fairtrials.org

Fair Trials

Efficiency over justice: Insights into trial waiver systems in Europe

December 2021

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.

We coordinate the Legal Experts Advisory Panel (LEAP) – the leading criminal justice network in Europe consisting of over 180 criminal defence law firms, academic institutions and civil society organisations. More information about this network and its work on the right to a fair trial in Europe can be found here.

Contacts

Laure Baudrihaye-Gérard
Legal Director (Europe)
+32 (0)2 894 99 55
laure.baudrihaye@fairtrials.net

Emmanuelle Debouverie
Senior Legal and Policy Officer
+32 (0)2 894 99 55
emmanuelle.debouverie@fairtrials.net

Nathalie Vandevelde
Assistant Legal and Policy Officer
+32 (0)2 894 99 55
Nathalie.Vandevelde@fairtrials.net

@fairtrials @fairtrials Fair Trials

This report is produced as part of the Trial Waiver Systems in Europe (TWSE) project co-financed by the EU Justice Programme and coordinated by Fair Trials, with partners ResPublica, Kisa, Hungarian Helsinki Committee, Antigone and Mirovni Institute.

This document was possible thanks to the financial support of the Justice Programme of the European Union. The contents of this document are the sole responsibility of the author and can in no way be taken to reflect the views of the European Commission.

Contents

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.
Sentence bargaining	A type of trial waiver system under which the accused person and the prosecution formally negotiate the sentence.
Guilty plea	A type of trial waiver system under which the accused person pleads guilty and waives their right to a trial at the pre-trial hearing, in exchange for a more lenient sentence

Executive summary

Criminal punishment is increasingly imposed without a trial but instead through a trial waiver system or other alternative disposition systems that fall short of a trial (including penal orders and fast track proceedings). A recent report by the European Commission for the Efficiency of Justice, noted that in 2016, in the majority of Council of Europe member states, about 50% of criminal cases were processed before courts; the rest resulted in a sanction or measure imposed or negotiated by prosecutors. It is likely that the share of criminal cases processed out of courts will increase in the future. This shift in how criminal cases are processed requires research to understand the implications that such case resolution mechanisms have on the rights of the accused, but also on the integrity of the criminal justice system as a whole.

This report focuses on trial waiver systems, or negotiated outcomes, defined 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". They include sentence bargaining agreements (close to the common law system of plea bargaining) and guilty pleas. The report is the outcome of comparative research in Italy, Cyprus, Hungary, Slovenia and Albania. It highlights the potential risks associated with the rise of trial waiver systems in Europe and offers guidance on creating policies that better protect fundamental rights and the rule of law.

Context

The report highlights four trends that are generally common to criminal justice systems across Europe. These trends are key to understanding the rise of trial waiver systems and the reasons for their shortcomings. First, criminal justice systems are overburdened and suffering from court delays and backlogs. This saturation is not only due to a lack of resources, but also caused by the constant and increasing recourse to criminal law and punishment to address social harm. This contributes to the second trend of overcriminalisation and overpunishment. Third, states continue to have excessive recourse to pre-trial detention leading to prison overpopulation and inhumane detention conditions. The fourth trend is symptomatic of all the others. States are looking at cost-efficient policies to deal with overburdened systems. This explains the rise of trial waiver systems as a star tool available to prosecutors throughout Europe to resolve criminal cases quickly and cheaply.

Challenges and risks

Timeliness and efficiency are, in principle, in the interest of all criminal justice actors, including suspected and accused persons. However, 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. The report identifies various challenges and risks posed by trial waiver systems.

- **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 it could lead to: detention pre-trial for months or years; otherwise inevitable custodial sentences; lengthy and costly proceedings (court costs, lawyer fees) that they would not be able 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 will waive their rights freely. Instead, their decision to 'consent' will not be determined by the strength of evidence against them, or their 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, valid waivers must be 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. Our research indicates 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 and power (e.g. requesting or conducting investigations) to provide an effective defence, in particular 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 in a position 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 it is at the trial hearing that challenges for violations of procedural rights are in principle brought to the attention of a court, the right to an effective remedy for violations of procedural rights pre-trial is inevitably violated in a trial waiver context. Accused persons are not bringing these challenges and courts do not generally inquire into the fairness of the process on their own initiative. 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 or assessed, and states are unable to verify that 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 may increase the rate of miscarriages of justice with innocent people admitting guilt for practical reasons, and that their fast and easy use may 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.

As court delays and backlogs are unlikely to disappear, trial waiver systems will continue to proliferate along with budgetary cuts and austerity measures that are affecting European justice systems. There is an urgent need to make sure that they are monitored, they ensure sufficient fundamental rights guarantees and they are compatible with the rule of law and our idea of justice.

Recommendations

- **Structural reform:** Cost-efficiency policies look at the symptoms of a system's crisis, not its causes. Trial waiver systems are a short-term solution. States must engage in wider systemic reform to ensure that the criminal justice system is used in a proportionate and appropriate way, including by limiting the use of pre-trial detention, and by adopting policies aiming at right-sizing the criminal justice system, through decriminalising and diverting cases out of it. Certain groups and individuals are more vulnerable to pressure. The state must actively engage impacted people and their representatives in reform to eradicate racism and other discrimination in criminal justice systems, including in the operation of trial waiver systems.
- **Data collection and research:** It is necessary to assess whether these systems have accomplished the cost efficiency objectives they were set up for, or whether they have participated to the expansion of the criminal justice net by allowing to process more cases more quickly and more cheaply but at the expense of fundamental rights.
- **Enhanced procedural rights:** States must ensure that fair trial rights are adapted specifically to the operation of trial waiver systems. Mandatory assistance of lawyers and full and timely access to the entire case file, including to translations of the case files should be a priority.
- **Effective judicial oversight:** Judicial review should be sufficient to maintain the integrity of the investigation and pre-trial phase, the evidence and charges, the reality of the person's consent to a trial waiver and finally the appropriateness of the sentence proposed. Moreover, courts should have

the power to modify agreements in the interest of accused persons when appropriate.

- **Increased accountability:** Prosecutors' conduct should be subject to heightened scrutiny and accountability mechanisms, through the development of prosecutorial guidelines that limit their powers pre-trial in the context of trial waiver systems. These should include rules imposing minimal investigation standards, limits on the determination of sentences and effective record keeping.

1. 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, where 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 also finally exposed to judicial scrutiny.

But 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 while saving resources, policy makers have replaced trials with legal regimes that encourage suspected and accused persons to admit guilt or cooperate with authorities, and waive their right to a full trial, in exchange for some benefits.

In 2017, Fair Trials published a report based on a global survey of trial waiver systems, *The Disappearing Trial*,[3] which includes information about the existence, adoption, and use of trial waiver systems in 90 jurisdictions worldwide, including 15 EU jurisdictions. This research demonstrated a considerable growth in the adoption and use of trial waiver systems since 1990. Before 1990, only 19 of the 90 jurisdictions studied in that report had trial waiver systems. By the end of 2015, the number had grown to 66, changing practice across a variety of different legal systems and traditions.[4]

In 1987, the Committee of Ministers of the Council of Europe called upon its Member States to take measures aimed at simplifying ordinary criminal proceedings by resorting to trial waiver systems.[5] In 1988, the procedure called "application for punishment upon request of the parties" (also called *patteggiamento*) was introduced in the Italian Code of Criminal Procedure. It became a model for other trial waiver mechanisms introduced in Europe. By 1990, Austria, Ireland, and Spain had introduced trial waiver systems in their legislation.[6] Between 1990 and 1999, they were followed by Estonia and Poland.[7] From 2000 to 2009, trial waiver systems were introduced in Croatia, Denmark, France, Germany, Lithuania, the

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 Fair Trials, *The disappearing trial, towards a rights-based approach to trial waiver systems*, 2017, available at bit.ly/3oKIsKI

4 *Ibid*., p.4.

5 Council of Europe, Committee of Ministers, Recommendation No. R (87)18 of the Committee of Ministers to Member States Concerning the Simplification of Criminal Justice, adopted on September 17, 1987, part. III, §§7-8, available at: bit.ly/3yg5QTD

6 Fair Trials, *The disappearing trial, op.cit*., pp.24-25.

7 *Ibid*., pp.26-27, available at bit.ly/3oKIsKI

Netherlands and Norway.[8] Since 2010, they were used by Slovenia, Hungary, Albania, Romania, Luxembourg, the Czech Republic and Belgium.[9] Research indicates, however, that agreements between prosecutors and accused persons were informally negotiated for decades before trial waiver systems were officially formalised.[10] Prosecutors in fact resorted to informal negotiations well before the formal introduction of trial waiver systems in national legal frameworks as coping mechanisms to deal with increases in caseloads.[11]

The use of trial waiver systems has also increased over the years. There is limited data collection and research on their operation in Europe, which makes a comprehensive understanding of their use and impact difficult. However, it is clear that in some jurisdictions, they now dominate criminal proceedings at the expense of traditional trials, including the United States (US) and the United Kingdom (UK),[12] and it is increasingly the case in Europe.[13] 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[14] were discontinued by prosecutors, 28% were processed before courts and "27% resulted in a penalty or measure imposed or negotiated by the prosecutor".[15] In other words, about 50% of all criminal cases that proceed are processed outside courts. Fair Trials' previous research shows that by 2017, 87.8% of cases were resolved through trial waiver systems in Georgia; 85% in Scotland; 64% in Estonia, 64% in the Russian Federation; 43% in Poland and 45.7% in Spain.[16] Hungary adopted its trial waiver systems legislation in 2018, and by 2019, the prosecutor's office chose not to submit a case to trial in 80.4% of cases.[17]

Despite the increasing popularity of trial waiver systems, concerns have been expressed about their potential impact on the fairness of criminal justice systems. In 2018, the Parliamentary Assembly of the Council of Europe's (PACE)

8 *Ibid*., pp.28-29.

9 *Ibid*., pp.30-31.

