FEDERAL CONSTITUTIONAL COURT

– 2 BvR 209/14 –– 2 BvR 240/14 –– 2 BvR 262/14 –

In the proceedings
on
the constitutional complaints

1.of Mr A(…),

– 2 BvR 209/14 –,

2.of Mr U(…),

– 2 BvR 240/14 –,

3.of Mr S(…),

– 2 BvR 262/14 –

– authorised representatives:
1. Rechtsanwalt Stefan Conen,
in Sozietät Strafrechtskanzlei,
Meinekestraße 3, 10719 Berlin,
authorised representative for 1.,
2. Rechtsanwalt Marcel Kelz,
Meinekestraße 7, 10719 Berlin,
authorised representative for 1.,
3. Rechtsanwalt Dr. Dirk Lammer,
in Sozietät Strafrechtskanzlei,
Meinekestraße 3, 10719 Berlin,
authorised representative for 2.,
4. Rechtsanwälte Richard Radtke, Christian Noll,
Meinekestraße 7, 10719 Berlin,
authorised representatives for 3., –

against a)the judgment of the Federal Court of Justice (*Bundesgerichtshof*)

of 11 December 2013 – 5 StR 240/13 –,

b)the judgment of the Berlin Regional Court (*Landgericht*)

of 7 November 2012 – (525) 69 Js 213/09 KLs (1/12) –

the Second Chamber of the Second Senate of the Federal Constitutional Court with the participation of

Justices Landau,

Kessal-Wulf,

König

decided unanimously on 18 December 2014 pursuant to § 93b in conjunction with § 93a of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz* – BVerfGG) in the version published on 11 August 1993 (Federal Law Gazette, *Bundesgesetzblatt* – BGBl I p. 1473):

The proceedings are joined for a joint decision.

The constitutional complaints are not admitted for decision.

The application for a preliminary injunction in the proceedings 2 BvR 262/14 has thus become moot.

R e a s o n s :

I.

1. With their constitutional complaints, the complainants challenge their conviction for drug-related offences. 1

The first complainant was sentenced to four years and five months of imprisonment for importing narcotic drugs in concurrence with illicit dealing in narcotic drugs and with aiding and abetting illicit dealing in narcotic drugs, in each case in not insignificant quantities. The Regional Court sentenced the third complainant to three years and seven months of imprisonment for aiding and abetting the offences committed by the first complainant. The second complainant was sentenced to four years of imprisonment for possession of narcotic drugs in concurrence with aiding and abetting illicit dealing in narcotic drugs, in each case in not insignificant quantities. 2

2. According to the Regional Court's findings, which are summarised here, in September 2009, the first complainant, on account of hints from criminal circles and subsequent telephone surveillance, came under suspicion of dealing in heroin on a large scale from a café. At the beginning of November 2009, a police informant was instructed to take up investigations. This mission was not documented. Apart from being reimbursed for his expenses, the police informant was to receive a fee for each day of work and a bonus related to the quantity of narcotics seized. 3

In the following months, the police informant frequently visited the café in question. Soon the first conversations with the first complainant took place. The first contact was merely documented in an internal police report and was officially documented only after charges had been brought. The police informant was supplied with a cover story, according to which he himself dealt in heroin that was imported via Bremerhaven in containers and could be removed from the port area, bypassing the customs inspection, through the contact to a dock worker, who was in fact an undercover investigator. 4

When in February 2010 the police informant asked him about potential drug deals, the first complainant answered that he did not want anything to do with "that heroin junk"; in the course of the conversation, however, he revealed that hashish and cocaine are a different matter. By contrast, the police informant reported to his controlling officer that the conversation had been initiated by the first complainant, who, all in all, had been very eager about the Bremerhaven contacts. 5

In May 2010, the police informant alleged to the first complainant to have advocated for him with his contact in Bremerhaven; the contact, he claimed, was reliable and willing to cooperate with the first complainant. The first complainant expressed his interest and wanted to get to know the contact. 6

Even though the police informant subsequently offered the first complainant several times to go to Bremerhaven with him, the first complainant initially did not respond to this. Even though the first complainant, contrary to the truth, told the police informant the opposite, he neither had the necessary contacts nor sufficient financial means. However, as the police informant continued suggesting to the first complainant to make use of the favourable import opportunities, the first complainant nevertheless tried to establish contact to a cocaine supplier. After almost nine months without cause to suspect the first complainant of dealing in cocaine or even – which had been the initial suspicion – in heroin, the deployment of the police informant was now continued with a view to the possibility of importing heroin via Bremerhaven, which had been a police fabrication. 7

