediate path, in which a partial verification of the confession is carried out, there are no criteria that minimally indicate in what level of depth this verification should occur.[976]

Despite the clear limits and gaps of the decision, the firm rebuff of "a new consensual procedural model" should not be underestimated.[977] Although recognizing the relevance of negotiated judgments within the German justice system, the German Federal Constitutional Court imposed constraints upon the consensual resolution of criminal cases and expressly prohibited consensual innovations such as the so-called "package deals".[978] The decision criticized the possibility of a "commerce of justice" and affirmed the importance of a serious fact-finding process in criminal procedure, refusing to recognize that criminal convictions could stem merely from consensual arrangements between procedural parties.[979]

This position stands in clear contrast with the treatment given by the U.S. Supreme Court to the questions arisen from the exponential growth of plea bargaining in the last decades of the 20th century. In a series of decisions rendered in the 1970s, the U.S. Supreme Court supported this development, perceiving that plea agreements could benefit all the affected: defendants would benefit from the swift processing of their cases and the

975 See: Weigend, 'Neues Zur Verständigung Im Deutschen Strafverfahren?' (n 37) 217-219.

976 Greco, '„Fortgeleiteter Schmerz" – Überlegungen Zum Verhältnis von Prozessabsprache, Wahrheitsermittlung Und Prozessstruktur' (n 26) 5.

977 Regarding this rejection, see BVerfG, Urt. v. 19.3.2013 – 2 BvR 2628/10 u.a. = BVerfGE 133, 168, para 65-67. Praising this part of the decision, see Heger and Pest (n 37) 450. Also Greco, '„Fortgeleiteter Schmerz"' (n 26) 11.

978 See BVerfG, Urt. v. 19.3.2013 – 2 BvR 2628/10 u.a. = BVerfGE 133, 168, para 79.

979 See BVerfG, Urt. v. 19.3.2013 – 2 BvR 2628/10 u.a. = BVerfGE 133, 168, para 129-130. Praising this position, see Weigend, 'Neues Zur Verständigung Im Deutschen Strafverfahren?' (n 37) 214-215.

possibility of faster rehabilitation, prosecutors and judges would save their scarce resources and society would be better protected.[980] Faced with evermore audacious consensual arrangements in criminal proceedings, the U.S. Supreme Court chose to accept the expansion of plea bargaining and restricted judicial control of these negotiations to procedural guarantees regarding the expression of the defendant's will.[981]

In a decision of paramount importance, the Supreme Court asserted that plea agreements are valid whenever the defendant has had "full opportunity to assess the advantages and disadvantages of a trial as compared with those attending a plea of guilty", even if the agreement had been carried out to avoid the death penalty.[982] On another occasion, the Supreme Court affirmed that prosecutors can make threats as a way to induce the investigated to accept the agreement and that, if the agreement is not concluded, such threats can be fulfilled, recognizing as "constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty."[983] In another case, the Supreme Court decided that problems of racial discrimination in the jury's composition do not affect the validity of a plea agreement since, after formally pleading guilty, the defendant could not "raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea."[984]

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980 See the ruling of the Supreme Court in Blackledge v. Allison, 431 U.S. 63 (1977): "Whatever might be the situation in an ideal world, the fact is that the guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system. Properly administered, they can benefit all concerned". For a substantiated criticism of this Supreme Court ruling, see: Malvina Halberstam, 'Towards Neutral Principles in the Administration of Criminal Justice: A Critique of Supreme Court Decisions Sanctioning the Plea Bargaining Process' (1982) 73 Journal of Criminal Law and Criminology 1. According to the author: "The Court's decisions in this area contravene fundamental principles of constitutional law and are inconsistent with its decisions in cases that do not involve the viability of the plea bargaining process." (3).

981 As noted by Donald Gifford: "Because the legitimacy of plea bargaining supposedly rests on its consensual nature, under the traditional view the only required regulation of plea bargaining is procedural safeguards designed to assure that the defendant´s consent to his guilty plea is legally effective". See: Donald G Gifford, 'Meaningful Reform of a Plea Bargaining: The Control of Prosecutorial Discretion' (1983) 1983 University of Illinois Law Review 37, 39.

982 See Brady v. United States, 397 U.S. 742 (1970).

983 See Bordenkircher v. Hayes, 434 U.S. 357 (1978).

984 See Tollett v. Henderson, 411 U.S. 258 (1973).

Understanding plea agreements as the embodiment of values such as autonomy and efficiency, the U.S. Supreme Court granted solid support to the practice of bargaining in criminal justice and opted to ignore the various risks associated with new forms of transactions, some of which did not even rely on a guilty plea.[985] Confronted with the constant innovations brought up by the indomitable practice of negotiated judgments, the German Federal Constitutional Court chose a different path: in its 2013 decision, the Court reaffirmed the state's commitment to the search for truth, the principle of individual culpability and due process as constitutional foundations of the German prosecution system.[986] To assure the observance of these principles, the German Constitutional Court imposed multiple restrictions on the practice developed by legal practitioners and even threatened to rule the regulation of negotiated judgments unconstitutional, should the pattern of wide disregard for the statutory rules continue.[987]