10 *See e.g.*, Jenia I. Turner, "Plea Bargaining and Disclosure in Germany and the United States: Comparative Lessons, William & Mary Law Review, vol.57, 2016, pp.1571-1572, available at: bit.ly/3oR5YGl

11 See section 4.1 "Trial waiver systems"

12 In the United States, in 2020, 97,8% of federal criminal cases were resolved through guilty pleas (on this topic, see United States Sentencing Commission, *2020 Sourcebook of Federal Sentencing Statistics*, available at: bit.ly/3oHZs4r. In England and Wales in 2021, 94.45% of convicted persons plead guilty (292596 guilty pleas out of 309777 convictions) (on this topic, see Crown Prosecution Service, *Quarterly Data Publication of prosecutions management information* (2021- Q3), available at: bit.ly/3oHZs4r

13 The Committee on Legal Affairs and Human Rights, *Deal making in criminal proceedings, the need for minimum standards for trial waiver systems*, Resolution, 12 October 2018, §2, available at: bit.ly/3DJgAuM

14 The research includes data from 45 states in the Council of Europe.

15 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.337, available at: bit.ly/3yiI4X5

16 Fair Trials, *The disappearing trial, op.cit*., p. 34.

17 Annual Report of the Hungarian Chief Public Prosecutor to the Parliament, 2019, p.25, available in Hungarian at: bit.ly/31SEF5m

Committee on Legal Affairs and Human Rights published a report stressing the need for a comprehensive study on the use of trial waiver systems and addressing recommendations to ensure that the threat to human rights, in particular the right to a fair trial, was minimised.[18]

This research aimed to gather comprehensive and comparative information in Italy, Cyprus, Hungary, Slovenia and Albania[19] and to develop country-specific guidance on use of trial waiver systems without compromising defence rights. At the regional level, the research aims to (i) improve understanding of the extent to which the spread of trial waiver systems across the EU has impacted the right to a fair trial; (ii) identify risks to the right to a fair trial, and best practices and procedural safeguards; and (iii) increase awareness of the risks to fair trial rights and injustice associated with trial waiver systems.

This report identifies opportunities and challenges to fundamental rights protection and the rule of law stemming from trial waiver systems, and identifies specific policies that could help to better protect them. Although it focuses on the laws and practices in five countries, the research findings, and in particular potential risks associated with the use of trial waiver systems, may be applied to other jurisdictions.

2. Scope of the research and methodology

There are various procedural instruments in modern criminal procedures that aim to accelerate the legal process and increase its efficiency. It is not easy to understand trial waiver systems and how they operate in specific legal environments and to compare legal instruments that present similar but not identical features, in law and in practice. One key aspect of the methodology was to define trial waiver systems in order to limit the research and extract comparable data from each domestic research. Another key aspect was to understand the operation of these systems not only in law but also in practice and how they are used and perceived by criminal justice actors.

2.1 Scope of the research

This report examines trial waiver systems in the European Union (EU). For the purpose of this research, a trial waiver is defined 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."[20] Various practices under different names may fall within this definition. Therefore, 'trial waiver

18 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: bit.ly/3oI7gmL

19 Albania is not a member of the European Union and is not bound by the Directives. It has however been granted candidate status in 2014 to join the EU and must therefore bring its legal framework in line with European Union law.

20 See Fair Trials, *The disappearing trial, op.cit.*, p.2.

system' 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 term trial waiver systems is an imperfect term, given that some mechanisms analysed in this study are formally taking place within the context of what is commonly understood to be a trial, but in simplified form.

This research and report cover the following systems which are described in greater detail in the Annex.

Sentence bargaining agreement

Sentence bargaining agreements exist in four of the studied jurisdictions: Italy,[21] Slovenia,[22] Albania[23] and Hungary[24] (not Cyprus). They generally apply to all types of offences. They are available to children suspected or accused in criminal proceedings in some jurisdictions. They involve a formal negotiation process between the accused person, their lawyer and the prosecutor. Typically, the negotiation takes place during the investigation phase (pre-trial) and may be initiated by either the prosecutor or the defence. The parties generally must agree on the nature and length or amount of the sentence that would be imposed should the accused person admit guilt. The parties do not negotiate the charges, although it may happen informally. Other elements may also be discussed, including damages to be paid to the victim, an exemption from the cost of the proceedings, the disposal or non-prosecution of other charges. The negotiation process is regulated in law and sometimes by prosecutorial guidelines that are generally publicly available. Prosecutorial guidelines may also regulate the determination of the sentence by prosecutors. At the end of the negotiation process, the agreement is reached and contains the detailed facts of charges, and the agreed sentence. In all cases, except for Italy, the accused person must acknowledge guilt as a precondition to enter the agreement. A court reviews the agreement and usually verifies that the legal conditions to enter into an agreement are met, that the legal process was respected, that the person has knowingly and voluntarily waived their right to a trial and that the admission of guilt is supported by other evidence in the case file. If the court rejects the agreement, the case usually proceeds following the traditional process (generally a trial) or is sent back to the prosecutor. Courts are however limited to either validating or rejecting the agreement and cannot modify its content.

21 In Italy, the "*applicazione della pena su richiesta delle parti*" (application of the sentence at the request of the parties) or "*patteggiamento*" was introduced in Articles 444 to 448 of the new Code of Criminal Procedure, which came into force by Presidential Decree No. 447 of 22 September 1988.

22 In Slovenia, the "*sporazum o priznanju krivde*" (admission of guilt agreement) was introduced in Articles 450(a) to (č) of the Criminal Procedure Act, with the Amendment of the Criminal Procedure Act No. 91/11 of 14 November 2011.

23 In Albania, the judgment upon agreement was introduced in Articles 406/d to 406/f of the Code of Criminal Procedure by Law 35/2017 dated 30 March 2017 "*on some additions and amendments to Law no. 7905 dated 21 March 1995 establishing the Code of Criminal Procedure of the Republic of Albania*".

24 In Hungary, the "*egyezség a bűnösség beismeréséről*" (settlement to plead guilty) was introduced in Article 407 and following of the new Code of Criminal Procedure of 13 June 2017 that came into effect on 1 July 2018.

Guilty pleas

Pleading guilty and waiving the right to a trial at the pre-trial hearing in exchange for a more lenient sentence exist as a formal process in Hungary[25] and Slovenia.[26] This process can be used for all types of offences. When the plea takes place at the pre-trial hearing (an intermediary phase of the proceedings after the indictment becomes final and before the main trial hearing is scheduled), the court is bound by the sentence. When the person pleads guilty, and if the court accepts the plea, there is no hearing on the evidence and a sentencing hearing is immediately scheduled. If the person refuses to admit guilt or if the court refuses to accept their admission of guilt, the case proceeds according to the traditional process (generally a trial). The legal framework for guilty pleas at the pre-trial hearing does not foresee formal negotiations. In practice, informal negotiations regularly take place often in the hallways in front of the courtroom right before the start of the pre-trial hearing. As in sentence bargaining agreements, courts verify that the person has knowingly and voluntarily waived their right to a trial and that the admission of guilt is supported by other evidence in the case file. Courts are bound by the sentence proposed by the prosecution insofar as they cannot impose a harsher sentence. If they reject the guilty plea, the case proceeds to a normal trial.

In Cyprus, the practice exists informally. It is not regulated in law. Prosecutors and police can approach suspected and accused persons at any stage prior to the trial. The guilty plea is made at the trial hearing and in principle should lead the court to impose a more lenient sentence, but the court is not bound by law to do so.

*

This report does not examine the practices that do not fall within the scope of this given definition, including penal orders, conditional disposals or diversion programs (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 report. They are worth mentioning briefly as their operation deserves the full attention of criminal justice reform advocates and policy makers.

25 In Hungary, the "*előkészítő ülésen való beismerés*" (confession at the preparatory session) was introduced in Article 502 and following of the new Code of Criminal Procedure of 13 June 2017 that came into effect on 1 July 2018.

26 In Slovenia, the "*predobravnavni narok*" (pre-trial hearing) was introduced in Articles 285 (a) to (f) of the Criminal Procedure Act, with the Amendment of the Criminal Procedure Act No. 91/11 of 14 November 2011.

The following systems are excluded from the research:

Conditional disposals[27] or diversion from prosecution[28]

This study does not cover conditional disposals or diversion from prosecution because they generally do not require the person to admit guilt and do not lead to a conviction, but to the disposal of the case altogether. Conditional disposals can be defined as a mechanism by which the prosecutor agrees to drop the charges in exchange for the fulfilment of certain conditions including medical treatment, therapy, training, community service, conciliating or paying damages to the victim.[29] If the person fulfils the imposed conditions, the case is dismissed. The level of judicial oversight around these processes varies from no control at all to some review of the process.[30]

Fast track proceedings[31]

Fast-track proceedings are not covered by this study because they aim to accelerate proceedings, not bypass the trial; they do not result in a reduced sentence or in any other direct benefit for the accused person, and they do not require an admission of guilt or any other form of cooperation with the authorities. There are however indirect benefits that can result from fast-track proceedings for accused persons such as shorter proceedings, which means they may avoid pre-trial detention. Fast-track proceedings are mostly applied in cases where individuals are allegedly caught in the act of committing an offence, in 'simple cases' or where the accused person has admitted guilt. In these cases, the prosecution has the possibility to bring the suspected person directly before the court for judgment, often after time spent in police custody or shortly after

27 According to our research, conditional disposals are operated in Slovenia (conditional suspension of criminal prosecution and settlement procedure), Hungary (conditional suspension of the criminal procedure), France ("composition pénale") and Belgium ("mediation pénale" et "transaction pénale"). The following description relates to these jurisdictions.

28 Diversion is the appellation used in the US for programs where a case is suspended for a period of time while certain conditions are imposed on the person, which, if fulfilled result in a disposal of the case and the absence of conviction. On this topic, *see also* Stephen C. Thaman, "Plea-Bargaining, Negotiating Confessions and Consensual Resolution of Criminal Cases", *General Reports of the XVIITH Congress of the International Academy of Comparative Law*, 2007, p. 964, available at: bit.ly/31Tx7yY

29 For example, in Belgium, the "mediation pénale" is a process under which the prosecutor offers the suspected person to compensate or repair civil damages caused by the offence, and, if appropriate, to comply with certain measures (undergo a therapy, medical treatment or training, or perform community service up to 120 hours) in exchange for closing the case. The "transaction pénale" allows the prosecutor to close a case in exchange for payment of a certain amount of money within a certain time frame. In France, the "composition pénale" allows to terminate proceedings through the imposition of conditions such as financial redress for the injury caused to the victim, donating to a charitable organisation or to the State, the undertaking of community service, of a training course, therapy, an offender-victim mediation, etc.

30 Jörg Martin Jehle, Marianne Wade, *Coping With Overloaded Criminal Justice Systems – The Rise of Prosecutorial Power Across Europe*, Springer, 2006, p.22.

31 According to our research, fast-track proceedings are used in Italy ("giudizio per direttissima"), in Albania ("gjykimi i drejtpërdrejtë »), in Slovenia (where some of the district courts began to use so-called 'fast-track' proceedings in practice and France ("comparutions immediates"). The following description relates to these jurisdictions.

the offence was committed. The person can choose to accept or decline to be tried in such a short delay. If they refuse, they will be tried in a normal trial setting and they face the risk that a pre-trial detention order be imposed. If the person agrees to be tried immediately, and if the court is satisfied that the arrest was lawful and that no further investigation is needed, the court decides the case according to the same scrutiny as a normal trial.

