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Trial waiver systems

A guide for policy makers

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Fairness, equality, justice

Fair Trials is an international NGO that campaigns for fair and equal criminal justice systems. Our team of independent experts expose threats to justice through original research and identify practical changes to fix them. We campaign to change laws, support strategic litigation, reform policy and develop international standards and best practice. We do this by supporting local movements for reform and building partnerships with lawyers, activists, academics and other NGOs. We are the only international NGO that campaigns exclusively on the right to a fair trial, giving us a comparative perspective on how to tackle failings within criminal justice systems globally.

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Abbreviations and Terminology

CEPEJ	European Commission for the Efficiency of Justice
Charter	Charter of Fundamental Rights of the European Union
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
UK	United Kingdom
US	United States

We have adopted the terms below throughout this report:

The Directive on the right to interpretation and translation	Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings.
The Directive on the right to information	Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings.
The Directive on the right of access to a lawyer	Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty.
The Directive on the right to legal aid	Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European Arrest Warrant proceedings.

The Directive on the presumption of innocence	**Directive 2016/343/EU of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings.**
The Directive on children's rights	**Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings.**
The Directives	**The six EU Directives on procedural rights for suspects and accused persons, namely (1) the Directive on the right to interpretation and translation, (2) the Directive on the right to information; (3) the Directive on the right of access to a lawyer, (4) the Directive on the right to legal aid, (5) the Directive on the presumption of innocence and (6) the Directive on children's rights.**
Suspected and accused person	**Suspect, accused person or other similar status, whether officially recognised as such or de facto. This term corresponds to "everyone charged with a criminal offence" under the ECHR.**
Trial waiver system	**A process not prohibited by law under which suspected or accused persons agree to acknowledge guilt and/or cooperate with the investigative authority in exchange for some benefit from the state, generally in the form of lower sentences.**

Introduction

Everyone is entitled to a fair and public hearing by an independent and impartial tribunal established by law.[1] A trial is where judicial truth is publicly established and a person is found guilty or innocent, following a thorough investigation process and a public discussion of the evidence between the accusation and the defence. A trial is also where an accused person finally has the chance to defend themselves after months or years of criminal investigation, a significant amount of which could have been spent in pre-trial detention. It is where the actions of police and prosecutors are finally exposed to judicial scrutiny.

However, in Europe and beyond, the criminal trial has become "something of a luxury".[2] In order to cope with overburdened criminal justice systems, court delays and backlogs[3], while also trying to save resources, policy makers have replaced trials with legal regimes that encourage suspected and accused persons to admit guilt or cooperate with authorities, thus waiving their right to a full trial in exchange for some benefits.

A recent report by the European Commission for the Efficiency of Justice (CEPEJ), details that in 2016, approximately 42% of the total number of criminal cases[4] were discontinued by prosecutors, 28% were processed before courts and "27% resulted in a penalty or measure imposed or negotiated by the prosecutor".[5] In other words, about 50% of all criminal cases that proceed are processed outside the framework of a trial.

This strive for efficiency has become the main driver of change for modern criminal justice systems.[6] A well-functioning criminal justice system is in the interest of all actors, including suspected and accused persons. However, the pursuit of efficiency cannot be limited to considerations of cost and fast resolutions. There is concern that efficiency is achieved by bypassing the fundamental rights of suspected and accused people.[7] While it is the duty of states to improve the situation of the judiciary or adjust it accordingly in order to cope with backlogs, cost-efficiency driven reforms should not place a disproportionate burden on suspected and accused persons, and the priority should always be given to protecting rights and respecting the rule of law.

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[1] Article 14 of the International Covenant on Civil and Political Rights; Article 47 of the European Union Charter of Fundamental Rights; Article 6 of the European Convention on Human Rights (ECHR).
[2] Jacqueline S. Hodgson, *The Metamorphosis of Criminal Justice, A Comparative Account*, Oxford University Press, 2020, p.13.
[3] Excessively lengthy proceedings remain one of the primary grounds for complaint under Article 6 before the ECtHR. According to the CEPEJ Report of 2018, failure to comply with the reasonable time standard was 2nd out of 24 causes of violation of the Convention in 2012 and 2013, and 5th in 2014, 2015 and 2016. *See* European Commission for the Efficiency of Justice (CEPEJ), *European judicial systems – Efficiency and quality of justice - 2018 Edition, CEPEJ STUDIES No.26,* 2018 (2016 data), p.230, available at: https://rm.coe.int/rapport-avec-couv-18-09-2018-en/16808def9c. *See also,* Marianne Wade, "Meeting the demands of justice whilst coping with crushing caseloads? How Sykes and Matza help us understand prosecutors across Europe", *Journal of Criminal Justice and Security, vol. 2018, No. 5-6*, 2019, p.25, available at: https://research.birmingham.ac.uk/portal/files/101740042/231_695_1_PB.pdf; Jacqueline S. Hodgson, *The Metamorphosis of Criminal Justice, op.cit.*, p.13.
[4] The CEPEJ research includes data from 45 states in the Council of Europe.
[5] CEPEJ, *European judicial systems – Efficiency and quality of justice - 2018 Edition, op.cit.*, p.337.
[6] Marianne Wade, "Meeting the demands of justice whilst coping with crushing caseloads?", *op.cit.*, p.10.
[7] *See e.g.,* The Committee on Legal Affairs and Human Rights, Deal making in criminal proceedings, *The need for minimum standards for trial waiver systems*, 2018, Explanatory memorandum by Mr Boriss Cilevics, available at: https://pace.coe.int/en/files/25041/html#_TOC_d59e139

This guide is based on our research and report *Efficiency over justice: Insights into trial waiver systems in Europe*. The report is based on findings from research conducted over two years with domestic civil society partners that gathered comprehensive and comparative information on the use in practice of trial waiver systems in Albania (Res Publica),[8] Cyprus (Kisa),[9] Hungary (Hungarian Helsinki Committee),[10] Italy (Antigone),[11] and Slovenia (Mirovni Institute).[12] 'Trial waiver system' is defined in the research as "a process not prohibited by law under which suspected or accused persons agree to acknowledge guilt and/or cooperate with the investigative authority in exchange for some benefit from the state, generally in the form of lower sentences". [13] It is employed as an umbrella term, whereas the terminology applied in national contexts is used to refer to specific practices encountered in domestic jurisdictions.

The variety of trial waiver systems, legal systems and socio-economic contexts in Europe makes it difficult to identify specific recommendations. There is no 'one size fits all' model and what works in the context of one jurisdiction will not necessarily be adequate in another. This guide nevertheless seeks to provide to policy makers in Europe multiple levels of recommendations to help mitigate the potential dangers arising from the introduction and uses of trial waiver systems.

This guide provides an overview of the risks associated with trial waiver systems identified in our research (I) and guidance on how to mitigate these risks, including through research and impact assessment (II); structural reform limiting the incentives to waiver the right to a trial (III); the implementation and adaptation of procedural safeguards to the trial waiver context (IV); effective judicial oversight over trial waiver systems (V) and increase oversight over prosecutorial powers through the development of public prosecutorial guidelines (VI).

[8] http://www.respublica.org.al/
[9] https://kisa.org.cy/
[10] https://helsinki.hu/en/
[11] https://www.antigone.it/
[12] https://www.mirovni-institut.si/
[13] The definition excludes therefore systems such as penal orders, conditional disposals or diversion programs (e.g., restorative justice, drug courts) and other systems that either do not require an admission of guilt, or do not lead to a trial waiver but rather to the disposal of the case entirely. Nevertheless, these mechanisms are likely to pose some of the same challenges identified in relation to trial waiver systems in this guide.

I. Research findings on the risks associated with trial waiver systems

Despite the increasing popularity of trial waiver systems, concerns have been expressed about their potential impact on the fairness of criminal justice systems. Researchers have alerted that quantitatively managing caseload has become a central objective that tends to "take precedence over the search for a qualitative adaptation of criminal sanctions, to the point that the fact of responding sometimes seems to count more than the response itself."[14]

If timeliness and efficiency are, in principle, in the interest of all criminal justice actors, including suspected and accused persons, our research indicates that they are the ones who ultimately pay the cost of systemic and persisting flaws at the heart of our criminal justice systems. We have identified the following risks.