In August 2010, the first complainant and the police informant drove to Bremerhaven to meet the undercover investigator. During the journey there, the first complainant was instructed by the police informant on how to act when meeting the contact. When asked, the undercover investigator stated that the import possibilities in question existed and demanded EUR 50,000 for [making use of] them. Finally, the first complainant announced – without actually having such contacts – that he would send someone to South America to initiate the preparations for the transport locally. 8

As the police informant continued urging him, the first complainant contacted the second complainant, a friend of his, who had been sentenced to two years in prison in the Netherlands in 2007 for smuggling a total of 3 kilograms of cocaine. The first complainant told the second complainant to contact Y., a person imprisoned in Turkey and who was supposed to have contacts to cocaine dealers. Although this endeavour was unsuccessful, the police informant reported to the officer in charge of him that the first complainant had told him that things would start soon. 9

In about early October 2010, the first complainant contacted S., whom he had known for a long time, and asked him to help him with the cocaine import. The first complainant was hoping that S. would be able to gather information in South America and would possibly already prepare a cocaine delivery to Bremerhaven. With a view to the amount of EUR 50,000 that he had been promised for this purpose, S., who in actual fact was still undecided, formally agreed to the proposal. 10

In October 2010, another meeting between the undercover investigator, the police informant and the first complainant, in which further details were discussed, took place in Bremerhaven. In February 2011, the police informant reported to the investigating authorities that the first complainant had admitted that the announced transport had failed, but that he had promised at the same time that the items would arrive via his “big man” in Turkey in one to one and a half months. There was still no cause to suspect other cocaine deals of the first complainant; there were no investigations in this respect either. 11

In the meantime, the first complainant himself doubted to be able to organise cocaine. When being “seized by his honour” and put under pressure by the police infor- 12

mant through statements in this respect, the first complainant, however, decided to continue. He therefore convinced S. to go to Venezuela to initiate a cocaine deal there; this failed, however. On the police informant's initiative, another meeting with the first complainant and the undercover investigator took place to make arrangements.

After this one and a half year of preliminary activities, the actual acts constituting the offence took place: The third complainant, a friend of the first complainant, who had not been involved in the events yet, wanted to buy water pipe tobacco. For this, he drove to the Netherlands in April or May 2011 together with the first complainant. On this occasion, the first complainant entered into a conversation with an acquaintance of the third complainant about, among other things, a possible delivery of cocaine; in this conversation, the first complainant talked about the opportunities that had been offered to him. The third complainant's Dutch acquaintance promised to try to arrange a meeting with a man who had contacts in South America. 13

The announced meeting, in which the first and the third complainant, the third complainant's Dutch acquaintance and possibly two South Americans participated, took place in the Netherlands on 25 May 2011. Negotiations were continued in further meetings from 30 May 2011 and resulted in the agreement to import approximately 100 kilograms of cocaine via Bremerhaven and to take them to Berlin for profitable resale. The first complainant was to receive 16 kilograms of good-quality cocaine, for which he expected a sales revenue of between EUR 500,000 and 600,000. The third complainant expected to receive at least EUR 10,000 for his participation. 14

Meanwhile, several meetings took place between the first complainant, the police informant and the undercover investigator. Doubts of the first complainant were dissipated. Jointly, an empty flat intended for temporary storage was viewed. Finally, the first complainant gave the undercover investigator further details about the container in question, handed him a down payment of EUR 3,000 and received the key of the flat for temporary storage. 15

On 17 August 2011, the ship with the container containing cocaine arrived at Bremerhaven. On the same day, the police informant and the first complainant went into the flat intended for temporary storage. There, the first complainant handed the undercover investigator EUR 12,000 and announced that he would pay the rest soon. They agreed to collect the bags in the port and transport them to the flat the following morning. On this day, the first complainant and the undercover investigator drove to the port premises in a van. The undercover investigator provided access to the container, and the bags found there were taken to the flat where the police informant was waiting. The first complainant now told the second complainant in a phone call to come to the flat; he had recruited the second complainant during the previous weeks for organising the onward transport of the cocaine to Berlin. Initially, the second complainant had expressed concerns but had then offered to help because he felt obliged to the first complainant, and because the first complainant had told him about the in- 16

fluence of his contacts. The second complainant expected to receive a double-digit number of kilograms of at least good-quality cocaine and a payment of “several thousand” euros.