Penal orders[32]

Penal orders do not involve a waiver of the right to a trial in exchange for some benefits, and as such fall out of the scope of this study. Penal orders allow the prosecutor to submit written evidence to the court in the absence of the accused person and ask that it impose a specific sanction. If the court approves, the person is found guilty and sanctioned in accordance with the prosecutor's application. The person usually does not have the opportunity to present a defence or be heard.[33] Courts can usually either entirely approve or reject the application but cannot modify it. Unlike a conditional disposal, a penal order leads to a formal conviction.[34] They typically apply to low-level offences when the facts are considered 'simple' and evidence is readily available, or to offences normally punishable by short custodial sentences or fines.[35] There is the right to challenge the court's decision within a specified (often short) timeframe,[36] in which case a full trial ensues. In the absence of a challenge, the conviction and sentence are final and recorded in the person's criminal record.

Abbreviated trials[37]

This study does not cover abbreviated trials because they do not require an admission of guilt or the cooperation of the accused person, and because the

32 According to our research, penal orders are used in Slovenia, Hungary, Albania, France ("ordonnance pénale") and Germany ("strafbefehl"). The following description relates to these jurisdictions.

33 Stephen C. Thaman, *op.cit.*, p. 970.

34 Jörg Martin Jehle, Marianne Wade, *Coping with overloaded criminal justice systems, op.cit.*, p.22.

35 In France, the "ordonnance pénale" (penal order) only applies to contraventions and to certain types of délits: theft and concealment, damage to private or public property, violation of traffic regulations, minor drug offences etc. It is furthermore limited to cases where facts investigated over the course of the police investigation are simple and established and where the information regarding the offender's personality and resources are sufficient to allow the prosecutor to determine the applicable sentence. In Albania, penal orders can be issued only in relation to misdemeanours, defined as criminal offences punishable by a maximum of two years prison sentences. Similarly, in Slovenia and Hungary, penal orders only apply to criminal offences punishable by a deprivation of liberty under three years as a main rule. In France, the maximum fine that can be imposed is half the amount of the fine incurred, without exceeding €5,000. If the judge considers that a prison sentence should be imposed, s/he refers the case back to the prosecutor. In Germany, a one-year imprisonment sentence can be imposed, provided that the person has a defence counsel, and that the sentence is suspended on probation. In Slovenia, the prosecutor may propose the pronouncing a fine, prohibition from driving a motor vehicle, or a suspended sentence with a fine or up to six months imprisonment.

36 In France, the suspected person can file a motion to oppose within 30 days of the penal order if the underlying offence is a misdemeanour and 45 days in case of a felony. In Albania, the person has a shorter time limit of ten days to challenge the order.

37 According to our research, abbreviated trials exist in Italy and Albania.

court must assess the person's guilt or innocence beyond a reasonable doubt as in regular trials. They apply to all types of offences. They take place entirely at the pre-trial hearing. The request can be filed up until the end of the pre-trial hearing. The accused person agrees to be judged on the basis of the case file in exchange for a more lenient sentence as established by law (usually a third of what the court would normally impose). If the evidence in the case file is insufficient for the court to reach a decision, it can order additional investigations, hear the parties or reject the request for an abbreviated trial. Contrary to fast-track trials and penal orders, abbreviated trials are held exclusively at the request of the accused person and there is a clear sentence discount if they are found guilty.

Minor offences proceedings and transactions

The treatment of minor offences as a specific issue is not treated in this report. It is nonetheless a major concern as minor offences constitute the majority of criminal cases in the EU criminal justice system.[38] They may include, depending on the jurisdiction, traffic offences, petty theft, offences against public order, destruction of property, begging, fare evasion and other non-violent criminal conduct. Punishment of minor offences varies widely from one state to another. Many European countries apply various forms of alternative disposition systems to minor offences, including trial waiver systems, fast track procedures, penal orders or on-the-spot fines with the police. Others have decriminalised minor offences so that they can be treated as administrative offences outside the criminal justice system. Often, these processes entirely skip any judicial involvement or are heard by special tribunals.[39] In fact, the Directives do not apply to the treatment of minor offences.

2.2 Methodology

For the past two years, Fair Trials has worked with domestic, civil society partners to gather comprehensive and comparative information on the use of trial waiver systems in Albania (Res Publica),[40] Cyprus (Kisa),[41] Hungary (Hungarian Helsinki Committee),[42] Italy (Antigone),[43] and Slovenia (Mirovni Institute).[44]

38 CEPEJ, *European judicial systems – Efficiency and quality of justice - 2018 Edition, op.cit.*, p.299; in Germany, fines make up over 80 % of all criminal sanctions (on this topic, see Criminal Justice Policy Program, Mitali Nagrecha, *The Limits of Fairer Fines: Lessons from Germany*, 2020, available at: bit.ly/3ol7IkX); in France about 50% of persons in prisons are there for theft, degradation of property or a drug related offence and 25 % are in prison for short sentences of less than 6 months (Observatoire International des prisons - section française, Courtes peines, available at bit.ly/3ol7HgT); in Belgium, a majority of offences concern theft, degradation of property and drug related offences (on this topic, *see* Police fédérale, *Statistiques policières de criminalité, 2000-2020*, available in French at: t.ly/7V19).

39 CEPEJ, *European judicial systems – Efficiency and quality of justice - 2018 Edition, op.cit.*, p.298.

40 respublica.org.al

41 kisa.org.cy

42 helsinki.hu/en

43 antigone.it

44 mirovni-institut.si

Partners conducted desk research covering publicly available information on trial waiver systems in their respective countries, including court judgments and academic literature, to analyse the legal framework in which these systems operate. They examined whether the Directives are implemented in trial waiver proceedings and how consistently and coherently these mechanisms work in practice, mainly through qualitative in-depth interviews with criminal defence lawyers, prosecutors and judges. Partners also reviewed case files from criminal proceedings where people agreed to waive their right to a full trial. Finally, partners verified the existence of statistical data and whether evaluations were carried out at the state level to assess the extent to which trial waiver systems reached their intended policy goals.

The project also benefited from desk-based research conducted in France and Belgium by our pro-bono law firm partner Freshfields.

3. Context – criminal justice systems in Europe

The opportunities and risks associated with the increased use of trial waiver systems must be seen in the broader context of the evolution of criminal justice systems in Europe. This report identifies four key trends that provide context for the increased use of trial waiver systems.

3.1. Overburdened justice systems, court delays and backlogs

Criminal justice systems across Europe are overburdened by heavy caseloads.[45] Backlogs create delays, with serious implications. Despite the right "to a fair and public hearing within a reasonable time",[46] excessively lengthy proceedings remain one of the primary grounds for complaint under Article 6 before the ECtHR.[47] The COVID-19 pandemic has only exacerbated these problems; with

45 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: bit.ly/3DJHeUn

46 Article 6(1) ECHR.

47 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* CEPEJ, *European judicial systems – Efficiency and quality of justice - 2018 Edition, op.cit.*, p.230.

court closures as a result of public health measures creating further backlogs,[48] and leading to extended pre-trial detention for people throughout Europe.[49] Among the various causes for delays in criminal cases, the CEPEJ points to the increase of cases with no corresponding increase in resources.[50] It refers to structural problems relating to, among others, the organisation of prosecution services and insufficient number of prosecutors.[51] In most Member States, prosecutors are not able to cope with the volume of cases.[52] The CEPEJ also notes problems with "periods of the investigation stage where little or no progress is made in the proceedings or in inquiries".[53] This is a systemic issue throughout Europe where many justice systems are suffering from austerity measures and budgetary cuts.[54]

3.2. Overcriminalisation and overpunishment

The overburdening of the system is caused by an increase in the number of cases in the criminal justice system. Criminal legislation has inflated over the recent years, both at the national[55] and European[56] 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."[57] The COVID-19 pandemic has illustrated the way that criminalisation has become a "first response" to societal

48 Fair Trials, *Beyond the emergency of the Covid-19 pandemic*, 2020, p.42, available at: bit.ly/3yd3pkS; European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 2021 Rule of Law Report, the rule of law situation in the European Union*, 2021, (COM(2021)700 final), p.9, available at: bit.ly/3EITJRC, noting that "[i]n particular, in the first phase of the pandemic, there were interruptions or delays in the handling of cases and court proceedings leading to significant additional backlogs in courts in a number of Member States."

49 Fair Trials, *Beyond the emergency of the Covid-19 pandemic*, *op.cit*., p.42.

50 CEPEJ, *Length of court proceedings in the Member States of the Council of Europe based on the case law of the European Court of Human Rights, 2018*, p.42, available at: bit.ly/3DLr7pg

51 *Ibid*., p.4

52 CEPEJ, *European judicial systems – Efficiency and quality of justice*, 2014 (2012 data), p.284, available at: bit.ly/3E0EYN2

53 CEPEJ, *Length of court proceedings in the Member States of the Council of Europe, op.cit*., pp. 58-59.

54 *See eg* European Commission, *2021 Rule of Law Report, op.cit*., p.10, noting that "[e]ffective justice systems rely on adequate human and financial resources" and that "[t]he justice systems in Malta, Belgium, Italy, Greece, Portugal and Cyprus still face substantial efficiency challenges."

55 Jörg Martin Jehle, Marianne Wade, *Coping with overloaded criminal justice systems, op.cit.*, p.60.

56 *See e.g*. European Parliament, *Legislative proposal to prevent and combat certain form of gender based violence*, September 2021, available at: bit.ly/30fJsNN and European Parliament, *Proposal to extend the list of EU crimes to all form of hate crime and hate speech*, September 2021, available at: bit.ly/3yiLucC

57 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 in French at: bit.ly/3dGAFYg

challenges, as new offences were rushed through legislatures in reaction to the health crisis.[58]

Alongside criminalisation, Europe is witnessing a toughening of criminal sanctions and an increase in the use of custodial sentences. In Slovenia, interviewed lawyers indicated that the criminal policy is increasingly harsher and sentences significantly higher than they used to be. In Slovenia, the acquittal rate dropped from 21% in 2010 to 13% in 2019. In Hungary, the conviction rate in the last ten years has constantly been over 90% and increasing - by 2019, it reached 96.95%.[59] In Albania, the overall acquittal rate for 2020 in the District of Tirana was as low as 2.9%.[60] As further detailed below, high conviction rates and the prospect of custodial punishment plays into decisions to waive the right to a trial, in the hope of obtaining more lenient sentences.