- The myth of consent: The legitimacy and legality of trial waiver systems rest on the assumption that a person may freely and knowingly waive their fair trial rights when they see it in their interest to do so. They rest on the concept of consent or party autonomy, borrowed from contract law. Research shows however that people plead guilty for a number of reasons that are entirely independent from the merits of the case, or their guilt or innocence. They are moved by systemic incentives to waive their right to a trial as a full trial could lead to: detention pre-trial for months or years; unavoidable custodial sentences; lengthy and costly proceedings (court costs, lawyer fees) that they would be unable to afford; losing their job or business; losing their housing; and being forced to leave their family. Direct pressure may also be exerted on accused persons to waive their fair trial rights in the name of cost efficiency by overburdened police forces, prosecutors and even courts. Against this background, it is questionable that someone would waive their rights freely. Instead, their decision to 'consent' is not determined by the strength of evidence against them, or actual guilt or innocence, but by fear of the consequences of going to trial.

- Limited access to and ineffective procedural rights: According to regional standards, waivers of fundamental rights are valid if made in full awareness of the facts of the case and the legal consequences of accepting the waiver. This requirement is indissociable from the effective protection of the other procedural rights pre-trial.[15] Our research indicates that accused persons are not systematically assisted by a lawyer when approached by prosecutors to negotiate

[14] Virginie Gautron, "L'impact des préoccupations managériales sur l'administration locale de la justice pénale française", *Champ Pénal, vol.11, 2014*, §23 (free translation), available at: https://journals.openedition.org/champpenal/8715#tocto2n3

[15] *See e.g.,* the six EU Directives on procedural rights for suspects and accused persons: the Directive on the right to interpretation and translation, the Directive on the right to information; the Directive on the right of access to a lawyer, the Directive on the right to legal aid, the Directive on the presumption of innocence and the Directive on children's rights.

a deal, and lawyers do not have the resources and power (e.g., to request or conduct investigations) to provide an effective defence, particularly in legal aid cases. Accused persons and their lawyers do not have timely and full access to case files to prepare their defence; translations of essential documents are lacking and interpretation services unavailable. Without these procedural guarantees, they are not able to knowingly consent to waiving their fundamental trial rights.

- Ineffective judicial oversight: Courts are the last rampart to remedy wrongs in the trial waiver process, but this research indicates that the level of judicial scrutiny over trial waiver processes is dramatically limited in law and in practice. Courts' reviews of the veracity of admissions of guilt and a person's consent can be limited to yes or no questions asked to the accused person at the hearing. They do not have the power to modify agreements and may only accept or reject them. When their only option is to send the case to trial or approve the deal, overburdened courts are structurally incentivised to approve them, even when they present obvious problems. The diminished role of courts in trial waiver systems also means that that there is an accountability gap with respect to police and prosecutors' powers because challenges for violations of procedural rights are not brought to the attention of a court in a trial waiver context. The lack of effective oversight is all the more problematic as accused persons must generally waive their right to appeal a conviction based on a trial waiver.

- Systemic discrimination and racism: Trial waiver systems may play a role in fostering and increasing vulnerabilities and social exclusion as systemic discrimination and racism are likely amplified when punishment is decided behind closed doors.

- Blind spots and the need for research and data collection: Despite their increasing use throughout Europe, trial waiver systems are not monitored nor assessed, and states are unable to verify whether they deliver their intended results. Our research indicates that persons subjected to trial waiver systems do not always benefit from sentence discounts, that trial waiver systems might increase the rate of miscarriages of justice with innocent people admitting guilt for practical reasons, and that their fast and easy use might have the counterproductive effect of widening the criminal justice net, thereby feeding more cases and people (innocent or not) into the system, including into European prisons.

II. The need for research and impact assessment

Trial waiver systems are a policy choice by governments to address the overburdening of criminal justice systems. The purported objectives of trial waiver systems are to save resources and time in criminal proceedings, while more lenient sentences benefit accused persons. However, whether they do in fact offer fair and just relief to criminal justice systems remains to be seen. Years after their implementation, the lack of data collection and impact assessment on their use makes it difficult to determine whether they have achieved these goals.

In 2016, Fair Trials observed that data collection was generally poor in most of the 90 countries studied worldwide as part of *The Disappearing Trial* survey.[16] Where most jurisdictions had introduced trial waiver systems for efficiency reasons, there was a nearly uniform failure on the part of authorities to assess whether these aims were achieved in practice.[17] In a 2018 report on the efficiency and quality of European justice systems, the CEPEJ highlighted that very few Council of Europe states provide data on the use of trial waiver systems and asked that states be in a position to produce such statistics in this regard.[18] In 2021, the same observation can be made.[19] Additionally, little data is collected to establish what cost savings, if any, have actually been made since the adoption of trial waiver systems. It is unclear what the parameters of a cost-benefit analysis of trial waiver systems should be. The 2018 CEPEJ report confirms that states' expenditures on justice have not decreased.[20]

This lack of data also means that there is no monitoring of trial waiver systems' use by practitioners, which, in view of the limited safeguards and restricted judicial oversight, raises serious fundamental rights and rule of law concerns. Potential negative effects of trial waiver systems on fundamental rights and the integrity of the criminal justice system are left unknown, in particular:

- The reality of sentence benefits: A key perceived benefit for an accused person entering into a trial waiver system is a lower sentence. However, without data, there is no certainty that prosecutors are offering sentences that are lower than those that a court would normally impose if there were a full trial. This is problematic because judicial review is often restricted and courts generally are bound by the agreed upon sentence and have no power to change it, but only to reject the agreement altogether.[21] Additionally, there is concern that prosecutors are setting harsher sentences than courts. This could impact the wider criminal justice system as prosecutorial sentencing practices influence courts to raise the

[16] Fair Trials, *The disappearing trial, towards a rights-based approach to trial waiver systems*, 2017, p.32, available at https://www.fairtrials.org/sites/default/files/publication_pdf/Report-The-Disappearing-Trial.pdf
[17] Fair Trials, *ibid.*, p.36.
[18] CEPEJ, *European judicial systems – Efficiency and quality of justice - 2018 Edition, op.cit.*, p.304.
[19] Fair Trials, *Efficiency over justice: Insights over trial waiver systems in Europe*, available at: https://www.fairtrials.org/sites/default/files/publication_pdf/TWSE-report.pdf
[20] CEPEJ, *European judicial systems – Efficiency and quality of justice - 2018 Edition, op.cit.*, p.32.
[21] *See* section V.

average sentences generally imposed, despite the general principle that sentences need to be proportionate and individualised.[22]

- Net widening effect and prison overpopulation: Even though on an individual, case-by-case basis, trial waiver systems might improve the efficiency of proceedings, the time and costs involved mean that these measures could increase rather than reduce caseloads. This is particularly concerning in states that have, in parallel, adopted a criminalisation policy and legislated to expand the scope of their criminal codes. By permitting prosecutors and courts to process more cases in less time, evidence suggests that trial waiver systems are driving more criminalisation and more incarceration. Moreover, because it may be in a person's interest to waive their right to trial, even when innocent or when another legal qualification to the offence would be more appropriate, trial waiver systems artificially create recidivism. Added to this, prosecutors can more easily and quickly prosecute offences with tools such as trial waiver systems when they would otherwise have deemed a criminal response unwarranted. As a result, trial waiver systems contribute to the production of inflated criminal records. They create situations of legal "recidivism" which might result in a person being subject to automatic, harsher punishment if they are prosecuted in the future. Trial waiver systems also lead to a distorted understanding of the reality of criminality based on artificially created situations of recidivism by legal operations.

- Miscarriages of justice and careless investigations: Where evidence is not tested in court, the risk of wrongful conviction increases when cases are processed through trial waiver systems.[23] This phenomenon is vastly documented in the US.[24] Innocent people are pushed to enter into trial waiver systems for a variety of personal and structural reasons.[25] Overworked and under resourced prosecutors having to deal with crushing caseloads and a lack of resources may also be inclined to offer deals in cases that they are not able to adequately investigate. In systems where trial waivers agreements rely heavily on admissions of guilt, there is a risk that as soon as the suspect confesses, either at the investigation stage or at the trial stage before the court, the investigation is considered complete. [26] Investigators have less incentive to ensure that rules on evidence and procedures are complied with if there is little risk that they will be scrutinized at trial. In many legal systems, the evidence becomes irrelevant following an admission of guilt, as the review of the evidence beyond the admission of guilt is limited in practice. In fact, by pleading guilty, a suspect will in practice never exercise their right to challenge the admissibility of evidence and obtain an effective remedy.

