Plea Bargaining

Plea bargaining as a phenomena has various names, e.g. “understanding”, “deal”, or the aforesaid “plea bargaining”. It consists of agreements made between the opposing parties, i.e. the Court or the State Prosecutor on the one hand and the defense on the other, with the objective to finalize the proceedings.

In Austria there is no legal regulation which would declare such plea bargains inadmissible. It is a fact that plea bargains to determine the outcome of a case are not mentioned at all in the Austrian legal system.

The Supreme Court refuses plea bargaining in any case as being inadmissible and in contradiction with the principle of ascertaining the material truth. In its decision of August 24, 2004[1], the Supreme Court has unequivocally objected to the practice of plea bargainings and has even declared the involvement in them punishable.

Plea bargaining is a violation of other essential principles of the Austrian Code of Criminal Procedure, such as the principle of the authorities acting *ex officio*, the principle of legality, of open court, of oral proceedings, and the presumption of innocence.

The Austrian law, however, knows institutions that are similar to plea bargaining, such as “Diversion” *(Under certain circumstances can the state prosecutor in minor cases waive prosecution so that sentencing is replaced by a payment, community work, a probation period etc.),* the provisions on witnesses giving state’s evidence and on penal orders *(In minor cases summary proceedings without trial*). All these institutions effectuate a shortening of criminal proceedings through communication between the parties; provided their material preconditions have been met they are admissible.

For a long time there has in Austria a discussion been going on with the objective to create explicit regulations for plea bargaining to determine the questions of guilt and sentence. Should the Austrian legislative decide in favor of a legal regulation, the challenge will be to create a balance between all persons involved in the case that satisfies the principle of transparency and publicity but also counteracts the risk of possible misuse. In order to remove any suspicion of secretiveness or interference from higher places the agreement and in particular the outcome of a plea bargaining must be transparent, by making the plea bargaining public, at the latest at the trial. The defendant should furthermore be advised by the judge on the consequences and the extent of the agreement. The defendant can never be obliged to enter an agreement and should never suffer a disadvantage for refusing to do so.

[1] OGH 24.8.2004, 11 Os 77/04 (EvBl 2005/64)

Böckemühl/Kier, in their “Pleadings against a Codification of a Code of “Criminal Procedure light” in Austria, object to a legal regulation of plea bargaining. For pressure on the defendant may not only be exercised by the state prosecutor and the court but also by his own defense counsel. For even the best law cannot do much about the fact that a good deal is depending on the personal relationship of the defense counsel with the state prosecutor respectively the court. [2]

Supporters of plea bargaining reply to this that it is in fact the unregulated areas that facilitate such alliances and that it therefore makes sense to introduce legal regulations that create equal conditions for all defendants so that personal relationships are not decisive anymore.

It must be considered that there will be a widening rift between defendants pleading guilty and defendants pleading not guilty. A defendant who insists on a lengthy taking of evidence risks to receive a much more severe sentence than another who from the beginning submits to the pressure coming from the state prosecutor or judge. Thus the sentence of the defendant who wants to prove his innocence (and finally fails) would be unfair compared to another who makes a deal.

Böckemühl/Kier see also grounds for criticism in “class justice” *[= legal system with class bias*]. In extremely complicated cases of economic delinquency most defendants can afford a number of defense lawyers and thus drag the proceedings out and finally “achieve” the mitigating circumstance under section 34 para. 2, no. 2 of the Code of Criminal Procedure. Their confession and their waiver of taking of evidence is therefore much more valuable than in the case of defendants with less complicated incriminations and will therefore lead to a reduction of their sentence that comes close to “class justice”. Consequently, if there were no option to waive the taking of evidence for rich and poor defendants likewise the results would be much fairer.[3]

There is also the disconcerting notion that in particular state prosecutors and judges, therefore a group that out of their own self-perception disapproves of any agreements between the State and (possible) criminals, should be under a duty to do precisely that.

This is in accordance with the legal opinion of the Supreme Court who in an *obiter dictum* in the decision 11 Os 77/04 has very clearly objected to plea bargaining: “A such agreement – which is essentially not comparable to any procedural and legally defined steps taken towards a “diversion” – must be rejected first on the grounds of an evident violation of section 202, first and

[2] BÖCKEMÜHL, Jan/ KIER, Roland, Verständigungen in Strafverfahren – Ein Plädoyer gegen die Kodifizierung einer „StPO light“ in Österreich, in: Österreichisches AnwBl 2010, S. 402.
[3] BÖCKEMÜHL, Jan/ KIER, Roland, Verständigungen in Strafverfahren – Ein Plädoyer gegen die Kodifizierung einer „StPO light“ in Österreich, in: Österreichisches AnwBl 2010, S. 412, 413.

second case, of the Code of Criminal Procedure, but mainly because of its flagrant contradiction to the basic principles of Austrian criminal procedure, in particular the principle of ascertaining the material truth – which excludes any agreements of the court with (possible) criminals; it may expose the persons involved to the risk of liability under disciplinary law (section 57 of the RDG) and criminal law (section 302 of the Penal Code)".

In another decision from 2010, the Supreme Court restates the inadmissibility of plea bargaining and elaborates as follows: "Such plea bargaining that is complied with by the judge – which is inconsistent with the system of a liberal criminal procedure i.a. on the grounds that it is beyond any control in the case of documentation being required by jurisprudence or legislation – constitutes therefore grounds for a reopening of the case (section 353 no. 1 of the Code of Criminal Procedure).[4] In this judgment the Supreme Court also points out the problem of a defendant who fails to comply with the plea bargaining: For when the defendant decides against pleading guilty, in spite of the plea bargaining agreed by his defense counsel and the court, he would hardly enjoy safety and legal protection. The Supreme Court states that the plea bargaining constitutes grounds for a reopening of the case if it can be made credible that a verdict of guilty has come about through bribery or another offence committed by a third person (here the presiding judge).

"The first and central precondition for the abolishment of all that plea bargaining business is therefore a reasonable sentencing by an appellate court that looks critically at the court of first instance. When the defense lawyers get the impression that the appellate courts will "confirm" all sentencings made by the first instance anyway, or will at most increase the sentence due to an appeal from the state prosecutor, they will be induced to settle things in the court of first instance."[5]

If therefore the defense counsel can tell his client with certainty what the value of a confession will be in his case he doesn't have to resort to an agreement.

You see, there are arguments for and against a legal implementation of plea bargaining. The future discussions will be exciting.

Katrin Ehrbar

[4] 13 Os 1/10m
[5] BÖCKEMÜHL, Jan/ KIER, Roland, Verständigungen in Strafverfahren – Ein Plädoyer gegen die Kodifizierung einer „StPO light" in Österreich, in: Österreichisches AnwBl 2010, S. 404.