3.3. Excessive use of pre-trial detention and inhumane detention conditions

A significant number of studies stress the inefficiency and negative impacts of pre-trial detention, including the de-socialisation of the suspect,[61] high costs for public authorities and the contribution towards prison overcrowding. However, the number of people held in pre-trial detention remains excessively high across Europe. Now, approximately 22% of the prison population in Europe is made up of people who are presumed innocent, waiting for their trial or final sentence.[62] This proportion indicates that judicial practices fall short of regional and international standards which set detention pending trial as a measure of last resort. Prison overcrowding, and the rights' violations it causes, is driven in large part by excessive use of pre-trial detention.[63] At least 11 EU Member States experience prison density of more than 100 inmates per 100 places. Austria, Greece, Malta, Romania, Hungary, France, Italy and Belgium experience serious overcrowding,

58 Fair Trials, *Justicia calls for action against disproportionate COVID-19 criminalisation*, available at: bit.ly/3ydxv7R.

59 Hungarian Chief Public Prosecutor's Office, *The main statistical data regarding prosecutorial activities before criminal courts, Activities in the year 2015*, 2016, p.63, available in Hungarian at: bit.ly/3yfheiG, and Hungarian Chief Public Prosecutors Office, *The main statistical data regarding prosecutorial activities before criminal courts, Activities in the year 2019*, 2020, p.67, available in Hungarian at: t.ly/UeWY

60 Data collected based on an analysis made by Res Publica of all the judgments delivered in that year at the District of Tirana.

61 Patricia Faraldo Cabana, "One Step Forward, Two Steps Back? Social Rehabilitation of Foreign Offenders Under Framework Decisions 2008/909/JHA and 2008/947/JHA", *New Journal of European Criminal Law, 2019 Vol. 2, Iss. 2*, p. 154.

62 Council of Europe – Université de Lausanne, Marcel F. Aebi and Mélanie M.Tiago, *Prisons and Prisoners in Europe 2019: Key Findings of the SPACE I report*, 2020, p.6, available at: bit.ly/3EZv9w1

63 Fair Trials, *A Measure of Last Resort? The practice of pre-trial detention decision making in the EU*, 2016, § 100, available at: bit.ly/3dLCxPf ; Council of Europe, European Committee on Crime Problems (CDPC), *White Paper on prison overcrowding*, 2016, (PC-CP (2015) 6 rev 7), §59, available at: https://rm.coe.int/16806f9a8a ; European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *26th General Report of the CPT, 1 January – 31 December 2016*, 2017, §52, available at: bit.ly/31QrgdM

with rates of more than 105 inmates per 100 places.[64] The ECtHR continues to find repeated violations of fundamental rights in relation to detention conditions and prison overcrowding – in April 2019, there were around 12,000 pending applications to the ECtHR raising issues relating to conditions of detention, indicating the systemic nature of overcrowding issues.[65] As detailed below, the risk of being held in pre-trial detention and the inhuman detention conditions in European prisons creates pressure on suspected and accused persons to waive their right to a full trial in order to obtain a faster resolution of their case.

3.4. Cost-efficiency driven policies

Today, reducing both cost and delay is "one of the most pressing concerns" for domestic policy makers.[66] In order to cope with delays and backlogs without spending more resources on the criminal justice system, policy makers have favoured solutions that aim to reduce the time and resources allocated to individual cases. Across Europe, states are constantly adopting new procedural shortcuts and simplifications to avoid full criminal trials and investigations. The strive for efficiency is behind the rise of trial waiver systems and other disposition mechanisms that fall short of a trial as the main drivers of change for modern criminal justice systems.[67] After years of criticism of the American plea bargaining system, an increasing number of European States have legislated to allow prosecutors to negotiate sentences with accused persons.[68] In France, for example, the CEPEJ highlighted in 2016 that: "75% of cases, compared with 45% ten years ago, are subject to rapid referral to the criminal court, either by the investigating judge or by direct summons, without a preliminary investigation. These developments have helped to expedite proceedings, with 75% of persons concerned now appearing before the courts within a period of two days to four months".[69]

In the same vein, the past 20 years have seen a shift towards the use of administrative proceedings and sanctions for what are considered by policy makers to be 'minor' offences. These offences are increasingly being dealt with under administrative systems as a way to improve the efficiency of punishment without the burden of procedural guarantees. The aim of these measures is to divert some of the workload of the criminal justice apparatus (police, prosecutors,

64 Council of Europe – Université de Lausanne, Marcel F. Aebi and Mélanie M.Tiago, *op.cit*., p.9.

65 Council of Europe, European Committee on Crime Problems (CDPC), High Level Conference "Responses to Prison Overcrowding, Key note speech by Judge Siofra O'Leary, available at: bit.ly/3oFSbSM. As of 31 August 2019, the total number of pending applications before the Court was 62 100. *See also* Krešimir Kamber, *Overuse of pre-trial detention and overcrowding in European prisons, Policy meeting: Overuse of pre-trial detention in Europe: How can we make legal assistance more effective?*, at an event organised by Fair Trials at the Press Club Brussels Europe, 2019, p. 9, available at: bit.ly/3dLCRgV

66 Jacqueline S. Hodgson, *The Metamorphosis of Criminal Justice, op.cit*., p.13.

67 Marianne Wade, "Meeting the demands of justice whilst coping with crushing caseloads?", *op.cit*., p.10.

68 *Ibid*., pp.8-9; Stephen C. Thaman, *op.cit*., p.951.

69 CEPEJ, *Length of court proceedings in the Member States of the Council of Europe op.cit*., p.59.

courts) towards administrative officers.[70] Fines are imposed on the spot or by mail, sometimes without a hearing, and without the assistance of a lawyer. Although many administrative sanctions are deemed "criminal in nature" by the ECtHR,[71] the use of administrative systems allows governments to bypass procedural rights and judicial oversight, creating an environment conducive to unchecked police powers, abuse of power, discrimination, ethnic profiling, and miscarriages of justice. In 2008, administrative offences made up the majority of offences (criminal and administrative) dealt by the justice system in some EU Member States.[72]

Another recent efficiency driven trend is the digitalisation and automation of criminal justice. Many countries are turning to remote hearings, using online video or audio-conferencing technology and other similar tools as an alternative to in-person hearings in the context of both pre-trial and trial proceedings. In parallel, European law enforcement and justice authorities are increasingly looking towards – and in some countries, implementing[73] - artificial intelligence and automated decision-making systems to profile people, predict their supposed future behaviour, and assess their alleged 'risk' of criminality or re-offending in the future. This trend is often driven by financial pressure, pressure for greater efficiency, and misguided perceptions about the efficiency, reliability and impartiality of these technological solutions. However, far from promoting fair and equal justice, artificial intelligence and automated decision-making systems are further fuelling and legitimising racial and ethnic profiling and discrimination, normalising pre-emptive law enforcement and criminal justice action through predictions, and infringing fundamental rights, including the right to a fair trial and specifically the presumption of innocence, the right to liberty, the right to a private and family life, and data protection rights.[74]

*

A well-functioning criminal justice system is in the interest of all system actors, including suspected and accused persons. However, the pursuit of efficiency cannot be limited to considerations of cost and fast resolutions. In the current context, there is concern that efficiency is achieved by bypassing the fundamental rights of suspected and accused people. 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.

70 Jörg Martin Jehle, Marianne Wade, *Coping with overloaded criminal justice systems, op.cit.*, p.19.

71 *See generally*, European Court of Human Rights (ECtHR), *Guide on Article 6 of the European Convention on Human Rights*, 2021, pp.10-11, available at: bit.ly/31P06CD

72 Jörg Martin Jehle, Marianne Wade, *Coping with overloaded criminal justice systems, op.cit.*, p.38.

73 Fair Trials, *Automated Injustice : the use of artificial intelligence & automated decision-making systems in criminal justice in Europe,* 2021, available at: bit.ly/3DIPI3F

74 *Ibid*.

4. Policy responses: trial waiver systems as the star solution

States have recognised the need to address the high workload that criminal justice systems have to deal with. To date, European states have preferred the option of introducing trial waiver systems as way to reduce workload, which explains their rise in Europe (4.1). But there are other policy options available to reduce caseloads, including decriminalisation (4.2) and increasing the discretion of prosecutorial authorities to pursue or drop cases (4.3).

4.1. Trial waiver systems

Since the end of the 1980s, trial waiver systems have progressively been introduced in Europe, with the main objective of addressing the overburdening of criminal justice systems. When introducing trial waiver systems, European policy makers articulated a number of objectives, all aiming at increasing the cost-efficiency of criminal proceedings in order to tackle the overburdening of criminal justice systems. Trial waiver proceedings are primarily designed to resolve the issue of court backlogs and lengthy criminal proceedings, while limiting costs.

Some European systems inspired others – for example, Hungary took inspiration from the Slovenian model. Some were inspired by the American plea-bargaining model[75] or directly responded to the Council of Europe's recommendation in 1987 that guilty pleas or similar proceedings be adopted in Europe.[76] In many of the countries studied, other forms of case dispositions falling short of trials already existed but were deemed insufficient to address the system's overload of cases.

Some of these legislative initiatives also codified existing informal practices. Prosecutors sometimes resorted to informal negotiations well before the formal introduction of trial waiver systems in national legal framework as necessary coping mechanisms to deal with caseload increase. For example, in Hungary, a judge interviewed as part of the research explained that before trial waiver systems were adopted in 2018, there had been a decade-long tradition of "plea bargaining in the waiting room".[77]

75 Máximo Langer, "From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure", *Harvard International Law Journal, vol.45*, 2004, available at: bit.ly/3DJpete

76 Council of Europe, Committee of Ministers, Recommendation No. R (87)18 of the Committee of Ministers to Member States Concerning the Simplification of Criminal Justice, *op.cit*.

77 In Germany, for a long time, the criminal justice system resolved cases without resorting to plea bargaining. When caseloads began to increase in the 1970s, several simplified trial and diversion procedures were introduced but were insufficient to address the problem. In consequence, in the 1980s, criminal justice actors and practitioners started to negotiate cases informally. Guidelines were elaborated by courts through caselaw, but as the practice grew, the limits of the absence of express legal authorization started to be felt. In 2005, courts called on the legislator to develop clear rules and in 2009 an amendment to the Code of Criminal Procedure was adopted, largely codifying the existing practice. See, Jenia I. Turner, *op.cit*., pp.1571-1572.

Although the original aim of sentence bargaining was to speed up the work and reduce workload, concluding an agreement and conducting a negotiation means an increased workload for the prosecution service. This can explain the limited success of this trial waiver compared to a guilty plea at the preparatory session. In the latter, although the court will ensure that the admission of guilt is supported by evidence in the file, there is no need to fully investigate the offence,[78] to appoint a lawyer for the hearing or for the informal corridor negotiations, no need to record the content of the negotiations, or write an agreement that must contain legally required formalities. Prosecutors are incentivised to opt for less burdensome processes, so they can deal with their workloads. As a result, informal processes remain common practice, outside any sufficient legal framework aimed at ensuring that the person concerned is in a position to knowingly waive their right to a trial.[79]

4.2. The option of decriminalisation

An alternative (or complementary) policy solution to reduce caseload is to decriminalise certain behaviours – for example, abortion, euthanasia and drug 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 will receive fewer cases and can focus on other categories of offences that are considered to require a criminal law response. Decriminalisation will simply decrease the volume of cases entering the criminal justice system.