[22] *Ibid.*
[23] Marianne Wade, "Meeting the demands of justice whilst coping with crushing caseloads?", *op.cit.*, p.7.
[24] *See, e.g.*, Emily M. West, The Innocence Project, *Court Findings Of Prosecutorial Misconduct Claims In Post-Conviction Appeals And Civil Suits*, 2010, available at: https://www.innocenceproject.org/wp-content/uploads/2016/04/pmc_appeals_255_final_oct_2011.pdf
[25] See sections I and III on the myth of consent and systemic incentives to waive the right to a trial.
[26] *See e.g.,* The Committee on Legal Affairs and Human Rights, Deal making in criminal proceedings, *The need for minimum standards for trial waiver systems*, 2018, Explanatory memorandum by Mr Boriss Cilevics, *op.cit.*, §5.2.

- Extent of impact on racialised and marginalised groups: There is plenty of evidence that justice systems widely discriminate against vulnerable people and people from certain racialised and ethnic groups.[27] Discrimination is also rooted in socio-economical inequalities and impacts people experiencing poverty. There is a clear risk of enhanced pressure on people suffering discrimination in the criminal justice system to waive their full trial rights – including the fact they are targeted by law enforcement authorities, do not speak national languages, are disproportionately represented in the incarcerated population, are not able to pay for lawyers' fees, court costs and any other costs associated with a lengthy trial. Trial waiver systems therefore reproduce and increase vulnerabilities and social exclusion.

To address the above concerns, the starting point is to identify the risks of trial waiver systems by shedding light on blind spots, and to work on limiting the ever-increasing reliance on the criminal justice apparatus that led EU Member States to this system overload. There is a need to understand whether trial waiver systems have reached their cost-efficiency objectives and to measure if, on the contrary, they have had the opposite effect of letting more cases permeate the criminal justice system, with fewer safeguards, therefore increasing workloads and ultimately the prison population. The systematic and thorough data collection by national authorities is necessary to evaluate trial waiver systems' overall impact on justice outcomes and expenditure.

States should collect data on trial waiver systems as part of the evaluation of justice systems, including:

- The number of trial waivers and court proceedings since the introduction of a trial waiver system.
- Percentage of convictions obtained through trial waivers, disaggregated by type of offence charged.
- Percentage of accused persons in pre-trial detention who waive their right to trial, versus the percentage of accused persons not in pre-trial detention who do so.
- Average length of pre-trial detention in cases resolved by trial waivers versus those which proceed to trial.
- Average sentences imposed on accused persons who waive their right to trial, versus those who proceed to trial (disaggregated by offence charged).
- Number of case disposals per year before the introduction of a trial waiver system versus the number of case disposals following the introduction of a trial waiver system.
- Rate of arrest and rate of prosecution following arrest prior to and following the introduction of a trial waiver system.
- Percentage of people who waive their right to a trial who are subsequently exonerated.
- Percentage of suspected and accused persons who waive their right to a trial without legal representation.

[27] Fair Trials, *Disparities and discrimination in the European Union Criminal Legal System*, January 2021, p.3, available at: https://www.fairtrials.org/sites/default/files/publication_pdf/Disparities-and-Discrimination-in-the-European-Unions-Criminal-Legal-Systems.pdf

- Acquittal and sentencing rates per type of procedure (full trial, plea agreement, summary trial), to understand and address potential disparities.
- Where available data exist, use of trial waiver mechanisms by age, gender, nationality or ethnic origin.
- Where available data exist, sentence type and length after a trial waiver by age, gender, nationality or ethnic origins.
- Budget allocated to the criminal justice system since the introduction of trial waiver systems.
- Average prison population prior to and following the introduction of a trial waiver system.

III. Structural reform to limit the systemic incentives to waive the right to a trial

Existing research identifies multiple forms of indirect pressure on accused persons to consent to a trial waiver, which flow from the dysfunctions and failures of criminal justice systems. Accused persons might be pressured or coerced to consent to trial waivers to avoid the uncertainties of a trial outcome, long pre-trial detention periods, and the cost of a trial. In these cases, the person's decision to 'consent' is not determined by the strength of evidence against them, nor their actual guilt or innocence, but by fear of the consequences of going to trial.[28] Research in the UK shows that people sometimes plead guilty even when innocent, and even when they do not believe they would be convicted at trial.[29]

People are in effect being faced with impossible sets of 'choices'. When the decision to enter into a trial waiver system is influenced by external factors independent of the risks and rewards of trial, are suspected or accused persons able to make constraint-free decisions?[30] In this context, autonomy becomes a legal fiction[31] and relying on consent as a basis to convict threatens fundamental rights and the rule of law.[32] It is questionable

[28] *See eg* Rebecca K. Helm, R. Dehaghani, D. Newman, "Guilty plea decisions, moving beyond the autonomy myth", *The Modern Law review*, 2021, p.20 (Table 1), available at: https://ore.exeter.ac.uk/repository/bitstream/handle/10871/125664/1468-2230.12676.pdf?sequence=5&isAllowed=y, showing that actual innocence or guilt only came in fourth position among seven other reasons for pleading guilty (from the most to the less often cited reasons : sentences and sentence discount, strength of evidence, time and delay involved in trial, factual guilt or innocence, financial concerts, remand in custody, enhanced vulnerability).
[29] Rebecca K. Helm, "Constrained Waiver of Trial Rights? Incentives to Plead Guilty and the Right to a Fair Trial", *Journal of law and society; vol. 46*, 2019, p.440, available at: https://onlinelibrary.wiley.com/doi/epdf/10.1111/jols.12169
[30] Rebecca K. Helm, "Constrained Waiver of Trial Rights?", *op.cit.*, p.432,; Josh Bowers, *Punishing the innocent,* University of Pennsylvania Law Rev., vol. 156, 2008, p.1117, available at: https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1233&context=penn_law_review
[31] Rebecca K. Helm, R. Dehaghani, D. Newman, "Guilty plea decisions, moving beyond the autonomy myth", *op.cit.,* p.30.
[32] Juliet S. Horne, *A plea of convenience – an examination of the guilty plea in England and Wales*, University of Warwick, School of law, 2016, p.203, available at: http://wrap.warwick.ac.uk/86730/8/WRAP_Theses_Horne_2016_v2_rsig.pdf

whether decisions to enter a trial waiver system, even free from direct pressure or duress, are completely free from constraint.

Limiting external constraints to admit guilt by rightsizing the criminal justice system is essential. It requires, aside from procedural safeguards and effective judicial oversight,[33] structural reform including decriminalisation, pre-trial detention reform and addressing institutional racism and discrimination.

Decriminalisation as an alternative answer to overburdened criminal justice systems

In order to cope with delays and backlogs without expending more resources on the criminal justice system, policy makers have favoured solutions that aim to reduce the time and resources allocated to individual cases. But the overburdening of the system is not simply caused by a lack of resources. It is also due to an increase in the number of cases that make their way to the criminal justice system. It is the result of public policies that tend to over-criminalise and over-punish. Criminal legislation has inflated over the recent years, both at a national[34] and European[35] level. Researchers in Belgium have described a "galloping penal inflation linked to the increased use of the law as a means of social regulation. (…) [I]n our contemporary societies, there is hardly a social problem that does not have a legal response and hardly a legal rule that does not have a criminal sanction attached to it." [36] By enabling more cases to be processed in less time, by relying on admissions of guilt instead of thorough investigations, trial waiver systems might in fact be a key driver towards the mass processing of cases which would not otherwise have been prosecuted, effectively widening the net of the criminal justice system and leading to overcriminalisation.