In the afternoon, police apprehension by a Special Operations Unit that had observed the flat since the morning took place. 97.17 kilograms of cocaine with a potency of active ingredients of almost 87 kilograms of cocaine hydrochloride were seized. The participants in the offence, also those who were not in the flat at this time, were arrested. 17

3. The Regional Court essentially based the conviction on the confessions of the altogether five defendants. The court stated that insofar as the extensive descriptions of the crime had in part contradicted each other, the chamber had used to the disadvantage of the respective defendant only the statements contained the description he had given himself. According to the court, particularly the first complainant’s statements on how the narcotics deal had come about could not be refuted. The police informant had not been available as a witness in the main hearing. Insofar as the police informant had, in more than 80 source interrogations, given a grossly different account of the course of the crime to his controlling officers, in particular concerning the nature and extent of his influence on the first complainant, the findings could not be based on these statements. The court held that the probative value of the police informant’s statements, which had merely indirectly been introduced through the interrogations of the controlling officers, was low anyway. Moreover, due to the police informant’s considerable financial interest in the first complainant’s being proved guilty, it could not be ruled out that the police informant had, for the sake of his own advantage, induced the first complainant, in the manner ascertained by the court, to engage in the cocaine deal. 18

Against this backdrop, it could also not be refuted that only a delivery of approximately 100 kilograms – and not of 150 kilograms as had been alleged in the charges brought – of cocaine had been agreed, and that only 16 kilograms of these – and not the entire quantity as had been alleged in the charges brought – had been intended for the first complainant’s and possible partners’ own deals in return for the import possibility provided. 19

Merely to the extent that the police informant’s statements, which had indirectly been introduced, had not contradicted the first complainant’s statements, had the chamber considered them as complementary information, in particular with a view to the chronology of the events. The chamber had been free to do so because it was not evident that this had resulted in disadvantages for the first complainant and the other accused persons. 20

Furthermore, the Regional Court also only considered the other evidence as information complementing the confessions of the five accused persons in its assessment of the evidence. 21

The Regional Court then found, particularly with a view to the “very long period of time” in which the police informant, building an extensive cover story for himself and supported by an undercover investigator, had influenced the first complainant by offering immense rewards and by building pressure, and with a view to the investigating authorities facilitating a crime that considerably exceeded the one the first complainant was suspected of having already committed, that the crime had been incited in a way that violated the rule of law as well as Art. 6(1) first sentence of the European Convention on Human Rights (ECHR). 22

With regard to the second complainant, the Regional Court did not find a violation of the ECHR; instead, it only generally acknowledged that the state’s exertion of influence constitutes a mitigating circumstance. In support of this finding, the Regional Court essentially argued with regard to the fact that the second complainant had consented to participate in a drugs transport within Germany that had not been induced by the circumstances of the (incited) import. The court noted that, unlike what applied to the participants in the import, the state’s exertion of influence and the undercover investigator’s activities had already been terminated at that stage, and that therefore trust in the import being risk-free had not been relevant for the second complainant. There had been no state interference in the planned onward transport of the drugs. 23

Even though the state investigation authorities had only exerted indirect influence on the third complainant, the Regional Court found a violation of Art. 6(1) first sentence ECHR also with regard to him because he had contributed to the offence precisely because the import route seemed safe due to the influence of state authorities. 24

The Regional Court refused to discontinue the proceedings, making reference to the decisions of the Federal Court of Justice, which had been issued “in the light of the decisions of the European Court of Human Rights”. It considered the fact that the crime had been incited in a way that violated the rule of law in its sentencing. In doing so, it applied a quantifiable reduction of the first complainant’s term of imprisonment by at least five years and seven months; had the crime not been incited in a way that violated the rule of law, the Regional Court would have imposed a term of imprisonment of no less than ten years. With regard to the third complainant, the trial court applied a quantifiable reduction of his term of imprisonment by at least three years and five months; had the crime not been incited in a way that violated the rule of law, it would have imposed a term of imprisonment of no less than seven years. In sentencing the second complainant, the Regional Court only generally acknowledged that the incitement by the state constitutes a mitigating circumstance without quantifying this in further detail, since in his case it did not find a violation of the ECHR. 25