There are different models of decriminalisation. It can take place through a formal legal approach e.g. legal reform – for example, some countries have had decriminalisation policies on drug use in place since the early 1970s; others never criminalised drug use and possession to begin with. Decriminalisation can also take place through practice, eg 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.[80]

The risk with this option 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

78 Except in Hungary, where according to the prosecutorial Circular KSB 3651/2018/1-I issued on 6 July 2018, prosecutors are obliged to fully investigate the case before a formal sentence bargaining agreement can be concluded.

79 *See* Annex "Overview of trial waiver systems in the studied countries".

80 *See* Release, *A quiet revolution: Drug decriminalisation policies in practice across the globe*, available at: osf.to/3olPwl7.

solvency, but with fewer procedural safeguards.[81] Decriminalisation in practice should not mean punishing through other means.

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 may be less likely to reoffend.[82] For instance, recent research in the US suggests that not prosecuting minor offences reduces the risk of recidivism by over 40%. 83 Diversion programs also reduce costs[84] and limit the inequality created by involvement in the criminal justice system.[85]

4.3. Increasing the discretionary powers of prosecutors and police

Another policy option is to leave discretion to the police and the prosecutor. Giving the police the discretion to decide whether to record offences and refer cases to the prosecutor could lead to a reduction in the number of cases that are fed into the criminal justice system (depending on police practices). In countries where the legality principle, which requires prosecutors to initiate criminal proceedings, applies, policies can be implemented to give more discretion to the prosecution services to decide whether to initiate criminal proceedings, or to deal with offences through a different procedure altogether (e.g. an informal warning). This approach further reinforces prosecutorial powers: "[i]n this case the prosecution service often plays the central role and becomes the 'judge before the judge'."[86]

The implementation of such policies will vary greatly according to legal systems and practices in different countries, in particular whether a principle of legality applies that requires the police to record all cases and for prosecutors to prosecute all cases and bring them to charge in front of a criminal court in an oral hearing. In some countries, e.g. Belgium, the prosecution determines the 'opportunity' to prosecute and in others the prosecution also has the power to drop a case conditionally, i.e. setting out a condition to dispose of the case without prosecution that the person needs to accept.

81 *See* Fair Trials, *Day Fines Systems : Lessons from global practice*, June 2020, available at: bit.ly/3DITTXG.

82 *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: bit.ly/3EMzbYf ; Centre for Health and Justice, A National Survey of Criminal Justice Diversion Programs and Initiatives, 2013, p.17.

83 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

84 *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.

85 *See e.g.*, Brennan Center for Justice, *Conviction, Imprisonment, and Lost Earnings How Involvement with the Criminal Justice System Deepens Inequality*, 2020, available at: bit.ly/3DO2bNT

86 *See* Jörg Martin Jehle, Marianne Wade, *Coping with overloaded criminal justice systems, op.cit.*, p.6.

5. Relevant regional standards

None of the provisions of major human rights treaties specifically articulate how existing standards on the right to a fair trial apply to trial waiver systems.[87] This omission may be explained by the fact that at the time they were drafted, trial waiver systems were not legally enshrined in most jurisdictions.[88] When in 1989, the Committee of Ministers of the Council of Europe called upon states to take measures to introduce trial waiver systems, no mention was made of the procedural safeguards to be applied in such proceedings.[89] More recently, international bodies have started adopting soft law instruments and reports which expressly refer to trial waiver systems.[90]

5.1. Relevant EU standards

At EU level, all Directives apply from the moment a person is made aware of - or from the moment they are - suspected or accused of having committed a criminal offence, and until the conclusion of proceedings.[91] As such, the Directives apply at the latest when the person is interviewed by the police or any law enforcement authority as a suspect or when they are deprived of liberty.

- **Right to a lawyer.** The Directive on the right of access to a lawyer provides that suspected and accused persons have access to a lawyer before their first interview by law enforcement authorities or without undue delay after arrest.
- **Right to legal aid.** The Directive on legal aid, provides that suspected and accused persons who have a right to a lawyer under the Directive on the right of access to a lawyer, must be entitled to legal aid.
- **Right to information.** The Directive on the right to information provides that suspected and accused persons are (i) promptly informed of their

87 For a review of international courts and tribunals case law see Fair Trials, *The disappearing trial, op.cit.*, pp. 66-68.

88 *Ibid.*, p.62.

89 Council of Europe, Committee of Ministers, Recommendation No. R (87)18 of the Committee of Ministers to Member States Concerning the Simplification of Criminal Justice, *op.cit.*

90 The Committee on Legal Affairs and Human Rights, *Deal making in criminal proceedings, the need for minimum standards for trial waiver systems*, Resolution, 12 October 2018, *op.cit.*; United Nations Office on Drugs and Crime (UNODC) and International Association of Prosecutors (IAP), *The Status and Role of Prosecutors*, 2014, p. 43, available at: bit.ly/3lVIkGx ; United Nations General Assembly, *Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, A/71/298, 2016, §40, available at: bit.ly/3EJMDfn ; UN Human Rights Office of the High Commissioner, *Guidelines on the Role of Prosecutors: Adopted by the Eighth United Nations Congress on the Prevention of Crime and Treatment of Offenders*, Sept. 1990, §10, available at: bit.ly/3lHGsLe

91 Articles 2(1) of the Directives on the right to a lawyer, the right to legal aid and the right to information; Article 1(2) of the Directive on the right to interpretation and translation. Article 2 of the Directive on the presumption of innocence provides a different definition of its scope: "It applies at all stages of the criminal proceedings, from the moment when a person is suspected or accused of having committed a criminal offence, or an alleged criminal offence, until the decision on the final determination of whether that person has committed the criminal offence concerned has become definitive."

procedural rights in a simple and accessible language; (ii) provided with information about the criminal act they are suspected or accused of having committed; and (iii) granted access to the material of the case in due time.

- **Right to translation and interpretation.** The Directive on the right to interpretation and translation, suspected or accused persons who do not speak or understand the language of the criminal proceedings concerned must be provided, without delay, with interpretation during criminal proceedings and within a reasonable period of time, with a written translation of all documents which are essential to ensure that they are able to exercise their right of defence.
- **Right to be presumed innocent and present at the trial.** The Directive on the presumption of innocence provides that suspects and accused persons have the right to remain silent in relation to the criminal offence that they are suspected or accused of having committed; have the right not to incriminate themselves; and have the right to be present at their trial.

Three Directives provide guidance on waivers of specific procedural rights. In the Directive on the presumption of innocence, the recitals indicate that individuals should be able to waive the right to be present at trial, expressly or tacitly, but unequivocally.[92] The Directives on the right of access to a lawyer, and on the right to interpretation and translation, provide that anyone willing to waive a right protected under EU law must be provided with clear and sufficient information about the right and the possible consequences of waiving it.[93] The latter two Directives also provide that waivers must be made voluntarily and unequivocally.

However, the Directives do not acknowledge the existence and wide use of trial waiver and other alternative disposition mechanisms. There is no specific legislative instrument otherwise regulating the use or procedure applicable to trial waiver systems. In particular, the right to an effective remedy for violation of procedural rights is generally realised at trial (see further below). In the absence of a trial, therefore, effective remedies may not be available. This poses a threat to the effectiveness of all rights protected by the Directives.[94]

5.2. Relevant ECHR standards

The ECtHR provides some guidance on the interpretation of the right to a fair trial in a non-trial context. In particular, the ECtHR has focused on the issue of the validity of waivers. The Court has held multiple times that neither "the letter nor the spirit of Article 6 of the Convention prevents a person from waiving of his own free will, either expressly or tacitly, the entitlement to the guarantees of a fair trial. However, such a waiver must, if it is to be effective for Convention purposes, be established in an unequivocal manner; it must not run counter to any important

92 Recital 35 of the Directive on the presumption of innocence.

93 Article 9(1)(a) and recitals 39 and 55 of the Directive on the right of access to a lawyer; Article 3(8) of the Directive on the right to interpretation and translation.

94 *See* section 6.3 "Lack of effective judicial oversight and accountability mechanisms", and in particular "Lack of effective remedies for procedural rights violations".

public interest; and it must be attended by minimum safeguards commensurate with its importance. In addition, it must not be tainted by constraint."[95]

On the issue of constraint, the ECtHR held in 1987, in *Deweer v. Belgium*, that the applicant's consent to a trial waiver was "tainted by constraint" because he, a shop owner, was faced with the decision either to pay a fine immediately (and waive his right to a trial) or to face an order for the closure of his shop until judgment was given after a full blown criminal prosecution.[96] The applicant would have been deprived of his income while nonetheless having to continue paying his staff, and would have run the risk of not being able to resume business once his shop would have reopened. The ECtHR considered that these circumstances implied that his consent to the trial waiver (paying the fine) was tainted by constraint.[97]

Years later, in *Natsvlishvili and Togonidze v. Georgia*, the ECtHR provided guidance on what constitutes voluntary consent to waiving fundamental rights.[98] Fair Trials has analysed the ruling in *The Disappearing Trial*:

- 127. (…) The case concerns the prosecution of the managing director of what was one of the largest public companies in Georgia, and the former mayor of a town called Kutaisi. Mr *Natsvlishvili* was arrested on suspicion of illegally reducing the share capital of the factory for which he was responsible and charged with making fictitious sales, transfers and write-offs, and spending the proceeds without regard for the company's interests. (…) During the first four months of his detention, Mr *Natsvlishvili* was held in the same cell as the man who was charged with kidnapping him some years before, and with another man serving a sentence for murder.
- 128. Mr *Natsvlishvili* eventually accepted a trial waiver (known as a "plea agreement" (…) He agreed to make a payment equivalent to nearly €15,000 plus 22.5% of his factory's shares to the State while maintaining his factual innocence. He later challenged the conviction as an abuse of process in violation of Article 6(1) of the ECHR (protecting the right to a fair hearing before an independent court) and Article 2 of Protocol 7 of the ECHR (protecting the right to appeal).
- 130. Ultimately, the ECtHR found no violation of Article 6, based on the fact that Mr *Natsvlishvili*'s decision to enter into the trial waiver was "undoubtedly a conscious and voluntary decision."[99] The Court stated that the safeguards necessary to ensure the legality of the trial waiver were that: (a) "the bargain had to be accepted…in full awareness of the facts of the case and the legal consequences and in a genuinely voluntary manner"; and (b) "the content of the bargain and the fairness of the manner in which it had been reached

95 ECtHR, *V.C.L. and A.N. v. the United Kingdom*, nos. 77587/12 and 74603/12, Judgment of 16 February 2021, §201 (citations omitted), available at: bit.ly/3IGAv0U

96 ECtHR, *Deweer v. Belgium*, n°6903/75, judgment of 27 February 1980, §53, available at: bit.ly/3lTtsIQ

97 ECtHR, *Deweer v. Belgium*, *op.cit.*, §54.

98 ECtHR, *Natsvlishvili* and Togonidze v. Georgia, n°9043/05, judgment of 29 April 2014, available at: bit.ly/3dJoUjS

99 ECtHR, *ibid.*, §97.

between the parties had to be subjected to sufficient judicial review."[100] As evidence of the voluntariness of the agreement, the Court noted that the defendant, rather than the prosecution, initiated negotiations. It also highlighted several additional safeguards, including the recording of the terms of the negotiation, and a public hearing to ratify the bargain during which the judge was free to depart from the terms of the agreement.