Given the attractiveness of consensual arrangements to legal practitioners, this firm defense of traditional values of criminal procedure cannot be undervalued, regardless of how naïve and formalistic the imposed restrictions may seem.[988] This is particularly true when one faces the possibility

985 From a German perspective, Luis Greco notes the enormous legitimizing force acquired by consensual exchanges in American criminal justice, validating agreements that do not even contain a confession by the defendant (the so-called "Alford plea"). See: Greco, *Strafprozesstheorie Und Materielle Rechtskraft* (n 668) 266. The term "Alford plea" comes from the ruling of the U.S. Supreme Court in North Carolina v. Alford, in which the Court decided that "accused may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even though he is unwilling to admit participation in the crime." See North Carolina v. Alford, 400 U.S. 25 (1970). In the occasion, the Court reaffirmed the understanding that: "[r]easons other than the fact that he is guilty may induce a defendant to so plead, [and] [h]e must be permitted to judge for himself in this respect". For a strong criticism of this type of consensual arrangement, see: Bibas (n 179) 1363. According to the author, "Alford and nolo contendere pleas are unwise and should be abolished. These procedures may be constitutional and efficient, but they undermine key values served by admissions of guilt in open court."

986 For a general description of the ruling, see item IV.2.e.

987 See BVerfG, Urt. v. 19.3.2013 – 2 BvR 2628/10 u.a. = BVerfGE 133, 168, para 121.

988 On this point, Thomas Weigend asserts that the 2013 German Federal Supreme Court tried hard "to verify the bottle, the label and the cork" but did not recognize that the bottle contained a drink in a terrible state. See: Weigend, 'Neues Zur Verständigung Im Deutschen Strafverfahren?' (n 37) 218. Also expressing doubts on the effectiveness of the solution given by the German Federal Constitutional Court. See: Heger and Pest (n 37) 486.

of a full endorsement of consensual exchanges as a source of legitimacy for imposition of criminal punishment, as occurred in the 1970s decisions of the U.S. Supreme Court and, more recently, in rulings of the Brazilian Federal Supreme Court regarding the use of collaboration agreements,[989] as will be analyzed in the next chapter.

5. Conclusion

Recently, references to a new model or paradigm of "consensual criminal justice" have abounded in Brazilian criminal law, both in legal scholarship and in judicial decisions.[990] According to its proponents, this new model of criminal justice would favor the resolution of criminal cases through consensual arrangements negotiated between prosecution and defense, strengthening the autonomy of the parties in the realm of criminal procedure. This ideal of consensual criminal justice has been of paramount importance in justifying and validating the inventive practice of collaboration agreements, which has engendered dramatic innovations over recent years, such as the design of new imprisonment regimes and the possibility of anticipated enforcement of criminal penalties.[991]

Associating collaboration agreements with the traditional concept of private contracts, the Brazilian Federal Supreme Court used doctrines and rules from contractual law – such as the principles of "*res inter alios acta*" and "*pacta sunt servanda*" – to interpret and resolve quarrels arising from the use of collaboration agreements.[992] This "contractualist" approach conferred solid ground and wide freedom for legal practitioners to develop a flexible and comprehensive negotiation system, giving rise to audacious consensual solutions.[993]

In order to analyze the association of the Brazilian practice of collaboration agreements with the concept of a new model of consensual justice, this chapter examined the German experience with two legal mechanisms: negotiated judgments and the crown-witness regulation. After describing the development and main characteristics of both mechanisms, the chapter focused on two points of analysis.

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989 For a description of this jurisprudence, see item I.4.c.
990 See item I.4.c.
991 See items I.4.a.
992 See item I.4.c.
993 See item I.4.b.

It first asserted that, although the two legal mechanisms share some similar features, since both entail consensual elements and design a negotiation forum between enforcement authorities and defendants, they fulfill different roles, seek differing objectives and impact criminal proceedings in a distinct manner. While the practice of negotiated judgments appears as a mechanism of procedural economy in a context of limited resources of the justice system, shortening the process of fact-finding, the crown-witness regulation represents an investigative tool that enhances the state's capacity to collect evidence and information in order to prosecute criminal organizations, expanding the state's efforts to search for truth.

Secondly, observing the standard pattern of widespread disregard shown by the German practice of negotiated judgments towards judicial decisions and statutory rules, it asserted that the use of consensual mechanisms in criminal justice entails negative externalities, creating a permanent tension on the boundaries of the negotiation forum established by law. Because of these externalities, legal practitioners have strong incentives to constantly expand the use of consensual mechanisms, particularly in situations where the process of fact-finding is long, complex and uncertain, as occurs in the field of economic crime. This expansionist movement erodes traditional values and guarantees of German criminal procedure, such as the state's commitment to search for truth, the principle of individual culpability and the rules of publicity, as has been noted by the 2013 ruling of the German Federal Constitutional Court.

From the results achieved in this Chapter IV, as well as the concepts analysed in Chapter III, Chapter V carries out a critical appraisal of the Brazilian practice of collaboration agreements and its alleged association with a new system of consensual criminal justice.