An alternative (or complementary) policy solution to reduce caseload is to decriminalise certain behaviours, as some European states have done in respect of drug possession and use. It is a policy decision to determine which behaviours are criminalised. States can choose to address these behaviours in different ways. If decriminalisation is applied to certain categories of offences, the criminal justice system receives fewer cases and can focus on other categories of offences that are considered to require a criminal law response.

There are different models of decriminalisation. It can take place through a formal legal approach (legal reform) e.g., some countries have had decriminalisation policies on drug use in place since the early 1970s; others never criminalised drug use and possession to

[33] See sections IV and V.
[34] Jörg Martin Jehle, Marianne Wade, *Coping with overloaded criminal justice systems*, *op.cit.*, p.60.
[35] *See e.g.* European Parliament, *Legislative proposal to prevent and combat certain form of gender based violence,* September 2021, available at: https://www.europarl.europa.eu/legislative-train/theme-a-new-push-for-european-democracy/file-legislative-proposal-on-gender-based-violence and European Parliament, *Proposal to extend the list of EU crimes to all form of hate crime and hate speech*, September 2021, available at: https://www.europarl.europa.eu/legislative-train/theme-a-new-push-for-european-democracy/file-hate-crimes-and-hate-speech
[36] Yves Cartuyvels, "Les droits de l'homme : frein ou amplificateur de criminalisation ?" *in H. Dumont, F. Ost, S. Van Drooghenbroeck (dir.), La responsabilité, face cachée des droits de l'homme*, Bruylant, Bruxelles, 2005, pp. 391-439 (free translation), available at: http://hdl.handle.net/2078.3/150101

begin with. Decriminalisation can also take place through practice, e.g., de-prioritising the policing and prosecution of certain offences. In this case, the behaviour remains 'criminal' but is never actually punished (also known as a 'depenalisation' policy). Drug possession and use is an example of decriminalisation using legal reform.[37] However, decriminalisation in practice should not mean punishing through other means, e.g., administrative punishment. [38]

Diversion from prosecution also fits into this less formal decriminalisation approach. It can significantly reduce the workload of courts and prosecutors and ensure that the people involved can stay out of the criminal justice system entirely. Evidence suggests that by using other, less stigmatising, and often more appropriate responses to crime, accused people are less likely to reoffend.[39] For instance, recent research in the US suggests that not prosecuting minor offences reduces the risk of recidivism by over 40%.[40] Diversion programs also reduce costs[41] and limit the inequality created by involvement in the criminal justice system.[42]

Decriminalisation should be the main policy solution to tackle overburdened criminal justice systems.

- States should examine, develop, pilot and roll-out policies aimed at the decriminalisation of certain categories of offences, such as minor offences that do not involve a significant risk to public safety.
- States should encourage diversion from prosecution for a selection of offences that cannot be decriminalised. These could include diversion programs focusing on treatment, or conciliation efforts between alleged victims and offenders.

Pre-trial detention reform

The overuse of pre-trial detention creates a systemic incentive for accused persons to enter trial waiver systems to avoid or limit their time in detention. Where pleading guilty

[37] *See* Release, *A quiet revolution: Drug decriminalisation policies in practice across the globe*, available at: https://www.opensocietyfoundations.org/publications/quiet-revolution-drug-decriminalisation-policies-practice-across-globe.

[38] The risk is that states decriminalise on the one hand, but resort to administrative punishment instead, thereby shifting the power to punish from criminal justice actors to administrative agents and courts. Punishment still exists but in another form. In countries that treat some minor offences as administrative, rather than criminal, offences, administrative fines can be even more burdensome than criminal penalties, with similar effects on financial solvency, but with fewer procedural safeguards. *See* Fair Trials, *Day Fines Systems : Lessons from global practice*, June 2020, available at: https://www.fairtrials.org/sites/default/files/publication_pdf/Day%20Fines_Fair%20Trials_FINAL.pdf.

[39] *See e.g.*, United Nations Office on Drugs and Crime ("UNODC"), *Introductory Handbook on The Prevention of Recidivism and the Social Reintegration of Offenders*, 2018, pp.67 and 78, available at: https://www.unodc.org/documents/justice-and-prison-reform/18-02303_ebook.pdf; Centre for Health and Justice, A National Survey of Criminal Justice Diversion Programs and Initiatives, 2013, p.17, available at: https://www.centerforhealthandjustice.org/tascblog/Images/documents/Publications/CHJ%20Diversion%20Report_web.pdf

[40] Amanda Y. Agan, Jenfier L. Doleac, Anna Harvey (National Bureau of Economic Research), *Misdemeanor prosecution*, March 2021, available at: https://www.nber.org/papers/w28600

[41] *See e.g.,* Michael Mueller-Smith, Kevin T. Schnepel, "Diversion in the Criminal Justice System", *The Review of Economic Studies*, *Volume 88, Iss. 2*, March 2021, Pages 883–936.

[42] *See e.g.,* Brennan Center for Justice, *Conviction, Imprisonment, and Lost Earnings How Involvement with the Criminal Justice System Deepens Inequality*, 2020, available at: https://www.brennancenter.org/sites/default/files/2020-09/EconomicImpactReport_pdf.pdf

could mean immediate release and going to trial could mean remaining in detention until the case is heard, the choice is often simple. In a context where pre-trial detention rates are still excessively high across Europe,[43] many accused persons know that a full trial probably means spending months, if not years, in pre-trial detention. It's easier to take the option that would allow them to stay out or to secure a shorter sentence, keep their job, their home, and allow them to provide for their families.

States should implement reforms to limit pre-trial detention, and make sure that it is only used as a measure of last resort.[44] These reforms should include:

- Strict requirements for courts to ensure that the risk of pre-trial detention is not used to encourage an accused person to waive their right to a trial; and
- the establishment of a challenge mechanism to enable an accused person to obtain a remedy in the event of the misuse of pre-trial detention.

Tackling systemic racism and discrimination

There is plenty of evidence that justice systems widely discriminate against vulnerable and marginalised groups.[45] For these groups and individuals, the pressure to waive their trial rights is undoubtedly stronger, and so are the risks associated with trial waiver processes. Given the high incarceration rates among socially and racially discriminated communities in Europe, the fear of prison sentences leads individuals – even when innocent – to accept deals that do not involve or minimize their time behind bars. In that sense, trial waiver systems may play a role in fostering and increasing vulnerabilities and social exclusion.

States should take action to address the racism and discrimination that is inherent in criminal justice systems, including in trial waiver systems.

- States should monitor bias or discrimination in the operation of police activity, criminal investigations, and proceedings.[46]
- The EU and Member States as part of their Action Plans Against Racism[47] should fully and actively engage impacted people and representatives of impacted communities in reform to eradicate racism in criminal justice systems, including in overcriminalisation and the operation of trial waiver systems.[48]

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[43] *See,* Fair Trials, *Pre-trial detention rates and the rule of law in Europe*, available at: https://www.fairtrials.org/publication/pre-trial-detention-rates-and-rule-law-europe

[44] *See also* Fair Trials, *A Measure of Last Resort? The practice of pre-trial detention decision making in the EU*, 2016, available at: https://www.fairtrials.org/sites/default/files/publication_pdf/A-Measure-of-Last-Resort-Full-Version.pdf, and in *Pre-Trial Detention Rates and the Rule of Law in the European Union* – Briefing to the European Commission, April 2021, available at: https://www.fairtrials.org/sites/default/files/publication_pdf/Pre-Trial%20Detention%20Rates%20and%20the%20Rule%20of%20Law.pdf

[45] *See also* Fair Trials, *Disparities and discrimination in the European Union Criminal Legal System*, *op.cit*.

[46] *See also* Fair Trials, *Ibid.,* pp.12-13.

[47] EU Anti-racism Action Plan 2020-2025, available at: https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combatting-discrimination/racism-and-xenophobia/eu-anti-racism-action-plan-2020-2025_en

[48] *See also* Fair Trials, *Disparities and discrimination in the European Union Criminal Legal System*, *op.cit.,* pp.12-13.