- 131. Judge Gyulumyan dissented however, arguing that it would have been impossible for the local judge to evaluate the fairness of the negotiations without access to a full recording of them (noting that there was evidence of informal negotiation that was unrecorded). She also pointed to "[s]everal shady factual circumstances of the case" that "taint[ed] the presumption of equality between the parties pending the relevant negotiations",[101] including the fact that the company shares were transferred and monetary payments made to the State before the trial waiver was negotiated and that the applicant was detained in deliberately stressful conditions. She also highlighted the weak bargaining power of an defendant in Georgia's criminal justice system, which recorded a conviction rate of 99.6%, as well as the weakness of the inculpatory evidence in the case, which she felt could not have been adequately reviewed in one day, as it was in *Natsvlishvili*'s case.

Recently, the ECtHR has indicated that in assessing the validity of a trial waiver, the prosecuting authorities must take into account if the accused is also a victim. In *V.C.L. and A.N. v. the United Kingdom*, the Court found a violation of Article 6(1) of the Convention where the particular vulnerability of accused persons – children who had been victims of human trafficking – was insufficiently taken into account by public authorities and courts when securing and overseeing plea deals.[102]

The applicants were two children who had been trafficked and had plead guilty to charges relating to their work in a cannabis factory. Their status of victims of human trafficking, although known, had not been taken into account when charging and convicting them.

The Court considered that "in the absence of any assessment of whether they were trafficked and, if so, whether that fact could have any impact on their criminal liability", their pleas had not been made "in full awareness of the facts".[103] Furthermore, it held that "given that trafficking threatens the human dignity and fundamental freedoms of its victims and is not compatible with a democratic society and the values expounded in the Convention, in the absence of any such assessment any waiver of rights by the applicants would have run counter to the important public interest in combatting trafficking and protecting its victims."[104] The Court concluded that in respect of both applicants the proceedings as a

100 ECtHR, *ibid*., §92.

101 ECtHR, *ibid*., dissenting opinion of Judge Gyulumyan, §3.

102 ECtHR, *V.C.L. and A.N. v. the United Kingdom*, *op.cit*.

103 *Ibid*.

104 *Ibid*.

whole could not be considered "fair". Although the Court referred to the positive obligation on states under Article 4 of the Convention to investigate situations of potential trafficking, the judgment more generally stressed that a failure to adequately investigate the context of the criminal offence, and in particular the heightened vulnerability of the accused person in the context of plea bargaining, can undermine the right to a fair trial under Article 6(1) ECHR.

In other cases, not specifically on trial waiver systems, the ECtHR considered several factors in assessing the validity of waivers of specific rights under Article 6:

- The presence of a lawyer as a key factor when examining whether the right to silence had been waived knowingly and voluntarily.[105]
- Whether the accused had sufficient information on their rights and whether they were told in simple, non-legalistic language, with the assistance of interpretation and translation if necessary.[106]
- The particular vulnerabilities of accused persons which may prevent them from understanding and foreseeing the consequences of their waiver, such as being under the influence of alcohol or in withdrawal[107] or having a low level of literacy[108]

Overall, the ECtHR indicates that contextual elements and the specific vulnerabilities of accused persons must be taken into account to determine whether the person is constrained to waive their fair trial rights. These include the risk of deprivation of property rights should the case proceed to trial, the past victimization of the person directly connected to the alleged offence and other evidence of their vulnerability. Unfortunately, they did not include the 99.6 % chances of being convicted to a long custodial sentence, as held by the majority in *Natsvlishvili*.

6. Risks in trial waiver systems

Trial waiver systems rely upon a person's consent, which is a fundamental element of any form of agreement. But what is 'consent' when an individual is facing the punishment powers of the state? First, the failings of the criminal justice system at multiple levels, from police arrest to incarceration, create pressure and systemic incentives on people to waive their right to a full trial for fear of the uncertain, unfair and unjust outcome they will face (6.1). Secondly, the lack or minimum procedural safeguards in place or implemented in the context of trial waiver systems undermine the ability of a person to consent knowingly (6.2). This research also shows the limited scope for judicial scrutiny over the validity of such agreements, including the key element of a person's consent. In

105 ECtHR, Pishchalnikov v. Russia, App. No. 7025/04, 4 September 2009, §78.

106 ECtHR, *Hermi v. Italy*, no. 18114/02, judgment of 18 October 2006, §41, available at: t.ly/xqQQ

107 ECtHR, *Plonka v. Poland*, No. 20310/02, judgment of 31 March 2009, §38, available at: t.ly/Tj1p

108 ECtHR, *Kaciu and Kotorri v. Albania*, nos. 33192/07 and 33194/07, judgment of 9 December 2013, § 120, available at: t.ly/lrjz

effect, trial waiver systems involve a reduced, 'light-touch' judicial function, yet with increased prosecutorial discretion and police powers to handle cases (6.3). Finally, a fundamental concern is discrimination. The systems appear to reinforce the existing patterns of discrimination that we see in European criminal justice systems (6.4).

The risks highlighted in this section emerge as recurring trends in our comparative study and in academic publications. However, because domestic criminal justice systems and trial waiver systems vary widely across Europe, they are not always applicable to all jurisdictions and all trial waiver systems.[109]

6.1. The myth of voluntary consent

According to the ECtHR, a person's decision to waive their rights to a full trial must be unequivocal, made in full knowledge of the facts of the case and of the legal consequences of accepting waiving these rights, and it must be made voluntarily.[110] The accused person's 'autonomy' is therefore central to the legality of trial waiver systems. All studied systems require that a person's consent be knowing and voluntary. However, in contrast to this principled approach, our research shows that suspected or accused persons are often incentivised or coerced into entering trial waiver systems, which raises a fundamental concern that 'consent' is illusory and that existing trial waiver systems do not adequately protect people against the risk of miscarriages of justice.

Direct pressure or coercion

As seen above, judicial actors and prosecutors are under huge pressure to manage their caseload as efficiently as possible. Their obligation to manage cases effectively comes into conflict with their normative role.[111] As a result, they may place pressure on suspected and accused persons to elicit their consent to waive their right to a trial and opt for a quicker resolution of their case.

Prosecutors are tasked with managing increasing caseloads with limited resources. They may be incentivised to pressure accused persons to agree to trial waiver systems in order to 'resolve' cases fast and cheaply. The same pressure can affect police practices, partly because they are pressured to 'resolve' cases quickly for various structural reasons, including appraisal systems that focus on the number of crimes 'solved'.[112] Investigators may be encouraged to use coercive

109 The qualitative research, including case file reviews and interviews of criminal justice stakeholders, was limited to Albania, Italy, Hungary, Slovenia and Cyprus. The research conducted by our pro-bono partner in Belgium and France were desk-based only.

110 ECtHR, *Natsvlishvili and Togonidze v. Georgia, op.cit*., §§91-92; *see also* section 5.2 "Relevant ECHR standards".

111 Erik Luna, Marianne Wade, *The Prosecutor in transnational perspective*, Oxford University Press, 2012, p.37; Virginie Gautron, "L'impact des préoccupations managériales sur l'administration locale de la justice penale française", *Champ Pénal, vol.11*, 2014, §23 (free translation), available at: t.ly/dXQt

112 United Nations Office of the High Commissioner for Human Rights (OHCHR), *Set universal standards for interviewing detainees without coercion*, §10, CPT, Extract from the 12th General Report of the CPT published in 2002, *Developments concerning CPT standards in respect of police custody*, §35, available at: https://rm.coe.int/16806cd1ed

or deceptive interrogation techniques aimed at obtaining confessions,[113] which can in turn help prosecutors secure a quick guilty plea or sentence agreement, placing them in a favourable bargaining position with respect to the accused person. Trial waiver mechanisms, therefore, create an incentive for the use of deceitful and abusive investigation techniques, especially where there is no trial during which such techniques can be brought to light.

The increasing use of trial waiver systems across the world contributes to an overreliance on confessions and creates barriers to the identification and exclusion of evidence obtained through abuse and wrongful practices. The following applies to police abuse and wrongful practices generally and not only to torture:

> **"An overreliance on guilty pleas can incentivize the police to use torture much in the same way that an overreliance on confessions does. This risk is heightened by the removal of the subsequent trial process and its associated safeguards for the exclusion of evidence obtained through torture. Criminal trials and procedures for challenging the admissibility of evidence are crucial forums that can expose torture and other ill-treatment, and they can also inform the wider public about instances of torture or other ill-treatment.**
>
> **Criminal court proceedings where allegations of torture are dealt with can also form the basis of collateral claims for compensation, or for the prosecution or establishing the civil liability of perpetrators. Plea deals may, at times, be used to avoid such claims by "cleansing" or "laundering" cases that are tainted by torture, ill-treatment or other human rights abuses by avoiding trials. Thus, trial waver systems can provide an incentive for the use of torture or other ill-treatment, as accountability for such acts becomes less likely."** [114]

This pressure is not only felt by the police and prosecutors. In Cyprus and Slovenia, interviewed lawyers explained that judges sometimes encourage accused persons to confess or try to reach an agreement with the prosecutor. They sometimes even threaten to impose a harsher sentence if an agreement is not reached. However, it did not appear from this study that criminal justice actors were imposing a 'trial penalty' in the form of a harsher sentence on suspected and accused persons who refuse to waive their right to trial.

113 CPT, Extract from the 12th General Report of the CPT published in 2002, *ibid*., §35 ; Saul M. Kassin, "False Confessions: Causes, consequences, and implications for reform", *Policy insights from the behavioural and brain sciences, vol.1*, 2014, pp. 112-121, available at: t.ly/NHDl ; Geoffrey P. Alpert, Jeffrey J. Noble, "Lies, true lies, and conscious deception", *Police Quarterly, 12 (2), 2008*, pp.14-15, available at: t.ly/ztFQ ; The New York Times, *It's Time for Police to Stop Lying to Suspects*, available at t.ly/ZvdY (accessed on 01.10.2021).