4. The challenged judgment of the Federal Court of Justice rejected the complainants’ respective appeals on points of law. In its reasoning of why it had rejected the discontinuation of the proceedings that had been applied for, the Federal Court of Justice referred in particular to its established case-law concerning what is known as the “solution of adjusting the sentence” (*Strafzumessungslösung*). In that vein, it not- 26

ed that even a massive violation of § 136a of the Code of Criminal Procedure (*Strafprozessordnung* – StPO) merely results – according to the legal provision itself – in a prohibition to use any evidence [stemming from the violation]. The Federal Court of Justice further noted that, according to the principles of German procedural law, this prohibition only affects the respective impermissible act of investigation, and that a procedural obstacle, on the other hand, might adversely affect the protection of non-involved third parties and their individual legal interests. Moreover, the function of criminal law to provide satisfaction might be missed.

5. With their constitutional complaints, the complainants challenge in particular that the criminal courts, even though they had established that the crimes had been incited in a way that violated the rule of law, merely compensated this – insufficiently – in their sentencing instead of discontinuing the proceedings. 27

II.

The constitutional complaints are not admitted for decision because the prerequisites for admission pursuant to § 93a(2) of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz* – BVerfGG) have not been met. The relevant constitutional issues have already been decided (§ 93a(2) letter a BVerfGG). Nor is admission for decision appropriate to enforce the complainants' rights referred to in § 90(1) BVerfGG (§ 93a(2) letter b BVerfGG), as the constitutional complaints have no prospect of success (cf. BVerfGE 90, 22 <24 et seq.>) In any event, they are unfounded. 28

1. The challenged decisions do not violate the complainants' right to a fair trial under Art. 2(1) in conjunction with Art. 20(3) of the Basic Law (*Grundgesetz* – GG). 29

a) The right of the accused to a fair trial is rooted – like the general guarantee of legal protection – in the principle of the rule of law in conjunction with the freedoms of the Basic Law, particularly in the right to freedom of the person (Art. 2(2) second sentence GG), which is threatened by criminal proceedings, and in Art. 1(1) GG, which prohibits to degrade persons to mere objects of a state procedure (cf. Decisions of the Federal Constitutional Court, *Entscheidungen des Bundesverfassungsgerichts* – BVerfGE 57, 250 <274 and 275>), and which obliges the state to proceed in a correct and fair manner (cf. BVerfGE 38, 105 <111>; 122, 248 <271>; 133, 168 <200>). 30

It is primarily for the legislature to determine which specific procedural rights and assistance individuals charged with a criminal offence should be granted under the principle of fair trial and what form these rights should take. It is then up to the courts to make this determination in the individual cases, within the boundaries of the law, as part of their duty to interpret and apply the law (cf. BVerfGE 122, 248 <272>; 133, 168 <200>). The right to a fair trial is violated only if an overall appraisal of procedural law – including the way in which it is interpreted and implemented by the courts – reveals that conclusions that are compelling under the rule of law were not reached or that procedural elements indispensable under the rule of law were relinquished (cf. BVer- 31

fGE 57, 250 <276>; 64, 135 <145 and 146>; 122, 248 <272>; 133, 168 <200>).

This appraisal must also take into account the requirements of a functioning criminal justice system (cf. BVerfGE 47, 239 <250>; 80, 367 <375>; 122, 248 <272>; 133, 200 <200 and 201>). The principle of the rule of law, of which the idea of justice is an essential component (cf. BVerfGE 7, 89 <92>; 74, 129 <152>; established case-law) not only requires that the law of criminal procedure be fair in its form and implementation. It also permits and demands that concerns of a functioning criminal justice system, without which justice cannot be enforced, are taken into account (cf. BVerfGE 33, 367 <383>; 46, 214 <222>; 122, 248 <272>). The state under the rule of law can only be realised if sufficient precautions are put in place to ensure that criminals are prosecuted and sentenced in accordance with the applicable law and that they receive just punishment (cf. BVerfGE 33, 367 <383>; 46, 214 <222>; established case-law). Accordingly, procedural decisions that serve the requirements of an effective criminal justice system do not automatically violate the constitutional right to a fair criminal trial if the procedural position of the accused or the individual charged with a criminal offence, compared to the former situation, is diminished in favour of a more effective criminal justice system (cf. BVerfGE 122, 248 <273>; 133, 168 <201>). 32

b) Measured against these standards, the challenged decisions of the Regional Court and of the Federal Court of Justice do not violate the complainants' right to a fair trial under Art. 2(1) in conjunction with Art. 20(3) of the Basic Law. When determining the individual sentences, the criminal courts adequately took into account the fact that the crime was incited in a way that violated the rule of law; they were not required to discontinue the proceedings. 33