IV. Implementing and adapting procedural safeguards to trial waiver systems

According to regional standards, waivers are valid if made in full awareness of the facts of the case and the legal consequences of accepting the waiver. This requirement is indissociable from the effective protection of the other procedural rights pre-trial. It appears however that accused persons are not systematically assisted by a lawyer when approached by prosecutors to negotiate a deal, and lawyers do not have the resources to provide an effective defence, particularly in legal aid cases. Accused persons and their lawyers do not have timely and full access to the case file to prepare their defence, and where the suspect or accused person doesn't speak the language of the proceedings, translations of case file documents and interpretation services may be unavailable. As a result, suspected and accused persons are often deprived of the necessary assistance, knowledge and means to enter into trial waiver systems knowingly and voluntarily. Strong procedural safeguards are essential to balance the power of prosecutors in out of court processes.

Information on trial waiver systems

The right to information protected in EU law applies from the moment the person is made aware that they are suspected or accused of a criminal offence.[49] It requires authorities to "promptly" (i) inform suspected and accused persons of their procedural rights and (ii) to provide arrested persons with a letter of rights they can keep throughout their detention. [50]

But the information is limited to the general procedural rights to which the person is entitled. It does not cover information specifically on trial waiver systems. There is generally no specific obligation for police and prosecutors to provide information on the process or on the consequences of waiving the right to a full trial. In systems where some information is provided, concerns were raised about the accessibility of the information and language used by authorities. The systems seem to rely on lawyers, when present, and courts to adequately inform persons of their rights in the trial waiver process and of the consequences of waiving their right to a trial. The lack of further information, particularly when the person is not assisted by a lawyer, strengthens prosecutors' bargaining power, and likely their ability to convince (or pressure) a person to waive their right.

Domestic laws should be amended to require that investigative authorities, prosecutors and courts provide clear and understandable information on trial waiver systems to accused persons.

[49] Article 2(1) of the Directive on the right to information.
[50] Article 4(1) of the Directive on the right to information.

- Once a trial waiver system is considered, an accused person must be adequately informed of their rights as part of the process; the consequences of waiving their rights; and the consequences of a criminal conviction, including civil claims by the victim, immigration status, child custody, access to housing, loans, education, etc.
- Criminal justice actors must be trained to use plain and accessible language,[51] especially when informing children or adults in situations of vulnerability.

Access to a lawyer and effective assistance

The right to a lawyer under EU law requires that "suspects or accused persons shall have access to a lawyer from whichever of the following points in time is the earliest: (a) before they are questioned by the police or by another law enforcement or judicial authority; (…) (c) without undue delay after deprivation of liberty; (d) where they have been summoned to appear before a court having jurisdiction in criminal matters, in due time before they appear before that court."[52] The key role of lawyers at the pre-trial stage has been defined by the ECtHR on many occasions.[53] They have a preventive function in limiting the risk of abuse, violence and coercion by official authorities.[54] In practice, lawyers can inquire about and identify signs of victimisation and file claims on behalf of their clients. The ECtHR states: "one of the lawyer's main tasks pre-trial is to ensure respect for the right of an accused [person] not to incriminate himself and for his right to remain silent."[55] In addition, the effectiveness of the right to a lawyer has direct repercussions on the accessibility to other procedural safeguards. Access to a lawyer must enable suspected and accused persons to benefit from, "the whole range of services specifically associated with legal assistance.[56]

A lawyer's assistance is key in a trial waiver setting. Lawyers help reduce direct and indirect coercion. They help people navigate the system, collect evidence, evaluate the strength of the evidence, and ultimately advise them on their best option. Where a person is detained, a lawyer is essentially the only contact they may have with the outside world. They are crucial in helping to challenge pre-trial detention, and as such, reducing the risk that a person may consent to a trial waiver to avoid spending more time in detention.

When it is available, mandatory assistance of a lawyer in trial waiver systems is sometimes limited to the formal negotiation process in the context of sentence bargaining. However, negotiations often take place after the person has been questioned by the police, often unassisted. Investigation techniques are often driven by the objective to secure a confession, leading to the use of deceitful techniques, coercion and sometimes violence. Trial waiver systems, because they rely on an admission of guilt,

[51] Fair Trials, *Letters of rights in plain language*, 2021, available at: https://www.fairtrials.org/letters-rights-plain-language
[52] Article 3(2) of the Directive on the right of access to a lawyer.
[53] *See, e.g.,* ECtHR, *Beuze v. Belgium*, *op.cit.*
[54] *Ibid.*, §126.
[55] *Ibid.*, §128.
[56] ECtHR, A.*T. v. Luxembourg*, no 30460/13, Judgment of 14 September 2015, §64, available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-153960%22]}

amplify this incentive for police and prosecutors. In this scenario, lawyers can act as a key protection to help prevent abuses and guarantee a fair process.

Even when present, lawyers are often ill-equipped to offer an effective defence as the law does not allow them to collect evidence or to request further investigations. They are generally not entitled, in law and or in practice, to investigate or request further investigation in the course of the negotiations. They are therefore less able to influence the charges and the sentence at that stage.

To ensure that all suspected and accused persons benefit from the effective assistance of a lawyer pre-trial, it is crucial that states guarantee the following:

- Mandatory assistance should be required for all discussions with prosecutors which are part of negotiations – even when these discussions are considered to be informal.
- Accused persons who plead guilty in a trial waiver context should always be advised and assisted by a lawyer before doing so.
- Lawyers should be able to investigate or request the collection of further evidence, to the prosecutor or a judicial authority and a decision by the prosecutor or judicial authority to reject the request should be subject to appeal.

Effective and qualitative legal aid systems

Trial waiver systems can become coercive when the time and cost involved in going to trial is prohibitive compared to the time and cost involved in entering a trial waiver system.[57] Criminal proceedings and investigations can be lengthy, especially when police, prosecutor offices and courts are overburdened. A lawyer's assistance and court costs might be very expensive. Accused persons might consider that their time, energy and money could – and most often must – be invested elsewhere, including into housing, education, medical care, children or other dependents. In addition, the necessity to 'get it over with' quickly pushes suspected or accused persons to consent to waiving their right to a trial.[58]

The Directive on legal aid provides that suspected and accused persons who have a right to a lawyer are also entitled to legal aid, which EU Member States can make conditional on the person meeting a means test,[59] a merits test,[60] or both.[61] However in many European countries that apply a means test, legal aid remains insufficient, so that people on low incomes cannot access legal aid nor can they afford a private lawyer. Unless

[57] Rebecca K. Helm, "Constrained Waiver of Trial Rights?", *op.cit.*, p.427.
[58] Rebecca K. Helm, R. Dehaghani, D. Newman, "Guilty plea decisions, moving beyond the autonomy myth", *op.cit.,* p.23.
[59] When applying a means test, Member States must consider factors such as the income, capital and family situation of the person concerned, as well as the costs of the assistance of a lawyer and the standard of living in that State (Article 4(3) of the Directive on legal aid).
[60] When applying a merits test, Member States shall take into account the seriousness of the offence, the complexity of the case and the severity of the sanction at stake (Article 4(4) of the Directive on legal aid).
[61] Article 4(2) of the Directive on legal aid.

mandatory assistance is in place, they face criminal proceedings, including trial waiver processes, alone. When available, legal aid does not cover the cost of proceedings under EU law and in many European jurisdictions. Moreover, legal aid budgets are typically underfunded. The CEPEJ reported that 17 Council of Europe Member States had reduced the implemented budget for legal aid between 2014 and 2016.[62]

Even when a lawyer assists the person in a trial waiver system, legal aid fees are often insufficient to allow lawyers to provide an effective defence. This includes the ability to analyse the case file, investigate or request further investigation, meet and discuss with their client (including in prison when they are detained) or challenge their detention, etc. When legal aid lawyers receive flat fees for the entire criminal proceedings, irrespective of whether there is a trial, they are incentivized to advise their clients to enter into trial waiver systems.

To ensure that all suspected and accused persons benefit from the assistance of a lawyer in trial waiver mechanisms, it is crucial that efficient legal aid schemes with reasonable access criteria are put in place.

- Legal aid schemes should be sufficiently inclusive to benefit all persons who cannot afford private lawyer fees.
- Court costs, costs for copies of the criminal file, and other fees associated with the proceedings and the person's defence (expert fees) should be covered by legal aid.
- Legal aid lawyers' fees should be sufficient to allow them to provide an effective defence in the context of trial waiver systems.
- Legal aid lawyers' fees should not be set at a level that puts financial pressure on lawyers to encourage their clients to waive their right to a trial.