114 Fair Trials and the Organization for Security and Co-operation in Europe (OSCE), *Eliminating incentives for torture in the OSCE region*, p. 38, available at: t.ly/KzYM

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 system, which flow from the dysfunctions and failures of criminal justice systems. Accused persons may 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' will not be determined by the strength of evidence against them, or their actual guilt or innocence, but by fear of the consequences of going to trial.[115] 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.[116] The ECtHR also refers to these systemic incentives in, *Deewer* (financial risks associated with going to trial compared to waiving the right to a trial)[117] and in the dissenting opinion in *Natsvlishvili* (pre-trial detention, excessively low acquittal rate).[118]

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?[119] In this context, autonomy becomes a legal fiction[120] and relying on consent as a basis to convict threatens fundamental rights and the rule of law.[121] It is questionable whether decisions to enter a trial waiver system, even free from direct pressure or duress, are completely free from constraint.

Time and cost

Depending on the legal system, going to trial may demand a lot of time, energy, and money. In Hungary, Cyprus and Italy, the financial situation of accused persons and the anticipated length of a trial were clearly identified as a factor taken into account in decisions as waiving their right to a trial would involve fewer lawyer fees or no court fees. Trial waiver systems can become coercive when the time and cost involved in going to trial is prohibitive compared to the

115 *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: t.ly/JIOI, 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).

116 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: t.ly/xrsv

117 ECtHR, *Natsvlishvili and Togonidze v. Georgia, op.cit*.

118 ECtHR, *Deweer v. Belgium*, *op.cit*.

119 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: t.ly/ubag

120 Rebecca K. Helm, R. Dehaghani, D. Newman, "Guilty plea decisions, moving beyond the autonomy myth", *op.cit*., p.30.

121 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: t.ly/XEZm

time and cost involved in entering a trial waiver system.[122] Criminal proceedings and investigations can be lengthy, especially when police, prosecutor offices and courts are overburdened.

A lawyer's assistance and court costs may also be very expensive. As explained below, the right to legal aid is often limited in many ways.[123] The conditions to access legal aid often imply that it will only be available to people in extremely dire situations, which leaves a large portion of the public unable to pay private lawyers' fees.[124] When available, legal aid does not cover the cost of proceedings under EU law and in many European jurisdictions.[125] Accused persons may 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.[126] For example, defence lawyers in Hungary reported that in order to speed up proceedings, accused persons sometimes make a confession at the pre-trial hearing, even if the bill of indictment does not fully correspond to the facts. Finally, legal aid schemes and the organisation of legal aid fees may incentivise legal aid lawyers to advise their clients to waive their right to a trial.[127]

122 Rebecca K. Helm, "Constrained Waiver of Trial Rights?", *op.cit.*, p.427.

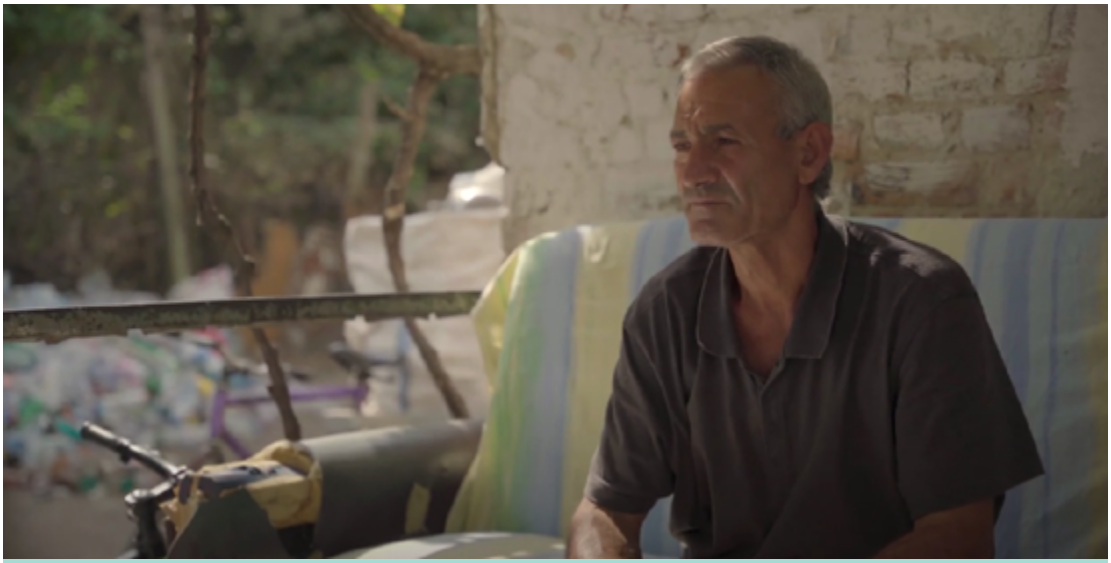
123 *See* section 6.4 "Amplification of discriminations", and in particular "Persons experiencing poverty or on low income".

124 *See* section 6.4 "Amplification of discriminations", and in particular "Persons experiencing poverty or on low income".

125 *See* section 6.4 "Amplification of discriminations", and in particular "Persons experiencing poverty or on low income".

126 Rebecca K. Helm, R. Dehaghani, D. Newman, "Guilty plea decisions, moving beyond the autonomy myth", *op.cit.*, p.23.

127 *See* section 6.2 "Lack or insufficient procedural safeguards leading to uninformed consent", and in particular "Lack or insufficient legal assistance.



Case study: Fiqiri, Albania
A man from the Roma community was collecting cans with a homemade tricycle to sell them to a recycling factory. He was arrested for driving this vehicle without a driver's licence. Although the facts of the case did not even constitute a criminal offence (the size of the engine was too small to require a driver's licence), he was offered an agreement. He could admit guilt and be sentenced to probation or could face months in prison should he choose to go to court. Out of fear of being imprisoned and not being able to provide for his family or pay rent, he accepted the deal. His tricycle, which was his working vehicle, was confiscated as part of the deal.[128]

Pre-trial detention

Where pleading guilty could mean immediate release and going to trial could mean remaining in detention until the case is heard, the choice is often simple.[129] In a context where pre-trial detention rates are still excessively high all over Europe, 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. Lawyers interviewed in Italy as part of this project indicated that pre-trial detention makes the person more 'tired' and ready to plea bargain in order to get out of prison, especially if it is their first time in detention. Similar concerns were expressed by lawyers in Slovenia and Hungary.

128 See Fair Trial's short film : "Fiqiri's story: forced to give up the right to a fair trial", available at: t.ly/tBCQ

129 As pointed out by judge Gyulumyan in her dissenting opinion: "the fact that the first applicant had been detained, allegedly deliberately, in stressful conditions [...] also taint the presumption of equality between the parties pending the [...] negotiations." (ECtHR, *Natsvlishvili and Togonidze v. Georgia, op.cit.*, dissenting opinion of Judge Gyulumyan, §4); *see also* Rebecca K. Helm, R. Dehaghani, D. Newman, "Guilty plea decisions, moving beyond the autonomy myth", *op.cit.*, p.26.

This is an even stronger incentive for certain groups who are disproportionately affected by pre-trial detention.[130] In Slovenia and Cyprus, pre-trial detention was clearly identified as a pressure point used by prosecutors, in particular with undocumented migrants who are systematically placed in prison while waiting for a trial. They usually prefer to end their detention sooner regardless of their chances of winning at trial.

By way of exception, in Albania, pre-trial detention was not raised as a systemic pressure point for accused persons because for the vast majority of offences, pre-trial detention is either not imposed or imposed for a very short duration. Accused persons facing long custodial sentences will take advantage of a long pre-trial detention period as it will be deducted from their final sentence – one day in pre-trial detention is counted as one day and a half by the court when deciding on the final sentence.

High conviction rates and harsh sentences

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.[131]The high benefits provided in exchange for a trial waiver can constitute constraint when there is a flagrant disproportion between the two alternatives offered.[132] Discounts that are too generous – or disproportionately high sentences after trial – pressure people into accepting to waive their rights.[133]

Similarly, the unlikelihood of being found innocent is an essential factor in an accused persons decision to enter trial waiver systems. As noted by Judge Gyulumyan in her dissenting opinion in *Natsvishvil*:

> **“[a]s regards the question whether the first applicant had agreed to the plea bargain in a truly voluntary manner, I note that the conviction rate in Georgia amounted to some 99% at the material time, in 2004. With such a sky-high rate, it is difficult to imagine that the applicant could have believed, during the relevant plea-bargaining negotiations, that his chances of obtaining an acquittal were real. […]Thus, the applicant had no real option other than to accept the “take it or leave it” terms dictated by the prosecutor.”** [134]

130 *See* section 6.4 “Amplification of discriminations”, and in particular “Migrants and undocumented persons”.

131 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: t.ly/ikqj

132 ECtHR, *Deweer v. Belgium*, *op.cit*., §51.

133 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.

134 ECtHR, *Natsvlishvili and Togonidze v. Georgia, op.cit*., dissenting opinion of Judge Gyulumyan, §4 (references omitted).

This was also observed in Albania, where very low acquittal rates[135] are pushing accused persons, either on their own or on the advice of their lawyer, to opt for a trial waiver system.

Moreover, in the context of a general and constant toughening of criminal sanctions in Europe,[136] accused persons have a vested interest in accepting deals that would help them avoid a custodial sentence or reduce their sentence length. In Hungary, for example, lawyers interviewed explained that accused persons tend to confess at the preparatory session to ensure that no harsher sentence than the one included in the sentencing motion will be imposed in their case, even in instances where the bill of indictment does not fully correspond to the truth. This is an even stronger incentive for certain categories of suspected or accused persons, who are disproportionately affected by custodial sentences, in particular migrants.[137]

6.2. Lack of or insufficient procedural safeguards leading to uninformed consent

The "disappearance of the contested trial and the reduced opportunities for the defence to test the prosecution case shift the focus of fair trial rights such as equality of arms toward the pre-trial phase."[138] Procedural safeguards pre-trial are central to the lawfulness of trial waiver systems. Pursuant to ECtHR, decisions to waive the right to a trial must be taken "in full awareness of the facts of the case and the legal consequences [of accepting the waiver]."[139] The requirement of an informed waiver is indissociable from the effective protection of the other procedural rights. The effective assistance of a lawyer, access to legal aid, to an interpreter where a person does not speak the language of the proceedings, to case materials, information on the trial waiver process and on the person's rights are crucial for their ability to consent to a trial waiver in full awareness of the facts and of the consequences of the waiver. Without these safeguards, informed consent is unlikely, if not impossible.