To date, the case-law of the Chambers of the Federal Constitutional Court has left unanswered the question of whether participation of a police informant acting as an agent provocateur in convicting a criminal may at all prevent the enforcement of the state's entitlement to punish the person concerned. The present case does not demand that this question be answered. Even if one assumed that the fact that a crime was incited in a way that violated the rule of law may amount to a procedural obstacle, such a prohibition to enforce the state's entitlement to impose a punishment could only be derived from the rule of law in extremely exceptional cases, since the principle of the rule of law protects not only the interests of the accused but also the [public] interest in a prosecution system that serves material justice (cf. BVerfG, Order of the Third Chamber of the Second Senate of 10 March 1987 – 2 BvR 186/87 –, juris, para. 2; Order of the Third Chamber of the Second Senate of 19 October 1994 – 2 BvR 435/87 –, juris, para. 24; Order of the Third Chamber of the Second Senate of 18 May 2001 – 2 BvR 693/01 –, juris, para. 3; Order of the Third Chamber of the Second Senate of 11 January 2005 – 2 BvR 1389/04 –, juris, para. 2). 34

aa) The case at hand, however, appears likely to be such an extremely exceptional case. 35

Its duty of objectivity (§ 160 (2) StPO) makes the public prosecutor's office a guaran- 36

tor for conducting proceedings in conformity with the principle of the rule of law and the principle of legality (cf. BVerfGE 133, 168 <219>). The investigative personnel of the public prosecutor's office is obliged to comply with its orders (§ 152(1) of the Courts Constitution Act, *Gerichtsverfassungsgesetz* – GVG); they are supposed to investigate rather than induce crimes. Nevertheless, wrongdoings of individual investigation officers cannot be ruled out entirely. If in such cases, the public prosecutor's office does not sufficiently exercise its oversight or if the police deliberately evades such oversight, the rule of law and adherence to the principle of legality are no longer guaranteed. This becomes apparent in the present case.

The police informant's pressure on the first complainant as well as the supportive role played by state authorities during the preparation of the crime illustrate that the public prosecutor's office – being the "master of the investigation proceedings" – has failed to exercise its oversight over the police. This failure must be taken into account during the further course of the proceedings. Considering the dimension of the misconduct as well as the corresponding illegal influence on the first complainant during the investigation, it would not have been unreasonable to assume a procedural obstacle. 37

bb) Nevertheless, the question whether a procedural obstacle can be derived from the rule of law in extreme cases of incitement by investigation authorities can remain unanswered also in the present case. Based on the trial court's findings regarding the specific details of the incitement as well as of the crime itself, it was reasonable under constitutional law that the regular courts concluded that this does not constitute such an extremely exceptional case. The Chamber does not need to decide whether this would also hold true had the incited first complainant not already been a suspect but a person who, as a mere object of the state investigation authorities, merely carried out a preconceived plan of a crime without acting of his own accord. However, in case of such a crime it appears questionable whether the state's right to impose a punishment could still be maintained with a view to material justice and contrary to the accused's legitimate interests. The crime in the case at hand, however, was not exclusively instigated by state authorities; the complainants were not mere objects of state prosecution. In particular, the first complainant neither was beyond suspicion before the police informant started to provoke him, nor was his conduct entirely in line with what the investigating authorities had stipulated. 38

cc) From the outset, there were factual indications that warranted opening an investigation against the first complainant for violations of the Narcotics Act (*Betäubungsmittelgesetz*). Already in the first conversation about narcotics with the police informant, the first complainant suggested a readiness to deal in hashish and cocaine. Furthermore, despite the continued pressure on the first complainant by the police informant, the first complainant remained largely free in his decisions. In particular, the informant neither threatened the complainant nor did he exploit any particular situation of distress on the part of the first complainant. The fact that the first complainant, in spite of the police informant's influence, independently and on his own 39

responsibility took a decision to commit the crime becomes evident in particular when considering that the actual crime developed from the meeting with an acquaintance of the third complainant during a journey to the Netherlands in spring 2011, a meeting that had come about incidentally and without state influence. When the first complainant realised the opportunity resulting from this meeting, he pursued his decision to commit the crime with considerable criminal energy. Considering this, one cannot assume that the first complainant became a mere object of state action. This holds all the more true for the second and the third complainant, who were influenced indirectly at most. In light of the considerable criminal energy they showed, the complainants have incurred a significant degree of personal guilt, which must be taken into account according to the principle of material justice.