Timely and full disclosure of case materials

The Directive on the right to information requires EU Member States to guarantee that suspected and accused persons are provided with information about the criminal act they are suspected or accused of committing "promptly"[63] and that they are granted access to all material evidence "in due time to allow the effective exercise of the rights of the defence and at the latest upon submission of the merits of the accusation to the judgment of a court".[64]

In practice, suspected or accused persons face challenges accessing case materials in criminal proceedings pre-trial.[65] Prosecutors may propose to initiate negotiations without being required by law to give the accused person or their lawyer access to the

[62] CEPEJ, *European judicial systems – Efficiency and quality of justice - 2018 Edition, op.cit.*, p. 84.
[63] Articles 3(1) and 4(1) of the Directive on the right to information.
[64] Article 7(3) of the Directive on the right to information.
[65] Fair Trials, *Where's my lawyer - making legal assistance in pre-trial detention effective*, 2019, pp.21-22, available at: https://www.fairtrials.org/sites/default/files/publication_pdf/Wheres-my-lawyer-making-legal-assistance-in-pre-trial-detention-effective.pdf; *Inside Police Custody 2*, 2018, p.40, available at: https://www.fairtrials.org/sites/default/files/publication_pdf/Inside-Police-Custody-2-JUSTICIA-Comparative-Report.pdf.

case file. In addition, practical problems impede on the effectiveness of the right, in particular in relation to untimely disclosure or to the cost of accessing case material. Prosecutors may refuse or delay the provision of copies of the case files or accused persons may need to pay to obtain copies of the case materials.

Difficulties in accessing case materials place the accused persons and their lawyers in a weaker position, unable to weigh up their chances should they decide to go to trial. The informational imbalance in terms of knowing what the state holds (or not) against a person clearly affects both parties' positions in the negotiation. While the prosecutor will maintain the upper hand, the lack of access to the case materials places the accused person in a situation of negotiating 'blind-folded'.

Finally, there is evidence that trial waiver systems might incentivise police and prosecutors not to investigate adequately, and instead rely extensively on system pressures leading people to admit guilt in the hope of early and clement outcomes. The risk of wrongful convictions and poor-quality investigations could be addressed in part by requiring prosecutors to provide more extensive disclosure of evidence than may have ordinarily occurred at the pre-trial stage of a full trial procedure.

To ensure that all suspected and accused persons are able to make informed choices about waiving their right to a trial, it is crucial that states guarantee the timely, full and effective disclosure of case materials.

- Accused persons should have enough time to review the evidence, investigate and prepare a defence;
- Full disclosure of the criminal file (including exculpatory evidence) must be provided sufficiently early before starting the negotiation process or before the hearing, to allow accused persons and their lawyers to adequately assess the benefits and risks of waiving the right to a trial.

Interpretation and translation of key documents

The Directive on the right to interpretation and translation requires EU Member States to guarantee that: "suspected or accused persons who do not speak or understand the language of the criminal proceedings concerned are provided, without delay, with interpretation during criminal proceedings before investigative and judicial authorities, including during police questioning, all court hearings and any necessary interim hearings."[66] In addition, persons who do not understand the language of the criminal proceedings must be "within a reasonable period of time, provided with a written translation of all documents which are essential to ensure that they are able to exercise their right of defence and to safeguard the fairness of the proceedings."[67]

States must implement specific obligations with respect to the timing of access to translations and interpretation services in the context of trial waiver systems. In a trial waiver setting, the lack of access to interpretation services and translations can result in accused persons entering sentence bargaining agreements or pleading guilty without sufficient understanding of the charges and evidence against them and of the

[66] Articles 2(1) of the Directive on the right to interpretation and translation.
[67] Articles 3(1) of the Directive on the right to interpretation and translation.

consequences of their choice. The lack of interpretation impacts their ability to take part in the discussion with the prosecutor and to adequately consult their lawyers to prepare their defence.

To ensure that all suspected and accused persons are able to communicate with their lawyers, prosecutors and the police, and make informed choices about waiving their right to a trial, it is crucial that states guarantee a timely and effective access to interpretation services and the translation of all necessary documents to prepare their defence.

- Quality interpretation services should be available for all interactions with the police, lawyers, prosecution services and courts.
- Timely translations of key documents in the case file must be provided to the accused person.

Safeguards where trial waiver systems fail or in cases involving multiple accused persons

Domestic laws need to regulate the admissibility of evidence obtained during trial waiver negotiations. In cases that involve multiple accused persons, the admission of guilt by one person might implicate the others. The use of trial waivers and the admissibility of evidence obtained through that process in the subsequent trial of a co-accused person raise various concerns. In particular, co-accused persons who have admitted guilt in a context of a trial waiver system may be compelled, as part of the trial waiver agreement, to testify against another accused person at trial. Considering that many reasons independent from the truth may lead a person to admit guilt, this raises serious doubts about the credibility of co-accused persons' testimony.

The ECtHR recently stressed that safeguards need to be put in place to ensure that statements made in the context of a plea agreement are not used against a co-accused at trial: "the quality of *res judicata* would not be attached to facts admitted in a case to which the individuals were not party. The state of the evidence admitted in one case must remain purely relative and its effect strictly limited to that particular set of proceedings."[68] The Court explained that this was all the more the case in a context where facts were assumed rather than proven: "the establishment of facts had been a result of plea-bargaining, not the judicial examination of evidence.

Consequently, the facts relied on in that case had been legally assumed rather than proven. As such, they could not have been transposed to another set of criminal proceedings without their admissibility and credibility being scrutinised and validated in those other proceedings, in an adversarial manner, like all other evidence."[69] The Court also made clear that when a person pleads guilty in a trial waiver context, their later testimony in a co-accused person's case cannot be considered credible: "X was compelled to repeat his statements made as an accused during plea-bargaining. Indeed, if during the applicants' trial X's earlier statement had been exposed as false, the

[68] ECtHR, *Navalnyy and Ofitserov v. Russia*, nos. 46632/13 and 28671/14, judgment of 4 July 2016, §105, available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-161060%22]}
[69] *Ibid.*

judgment issued on the basis of his plea-bargaining agreement could have been reversed, thus depriving him of the negotiated reduction of his sentence."[70]

Another concern is that, where proceedings are disjoined, the same judge may both rule on the admissibility of a trial waiver system (and hear incriminating statements against co-accused persons) and adjudicate at the trial of a co-accused person.

Similarly, domestic laws need to adequately protect accused persons against the use of statements obtained during a trial waiver negotiation or hearing, if the trial waiver system fails and a trial ensues. In some countries, there is simply no obligation to remove statements made in the context of the negotiations from the case file and research suggests that judges may take them into consideration as evidence corroborating the person's guilt. In addition, the same judge may reject a trial waiver system, involving an admission of guilt, and subsequently adjudicate on the same case at trial.

States should ensure that evidence obtained in the context of a trial waiver system negotiation, whether informal or not, or at the hearing on the trial waiver, is not used in following proceedings should the trial waiver process fail.

In cases where agreements are not concluded, or guilty pleas are not approved by courts:

- The law should provide for the automatic exclusion from the criminal file and the inadmissibility of statements or evidence obtained in the context of negotiations (including informal) with prosecutors and the police, or at hearings where the trial waiver system is discussed, including guilty pleas the preparatory hearing.
- The same judge, panel or court should not adjudicate on the failed trial waiver process and the subsequent trial of the accused person in the same case.

In cases that involve multiple accused persons:

- Statements or other evidence obtained in the context of a trial waiver process with co-accused persons in the same or related case, should not be admitted into evidence at another co-accused person's trial.
- The same judge, panel or court should not adjudicate on a trial waiver and a trial in the same case involving multiple accused persons.

V. Effective judicial oversight over trial waiver systems

Considering the limited procedural rights pre-trial and the incentives pushing accused persons to admit guilt even when innocent, courts operate as the rampart to remedy wrongs in the trial waiver process. However, in practice, courts' review of the veracity of admissions of guilt and the persons' consent is often limited to yes or no questions asked to the accused person at the hearing. In addition, legal frameworks tend to limit their

[70] ECtHR, *ibid.*, §109; *See also,* CJEU, *AH and others*, C-377/18, 5 September 2019, §51, available at : https://curia.europa.eu/juris/document/document.jsf;jsessionid=F75E249450A296CDFA807A72D5A03FE7?text=&docid=217488&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=5719088.

power to modify agreements, giving courts the option only to accept or reject a trial waiver agreement. Overburdened courts are structurally incentivised to approve them, even when they present obvious problems.

The diminished role of courts in trial waiver systems also means that that there is an accountability gap with respect to police and prosecutors' powers. Judicial review should be sufficient to verify the integrity of the investigation and pre-trial phase, the evidence and charges, the person's valid consent to a trial waiver and finally the appropriateness of the sentence proposed. What this review requires in practice in terms of scope and level of scrutiny will depend on each jurisdiction and legal system. Increased judicial scrutiny inevitably means more time spent at hearings on trial waiver systems, but is essential to ensure that fundamental rights and integrity of justice systems are preserved.

Effective remedies for rights violations

In many EU countries, it is typically at the trial hearing where challenges for violations of fundamental or procedural rights, including unlawful arrest, search, or any form of coercion – including to waive fundamental rights – are brought to the attention of the court.[71] The right to an effective remedy is organised as such: the remedy for a violation often arrives very late in the process, after courts are able to assess the overall fairness of the proceedings, when a person is ultimately tried.[72] Available remedies can take different forms, including the exclusion of evidence obtained in violation of the person's rights or a diminished probative value, a reduced sentence, and in some instances the dismissal of the case.[73]

But in the context of trial waiver systems, courts have limited power to review the fairness of the proceedings on their own initiative. Accused persons are not incentivised to challenge rights violations, as this could lead the court to reject the request to approve a trial waiver agreement or an admission of guilt. Moreover, accused persons might not get a second chance to flag mistreatment and violations of their rights down the road as the right of appeal may be drastically limited after a trial waiver mechanism has been entered into.

In practice, courts must generally verify whether the specific procedural requirements exhaustively set out in law have been met for a specific trial waiver. They generally do not, however, have the power to verify on their own motion that other procedural rights were guaranteed in the investigation phase and that the resulting evidence, including where relevant a confession, was gathered legally and in full observance of procedural safeguards.

This is all the more problematic when courts have an obligation to control that the charges are supported by evidence.[74] Indeed, in the absence of effective remedies for procedural rights violations in the course of the investigation, and in particular of

[71] Anneli Soo, "(Effective) Remedies for a Violation of the Right to Counsel during Criminal Proceedings in the European Union: An Empirical Study*", Utrecht Law Review, Vol. 14, Issue 1*, 2018.
[72] ECtHR, *Beuze v. Belgium*, *op.cit.*
[73] Fair Trials, *Unlawful evidence in Europe's Courts: principles, practice and remedies*, available at: https://www.fairtrials.org/sites/default/files/publication_pdf/DREP-report_final.pdf
[74] *See* section V.

evidentiary remedies such as the exclusion of unlawfully obtained evidence, courts do not verify the legality and reliability of evidence in light of how it was obtained. Courts that do look at the case file may inevitably look at tainted or unlawful evidence with limited probative value, including statements obtained under duress or in violation of the right to a lawyer.

Ultimately, fundamental rights violations during the pre-trial phase can become a part of the negotiation process in the context of sentence bargaining and guilty pleas at the pre-trial hearing. In principle, the person would raise procedural rights violations at trial and obtain the exclusion of key evidence as a result.[75] In the context of negotiations with the prosecutor, the violation of procedural rights may become one matter for discussion, and leverage for accused persons to reduce the sentence or limit the charges.

In order to guarantee the right to an effective remedy, national laws should provide for an opportunity to challenge procedural rights violations in the context of trial waiver systems. Any findings of a violation should be considered by courts in their assessment of the fairness of the process overall and the determination of the sentence.

- Trial waiver processes should provide for the possibility to raise procedural rights violations in a timely and meaningful manner before a court which oversees investigation and the trial waiver process.
- Courts should have at a minimum the power and means to review the fairness of the procedure on their own motion and upon request by the accused person. In particular, they should be able to inquire into any abuse or violations of fair trial rights including the right to be assisted by a lawyer when questioned by the police, the right to access case materials, the right to interpretation and translation services, and the right to be informed.
- Courts should have at a minimum the power and means to grant an effective remedy in the event of a violation of procedural rights or any other abuse by public authorities. An effective remedy in this context could take the form of: (i) a reduced sentence; (ii) the exclusion of evidence; (iii) additional time to prepare a defence when procedural rights were delayed; and (iv) where appropriate the dismissal of the case or de novo reopening of the case in cases of serious violations.
- Domestic legislation should impose the adequate recording of interactions between police, prosecutors and suspected and accused persons, irrespective of whether they are considered formal or informal, to allow for an effective judicial control of the fairness of the process.
- Records must be included in the criminal file and made available to defence lawyers and their clients.
- Accused persons should not be required to surrender their right to appeal when entering trial waiver systems.
- Appeal courts should have the power to order the reopening of the case and order a full trial, or dismiss the case.
- Accused persons should be allowed to withdraw their plea at any point, even on appeal.

[75] However, see the shortcomings in regional standards and domestic practice on evidentiary remedies, in Fair Trials, *Unlawful evidence in Europe's Courts, op.cit.*

Effective judicial review of the investigation, evidence and charges

When cost-efficiency considerations predominate, there is a risk that convictions rely heavily on acknowledgment of guilt, and that investigations are incomplete. An effective judicial scrutiny incentivises a thorough investigation of cases, even in trial waiver systems. Considering all factors that might lead a person to admit guilt, including when they are innocent, a confession should never constitute the only piece of evidence that is considered by the court. Courts need to assess whether there is sufficient independent evidence that supports an admission of guilt and examine it accordingly. Ensuring access to effective remedies would also work as a safeguard against possible biases that may have influenced prosecutors' decisions, in particular decisions regarding the person's guilt.

In order to guarantee an effective review of the trial waiver process, courts should be given the power and time to control the evidence and the fairness of the investigation.

- Courts should have the power and means to review the evidence to ensure that an admission of guilt is sufficiently supported by independent evidence and that there is no evidence that directly contradicts it.
- Courts should ensure that the charges correspond to the evidence in the case.
- When an admission of guilt is not sufficiently corroborated by independent evidence, or where the charges are not supported by sufficient evidence, courts should have the power to take appropriate measures including to reject the trial waiver request and refer the case to the prosecutor or to trial.
- When a trial ensues, the fact that the trial waiver system failed should not be used to increase the sentence of the person should they be convicted (i.e., a trial penalty).

Effective judicial review of consent to the waiver

As explained above, a person might be incentivised to waive their right to a trial for a series for reasons independent from their guilt or innocence, or from their chances at trial.[76] It is difficult, in the context, to treat a person's consent to waive their right to a trial as being voluntary. Judicial scrutiny over consent should go further than the mere questioning of the accused at the hearing, asking for confirmation of their admission of guilt and whether they have understood the consequences of waiving their right to a trial. Courts should have regard to the systemic pressure weighing on accused persons, and their specific personal situation, including specific vulnerabilities, at the moment of making the decision to enter a trial waiver system.

For there to be effective judicial scrutiny over consent:

- States should ensure that the presence of the accused person in court be mandatory at the hearing on the validity of the trial waiver system.
- Courts must have the power and means to inform the person about the consequences of a waiver of the right to a trial and in plain and accessible language.

[76] See sections I and III on the myth of consent and systemic incentives to waive the right to a trial.

- Courts should thoroughly review the accused person's consent and assess whether they were in any way coerced or pressured to admit guilt. They should pay particular attention to circumstances including, not limited to: lack of access to effective legal assistance, immigration status, pre-trial detention, discrimination, drug or alcohol dependency, and other vulnerabilities.
- Courts should reject the request for a trial waiver system and order a full trial where consent is absent or where there is reasonable doubt that the person may have been coerced or does not fully understand the consequences of waiving their right.