2. Even taking into account the case-law of the European Court of Human Rights (ECtHR) concerning the issue of incitement to a crime in breach of the Convention (cf. Art. 6(1) first sentence ECHR), there is ultimately no violation of the right to a fair trial, since the violation of Art. 6(1) first sentence ECHR that occurred during the investigation was adequately compensated for by the regular courts. 40

a) It is true that a complainant cannot directly challenge the violation of a right set out in the European Convention of Human Rights by lodging a constitutional complaint before the Federal Constitutional Court (cf. BVerfGE 74, 102 <128>; 111, 307 <317>; 128, 326 <367>; established case-law). Relying on the relevant fundamental right, the complainant may, however, claim in proceedings before the Federal Constitutional Court on the one hand that the regular courts disregarded or failed to take into account a decision of the ECtHR (cf. BVerfGE 111, 307 <329 and 330>; see also BVerfGE 128, 326 <368>). For the binding effect of statute and law (Art. 20(3) GG) also includes a duty to take into account the guarantees of the European Convention on Human Rights and the decisions of the ECtHR as part of a methodologically justifiable interpretation of the law (cf. BVerfGE 111, 307 <323>). Both a failure to consider a decision of the ECtHR and the “enforcement” of such a decision in a schematic way, in violation of prior-ranking law, may therefore violate fundamental rights in conjunction with the principle of the rule of law (cf. BVerfGE 111, 307 <323 and 324>). Where the Basic Law is interpreted in a manner open to the Convention, the case-law of the European Court of Human Rights must on the other hand be integrated as carefully as possible into the existing, dogmatically differentiated national legal system (cf. BVerfGE 111, 307 <327>; 128, 326 <371>). The possibilities of interpretation in a manner open to the Convention end where it no longer appears justifiable under the recognised methods of interpretation of statutes (cf. BVerfGE 111, 307 <329>; 128, 326 <371>; BVerfG, Order of the Second Senate of 22 October 2014 - 2 BvR 661/12, para. 129). 41

b) When it comes to the legal appraisal of inciting conduct on the part of investigative authorities, the ECtHR’s case-law follows a different dogmatic path than the “solution of adjusting the sentence”, on which the challenged decisions of the Federal Court of Justice are based (cf. Decisions of the Federal Court of Justice in Criminal 42

Matters, *Entscheidungen des Bundesgerichtshofes in Strafsachen* – BGHSt 32, 345 et seq.; 45, 321 et seq.; 47, 44 et seq.). For when assuming that a crime was incited, the ECtHR focuses on the admissibility of conducting a trial at all as well as on the admissibility of evidence (see only ECtHR, Teixeira de Castro v. Portugal, Judgment of 9 June 1998 – 44/1997/828/1034 –, *Neue Zeitschrift für Strafrecht* – NStZ 1999, pp. 47 et seq.; ECtHR (GC), Ramanauskas v. Lithuania, Judgment of 5 February 2008 – 74420/01 –, *Neue Juristische Wochenschrift* – NJW 2009, pp. 3565 ff.; ECtHR, Prado Bugallo v. Spain, Judgment of 18 October 2011 – 21218/09 –, NJW 2012, pp. 3502 et seq., as well as most recently ECtHR, Furcht v. Germany, Judgment of 23 October 2014 – 54648/09 –). As a result, the ECtHR held that evidence obtained by police incitement is not rendered admissible by a public interest. Instead, incitement by the police to commit a crime and the use of the evidence thus obtained can result in the respective offender's right to a fair trial within the meaning of Art. 6 ECHR being violated (cf. ECtHR, Prado Bugallo v. Spain, Judgment of 18 October 2011 – 21218/09 –, NJW 2012, p. 3502 <p. 3503>, para. 27 with further references; see also most recently ECtHR, Furcht v. Germany, Judgment of 23 October 2014 – 54648/09 –, para. 47 with further references).