Effective judicial review of the sentence

When determining sentences, prosecutors are not bound by the principle of proportionality, as are courts. Criminal law sets maximum sentences per offence, and in some cases, a minimum sentence as well. In the absence of sentencing guidelines or publicly available information on the average sentences per type of offence, prosecutors have a wide margin of discretion to impose or request a specific sentence. In practice, prosecutor-imposed sentences can sometimes be higher than the sentence a court would normally impose.[77] Courts appear to have, legally or in practice, limited involvement in determining the sentence in the context of trial waiver systems. They are bound to accept the agreement as is, without the possibility to modify it, or to reject it altogether and refer the case to trial. In a context where courts face case backlogs, they are not incentivised to reject agreements and send the case to trial when the sentence requested by the prosecutor appears disproportionate.

An effective review of the sentence is also key to ensure that the sentence benefit offered by the prosecution is not disproportionately low compared to what a court would have imposed. This is important as studies have demonstrated the coercive effect of large sentencing differentials between the potential sentences after conviction at trial as opposed to those available through a trial waiver.[78] The high benefits provided in exchange for a trial waiver can constitute constraint when there is a flagrant disproportion between the two alternatives offered.[79] Discounts that are too generous – or disproportionately high sentences after trial – pressure people into accepting to waive their rights.[80]

Courts must verify the legality and proportionality of the sentence agreed upon or requested by the prosecutor to ensure that national sentencing systems are consistent, sentences are proportionate and to prevent the escalation of harsher punishments.

- Courts must have the power and means to review the proportionality of the proposed sentence with the offence, taking into account the personal circumstances of the accused person, as in a trial setting.

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[77] *See* section II.
[78] Jamie Fellner (U.S Program, Human Rights Watch), "An Offer You Can't Refuse: How US Federal Prosecutors Force Drug Defendants to Plead Guilty", *Federal Sentencing Reporter*, *vol. 26*, 2014, available at: https://online.ucpress.edu/fsr/article-abstract/26/4/276/93343/An-Offer-You-Can-t-RefuseHow-U-S-Federal?redirectedFrom=PDF
[79] ECtHR, *Deweer v. Belgium*, n°6903/75, judgment of 27 February 1980, §51, available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57469%22]}
[80] Rebecca K. Helm, "Cognition and incentives in plea decisions: categorical differences in outcomes as the tipping point for innocent defendants", *Psychology, Public Policy, and Law*, 2021, advanced online publication, p.1.

- Courts must have the power and means to amend the agreement between the prosecutor and the accused person to reflect a more appropriate and lenient sentence. Courts may not, however, have the power to increase the agreed upon sentence as it would contravene the accused person's consent to a specific and lower sentence.
- States should gather and publish data on the average sentence imposed per offence or type of offence.
- More generally, states should consider issuing professional guidelines and training for the judiciary on their role in trial waiver systems.

VI. Increase oversight of prosecutors through prosecutorial guidelines

The drive towards efficiency has limited the role of courts and trials and significantly increased prosecutorial powers to dispose of cases pre-trial including though trial waiver systems, conditional disposals and penal orders.[81] Prosecutors are effectively enforcing *ad hoc* criminal justice policies as they filter cases in and out of the criminal justice systems, and in and out of courts. They decide which cases will go through the normal trial route, which will go through alternative processes, and which will simply not be prosecuted at all.

This shift in powers is based on the representation, inherent to inquisitorial criminal legal systems, that prosecutors oversee investigations and deal with cases in an impartial and independent manner in the same way as courts. However, this representation needs to be tested. The pre-trial investigation phase is partisan by nature, and prosecutors who lead investigations, cannot be expected to operate as impartial and independent judicial authorities and control procedural fairness in the same way as courts.[82] Their key role is to oversee investigations and they are inclined, through institutional pressure, to focus on bringing charges and obtaining sentences. Moreover, prosecutors' relationship with the police also impacts their approach to cases. Although the police do not generally have a role to play in proposing and negotiating agreements or guilty pleas, they in practice do influence outcomes in trial waiver systems. Prosecutors inevitably rely on police investigations and recommendations to assess whether the case is suitable for a trial waiver system.

This raises concerns where prosecutorial decisions are taken outside the scrutiny of courts, which leaves room for biases and abusive practices to flourish. Ultimately, the increasing burden on prosecution authorities bears the risk of undermining the integrity of investigations and eroding procedural safeguards for all suspected and accused persons by coercing them to admitting guilt, or abusively resorting to trial waiver systems in cases for which insufficient inculpatory evidence exist.

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[81] *See generally,* Marianne Wade, "Meeting the demands of justice whilst coping with crushing caseloads?", *op.cit.*, pp.6-7; Jörg Martin Jehle, Marianne Wade, *Coping with overloaded criminal justice systems*, *op.cit.*, p.6; Jacqueline S. Hodgson, *The Metamorphosis of Criminal Justice, op.cit.*, chapter 5.
[82] *See e.g.,* CJEU, joined cases C-508/18 OG (Public Prosecutor's office of Lübeck) and C-82/19 PPU PI (Public Prosecutor's office of Zwickau), 27 May 2019, available at: https://curia.europa.eu/juris/document/document.jsf?text=&docid=214466&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=8276357

Considering the ever-increasing power of prosecutors to effectively investigate, prosecute and punish, and the lack of effective judicial oversight over trial waiver systems, other accountability mechanisms should be put in place. Prosecutorial guidelines could promote accuracy and consistency in the implementation of trial waiver systems, increase transparency in prosecutors' offices, and reduce the potential for implicit biases. They would also provide guidance to ensure that negotiations take place as prescribed by law and in application of the fundamental related safeguards it provides (assistance of a lawyer, timely access to the case materials etc).

Alongside better judicial review, states should promote the development of prosecutorial guidelines to streamline and limit their discretionary powers, and hold them accountable.

- The guidelines should be made public, binding on prosecutors and subject to judicial oversight.
- Guidance is likely to vary in different jurisdictions but could include the following elements aimed at reducing risks in the use of trial waiver systems:
    - early identification of cases that can be diverted from the criminal justice system (where diversion programs exist);
    - criteria for minimum standards of investigation;
    - their obligations to not engage in informal negotiations with the person in the absence of legal assistance;
    - criteria on the determination of the sentence, including on the proportionality principle, mitigating circumstances and the collateral consequences of a conviction and/or specific sentence that would otherwise be taken into account by courts;
    - criteria for keeping record of interactions with suspected or accused persons or their lawyer;
    - providing early and full access to full case files;
    - ensuring that persons are assisted by a lawyer at all stages of the process.

Conclusion

Trial waiver systems are changing our largely shared concept of justice. By making the trial optional along with the procedural rights that attach to it, and form the fundamental right to a fair trial, the objective is no longer about justice. States made a policy choice to introduce trial waiver systems as a way of dealing with overburdened justice systems, giving practitioners, in particular prosecutors, the tools to cope with the number of cases coming into the system. At their core, trial waiver systems serve as a regulation mechanism and address the needs of prosecutors and courts to manage caseloads. But case management has in some cases taken precedence over the appropriate determination of the criminal justice response to a specific case, leading to fast-track punishment without proper safeguards. This results in an important discrepancy between how justice is perceived by the public, and how it is delivered in most cases,[83] and threatens to undermine the legitimacy of the criminal justice system.[84]

[83] Marianne Wade, "Meeting the demands of justice whilst coping with crushing caseloads?", *op.cit.*, pp. 25 and 27.
[84] *Ibid.*, pp. 27-28.

As long as States continue to under-invest in criminal justice systems, including in courts, human resources and legal aid, and continue to extend the reach of the criminal justice net through ever increasing criminalisation and pre-trial disposition mechanisms, the influx of cases into the criminal justice system will keep rising. Trial waiver mechanisms are both the product and amplifier of structural shortcomings within criminal justice systems. In the absence of long-term holistic reform, suspected and accused persons bear the burden of efficiency-driven policies. They are expected, through incentives, pressure and coercion, to participate in the case management process by agreeing to waive their right to a trial and consent to a quick punishment. And in this process, the fundamental right to a fair trial, which is the basis of the rule of law, becomes a secondary consideration.