The Chamber agrees with the ECtHR insofar as the state may not incite innocent citizens to commit crimes; the investigative authorities are tasked to prosecute crimes, not to cause them. It does not follow, however, that the national legal system is obliged to follow the ECtHR's dogmatic approach. As long as the substantive requirements for a fair trial under Art. 6(1) first sentence ECHR are met, the ECtHR leaves it to the national courts to decide on how to implement the requirements of Art. 6(1) first sentence ECHR within their respective national criminal justice system. Accordingly, the ECtHR emphasises that the question of the admissibility and appraisal of pieces of evidence is primarily a matter for regulation by national law, whereas the ECtHR's task is to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair (cf. ECtHR, Teixeira de Castro v. Portugal, Judgment of 9 June 1998 – 44/1997/828/1034 –, NStZ 1999, p. 47 <p. 48>, para. 34; ECtHR (GC), Ramanauskas v. Lithuania, Judgment of 5 February 2008 – 74420/01 –, NJW 2009, p. 3565 <p. 3566>, para. 52 with further references, as well as most recently ECtHR, Furcht v. Germany, Judgment of 23 October 2014 – 54648/09 –, para. 46). In this context, the ECtHR's task is not to determine whether certain pieces of evidence were obtained unlawfully, but rather to examine whether such "unlawfulness" resulted in the violation of a right protected by the Convention (cf. ECtHR, Judgment of 5 February 2008 – 74420/01 –, Ramanauskas v. Lithuania, NJW 2009, p. 3565 <p. 3566>, para. 52>). 43

c) The Chamber does not need to and indeed cannot decide whether the "solution of adjusting the sentence" will meet the ECtHR's standards in every individual case by focusing on the legal consequences and by avoiding schematic solutions. 44

aa) It is true that the "solution of adjusting the sentence" coherently integrates into the German system of criminal law because the German law of criminal procedure 45

generally limits the reach of the prohibition to use evidence strictly to the respective act of investigation that is impermissible. Moreover, procedural obstacles that are to be derived from the rule of law are, if at all, a rare exception; pursuant to the wording of the legal provision under § 136a(3) second sentence StPO itself, even the use of prohibited methods of examination merely results in a prohibition to use evidence [obtained with the help of such methods]. In this regard, it is to be taken into account in particular that the protection of victims might suffer in the event of a procedural obstacle if criminal law no longer fulfils its function of providing satisfaction and prevention. Where third parties are concerned as victims of the crime, their individual legal interests might be violated. Irrespective of its advantages, the "solution of adjusting the sentence" is not derived from the Constitution; it is based on ordinary law. A different response to cases in which the crime was incited in a way that violated the rule of law would be possible under constitutional law.

bb) At least in the way it was applied to the case at hand by the criminal courts, however, the "solution of adjusting the sentence" does not violate the constitutional principle of a fair trial – even in view of the requirements set by Art. 6(1) first sentence ECHR. 46

(1) Already the trial court dealt with the exact circumstances of the incitement extensively and referred to the decisions of the Federal Court of Justice, which had been issued "in the light of the decisions of the European Court of Human Rights". With regard to the first and the third complainant, it held that the incitement had been impermissible and explicitly found a violation of Art. 6(1) first sentence ECHR, even though the first complainant had, based on specific indications, from the beginning been suspected of being involved in drug-related offences. Applying the "solution of adjusting the sentence", the Regional Court moreover considerably reduced the term of imprisonment; in the case of the first complainant, the reduction amounted to at least five years and seven months, and in the case of the third complainant, to a total of at least three years and five months of imprisonment, and thus led to a quantifiable, very considerable reduction of the term of imprisonment. 47

(2) In its judgment on the appeals on points of law, the Federal Court of Justice not only extensively dealt with the legal consequences of crimes having been incited in a way that violated the rule of law, but it also opposed the view of the public prosecutor's office, which had argued not only against the sentencing, but above all against the assumption that an incitement contrary to the rule of law had occurred. The public prosecutor's office had challenged the assessment of the evidence with regard to the facts supporting the assumption that a crime had been incited in a way that violated the rule of law, and had wanted to achieve that more account be taken of the police informant's statements as set out in the source notes. In its decision, the Federal Court of Justice also took account of the ECtHR's case-law issued until then, by making reference to its own prior case-law that in turn had extensively dealt with the ECtHR's case-law. The decision in the case Furcht v. Germany (ECtHR, Furcht v. Germany, Judgment of 23 October 2014 – 54648/09 –) had not yet been issued at that 48

time and could therefore not be considered by the Federal Court of Justice.

(3) Ultimately, the criminal courts, in interpreting ordinary law, integrated the case-law of the European Court of Human Rights as carefully as possible into the existing, dogmatically differentiated national legal system; considering the recognised methods of interpretation of statutes, their approach does not appear to be unjustifiable. This conclusion is supported not only by the express finding and acknowledgment of a violation of Art. 6(1) first sentence ECHR and by the quite considerable and specifically quantified reduction in sentencing, but also by the way the Regional Court treated the evidence. 49

Its assessment of the evidence relied primarily on confessions made by the three complainants as well as by the two other defendants. The descriptions of the crime provided in these five confessions – to the extent that the respective defendants had knowledge of the relevant facts – were largely identical. To the extent that the descriptions did not match, the Regional Court only held those facts against the individual defendants that they had confessed to. In particular, the Regional Court did not rely on further evidence to make findings against the defendants that deviated from their respective confessions. Even without the testimony by the police informant and the investigators, the Regional Court found the confessions as such and the way they matched each other to be sufficiently credible and reliable. 50

The Regional Court did not draw conclusions that were disadvantageous to the complainants from the testimony given by the police informant, on whose actions the finding of a violation of the Convention is decisively based, even though it did not explicitly assume a prohibition to use the evidence. Even given the further results of the investigation, which suggested considerably aggravating factual circumstances, the Regional Court did not come to the conclusion that the confessions should in any way be refuted. Accordingly, the Regional Court not only assumed the quantity of narcotics ordered to be lower than that on which the charges brought had been based. Moreover, it did not find that the defendants – as had been alleged in the charges brought – had acted as a gang. 51

To the extent that the Regional Court, when assessing the evidence, consulted the results of the police investigation and the statements of the investigators including that of the undercover investigator at all, it used them, on the one hand, as complementary information and not to refute a statement to the contrary made by the complainants or to prove the core of the crime that was relevant under criminal law. In particular it based its findings concerning the actual purchase negotiations in the Netherlands exclusively on the complainants' statements. On the other hand, it was mandatory to take this evidence to clarify the exact circumstances of the investigation, its deficiencies and the facts that establish that the incitement was contrary to the rule of law (see on the necessity to investigate the accusation of incitement that is contrary to the rule of law ECtHR (GC), Ramanauskas v. Lithuania, Judgment of 5 February 2008 – 74420/01 –, NJW 2009, p. 3565 <p. 3568>, para. 72). This espe- 52

cially applies to the continued influence exerted by the police informant on the first complainant and to the meetings between the first complainant and the undercover investigator that followed the first contact, in which doubts of the first complainant were dissipated, *inter alia*, by viewing an empty flat intended for temporary storage of the narcotic drugs. The Regional Court had to clarify these circumstances, also by interviewing the undercover investigator, because only thus did the actual dimension of the investigating authorities' influence, which was contrary to the rule of law, on the first complainant become apparent. Therefore, the way the Regional Court treated the evidence ultimately comes close to an express prohibition of using incriminating evidence provided by the police informant and the undercover investigator to the detriment of the complainants and the other defendants.

Particularly in this respect, the way in which the Regional Court treated the individual evidence significantly differs from the courts' approach taken in the case decided by European Court of Justice on 23 October 2014 (ECtHR, Furcht v. Germany, Judgment of 23 October 2014 – 54648/09 –). In this case, the undercover investigators' statements had served to refute essential parts of the applicant's allegations (cf. ECtHR, Furcht v. Germany, Judgment of 23 October 2014 – 54648/09 –, para. 9 and para. 14). The reasons of the challenged Regional Court judgment do not show that evidence has been used in this way to the complainants' disadvantage. Taking into account the case-law of the European Court of Human Rights, the criminal courts will nevertheless have to consider whether to explicitly prohibit in comparable cases the use of evidence directly obtained by inciting a crime in a way that violates the rule of law, in particular with regard to the witnesses of the act directly involved in the incitement violating the rule of law. 53

In accordance with § 93d(1) third sentence BVerfGG, no further reasons are given. 54

This decision is final. 55

Landau Kessal-Wulf König

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