At the regional or domestic level, fair trial rights pre-trial are not adapted specifically to the trial waiver system. The general framework applies, along with its common implementation issues, which often leaves suspected and accused persons deprived of the necessary assistance and means to consent to trial waiver systems knowingly.

Access to procedural rights in the context of trial waiver systems operate under time pressure in some systems. Research has shown that pressure to waive fair

135 In 2020, the acquittal rate for the Tirana District Court was at 2,9%, based on an analysis made by Res Publica of all the judgments delivered in that year at the District of Tirana.

136 See section 3.1 "Overcriminalisation and overpunishment".

137 See section 6.4 "Amplification of discriminations".

138 Jacqueline S. Hodgson, *The Metamorphosis of Criminal Justice, op.cit.*, pp. 145-146.

139 ECtHR, *Natsvlishvili and Togonidze v. Georgia, op.cit.*, §§91-92.

trial rights may also come from the timeframe in which these systems operate.[140] In some jurisdictions, greater benefits are provided for trial waivers exercised early in the proceedings. In Cyprus, according to case-law, early admissions of guilt and cooperation with the investigators are taken into account for sentencing purposes. This implies that accused persons may be pushed to accept offers from prosecution authorities without having sufficient access to information, the case file, and legal advice to make a reasoned and well-informed decision.

Lack of information on rights in the trial waiver process

The right to information under EU law applies pre-trial and from the moment the person is made aware that they are suspected or accused of a criminal offence.[141] 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.[142] 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.

In relation to sentence bargaining agreements, 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. Since mandatory assistance of a lawyer is required before signing an agreement,[143] the task of explaining the process in detail and its consequences in effect falls to them.

- In Hungary, the police must inform suspected people that they may initiate the conclusion of a sentence bargaining agreement and that the assistance of a defence lawyer is mandatory if the person and prosecutor decide to go ahead with the agreement process. However, it is only after the person has agreed to negotiate that the prosecution must inform them or their lawyer of the possible content of the agreement, and only after they have agreed on the content of the agreement that the prosecutor must warn them about the consequences of waiving their right to a trial. At the hearing, the court must inform the person about the consequences of the court approving the agreement, and in particular that there is no remedy against the court decision approving the agreement (i.e. very limited grounds for appeal).[144]
- In Slovenia, prosecutors interviewed explained that they must caution the person before they sign the agreement on the basis of a standardized form.
- In Albania, there is no obligation for the police and prosecutors to inform the person on the process or on the consequences of waiving their right to

140 For example, in England and Wales, see Sentencing Council, *Assessing the impact and implementation of the Sentencing Council's Reduction in Sentence for a Guilty Plea Definitive Guideline*, p.2, available at: t.ly/F4th

141 Article 2(1) of the Directive on the right to information.

142 Article 4(1) of the Directive on the right to information.

143 See section 6.2 "Lack or insufficient procedural safeguards leading to uninformed consent", and in particular "Lack or insufficient legal assistance.

144 Article 732(2) of the Hungarian Code of Criminal Procedure.

a trial. Lawyers interviewed explained that the general assumption is that providing information is the role of defence lawyers.

- In Belgium, the law explicitly provides that the lawyer informs the person of their rights, the consequences of admitting guilt and the course of the proceedings.[145]

In relation to guilty pleas at the pre-trial hearing, courts are required to inform the person of the possibility of pleading guilty and its consequences.

- In Slovenia, the person must be informed in the summons to the pre-trial hearing and at the hearing of inter alia: (i) that they may plead guilty or not guilty; (ii) that if they plead guilty, their statement may not be retracted and that they waive their right to a trial and that evidence will be heard only in relation to the circumstances that are relevant to the sentence; (iii) that they have the right to be assisted by a lawyer.[146] This information is particularly important where the person is not represented by a lawyer, that is in the majority of cases in Slovenia.[147] However, when not represented by a lawyer, it is not certain how this information can allow the accused person to make a fully informed choice.
- In Hungary, the written summons to the pre-trial hearing provides similar information. It includes inter alia: (i) that they may plead guilty or not guilty; (ii) that if they plead guilty, the court will not examine whether the facts of the case included in the indictment are well founded and will not hear evidence on the question of guilt.[148] The court must repeat the warning at the pre-trial hearing, before starting the accused person's interrogation.

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, in particular when the person is not assisted by a lawyer, strengthens prosecutors bargaining powers, and likely their ability to convince (or pressure) a person to waive their right.

Limited access to 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 having committed "promptly"[149] 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".[150]

145 Article 216, §3.3 of the Belgian Code of Criminal Procedure.

146 Article 285 (a)(3) of the Slovenian Criminal Procedure Act.

147 See section 6.2 "Lack or insufficient procedural safeguards leading to uninformed consent", and in particular "Lack or insufficient legal assistance.

148 Article 500(2)(a)–(c) of the Hungarian Code of Criminal Procedure.

149 Articles 3(1) and 4(1) of the Directive on the right to information.

150 Article 7(3) of the Directive on the right to information.

The "logic of a shift away from trial and toward earlier case disposition based on some agreed outcome is to have earlier and fuller discovery, rather than less."[151] Authorities should disclose evidence as soon as a trial waiver is considered to allow the person to make informed choices as early as possible. This is not what is observed in practice. The general rules apply, and so do the well-known and widely reported problems that suspected or accused persons face in practice when accessing case materials in criminal proceedings pre-trial.[152]

In the context of sentence bargaining agreement, disclosure obligations vary. In Slovenia, Hungary, Italy and Albania, prosecutors can propose to initiate negotiations without being required by law to give the accused person or their lawyer access to the case file.

- In Italy, Albania and Slovenia, the general rule applies and full access to the case file is only granted after the closure of the investigation, when the indictment is filed. [153] In Slovenia, there is no specific disclosure obligation in the context of trial waiver systems. In practice therefore, lawyers may enter negotiations in the pre-trial phase not knowing whether the prosecutor is withholding any evidence, including exculpatory evidence.
- In Hungary, the general rule applies and the person and their lawyer should have access to all case materials during the investigation, after the accused person's interrogation. The law however provides for exceptions to this rule.[154]
- In France and Belgium, the person and their lawyer must have access to the case file as soon as the prosecutor offers an agreement. If violated, this right may give rise to the annulment of the proceedings in certain cases. [155]

In the context of guilty pleas at the pre-trial hearing, accused persons are usually placed in the same position as they would in a normal trial setting, and should have had an opportunity to access the case file sufficiently early ahead of the hearing. In Cyprus, the general rule applies and the prosecution is obliged to provide access only to the relevant material evidence it will use in the context of the trial and not all materials, including exculpatory evidence.

Practical problems may impede on the effectiveness of the right, in particular in relation to untimely disclosure or to the cost of accessing case material. For example:

- In Albania, prosecutors refuse to provide copies of the case files, or delay the timing of access to the file. Lawyers report that they either have to study the case file at the courthouse, or take photos with their phones of the most relevant documents from the case file to discuss with their clients.

151 Jacqueline S. Hodgson, *The Metamorphosis of Criminal Justice, op.cit.*, p. 147.

152 Fair Trials, *Where's my lawyer* - making legal assistance in pre-trial detention effective, 2019, pp.21-22, available at: t.ly/MK2l *Inside Police Custody* 2, 2018, p.40, available at: t.ly/Y30W.

153 Article 415 bis of the Italian Code of Criminal Procedure and Article 327(3) of the Albanian Code of Criminal Procedure.

154 Article 100(1)(a) and 100(6)–(6)(d) of the Hungarian Code of Criminal Procedure.

155 Article 216, §3.3 to the Belgian Code of Criminal Procedure.

- In Italy, obtaining copies of the case file can be time consuming. In addition, copies can be made at the expense of the defence and the prices are not determined by law but by the registry of each judicial office.[156] Costs of copying therefore varies from one court to another, sometimes quite significantly.

Difficulties to access 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' is difficult to see, in such circumstances, how their consent can be deemed as being informed as required by the ECtHR.

Limited access to interpretation services and translation

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."[157] 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."[158]

The lack of availability of interpretation services and translations undermines the effective access to all other procedural rights, including access to a lawyer or to information.[159] In none of the countries studied, are there specific obligations with respect to the timing of translations and the availability of interpretation services in the context of trial waiver systems.

- In Cyprus, where negotiations with the police and prosecutors are informal and cannot be considered as part of the procedure, the right to interpretation does not apply. When interpretation is available, many vulnerable groups, such as migrants and refugees, may misunderstand the role of the interpreter, in particular when interpreters overstep their functions and provide advice, often against their best interest. Moreover, despite clear legal provisions on the right to have the main documents of the case translated in a language understood by the person, in practice, translations are not provided. Instead, authorities consider that it is the duty of lawyers to inform their clients of the charges against them.

156 This seems to be in violation of Art. 7(5) of the Directive on the right to information.

157 Articles 2(1) of the Directive on the right to interpretation and translation.

158 Articles 3(1) of the Directive on the right to interpretation and translation.

159 Fair Trials, *Where's my lawyer*, *op.cit.*, pp.23-24.

- In Hungary, although the right to an interpreter applies to consultations with defence lawyers, the right is ineffective because of difficulties to find and pay for quality interpretation services. Moreover, while the charges must be translated orally by an interpreter at the beginning of the investigation, any other record, including witness statements, are not available for the suspect in their mother tongue free of charge (except for documents that need to be officially notified to the person). Low-income people who need translated materials are significantly disadvantaged compared to wealthier people who may be able to afford to translate the documents the prosecutor is not required to translate.
- In Albania, although a list of evidence is usually provided to the suspected or accused person in their mother tongue, the evidence itself is rarely translated.[160]
- In Italy, it is possible for the suspected or accused person to request an interpreter for a consultation with the lawyer right before the hearing. At hearings, interpretation services are, however, often described as poor. In addition, practitioners reported that interpretation services were unavailable for consultations between the lawyer and the accused person, and were *de facto* only available free of charge right before the hearing, where the court-appointed interpreter is present. Translation services are also provided for the most important documents (notification of the conclusion of investigations, summons to appear in court, notice of hearing, sentences and ordinances), but not for other documents, including the evidence. One lawyer explained that accused persons are often pressured to waive their right to translation.

In a trial waiver setting, the lack of access to interpretation services and translations may result in accused persons entering sentence bargaining agreements or pleading guilty without sufficient understanding of the charges and evidence against them and of the 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.

Lack of or insufficient legal 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."[161] The key role of lawyers at the pre-trial stage has been defined by the ECtHR on many occasions.[162] They have a preventive function in limiting the risk of abuse, violence and coercion by official authorities.163 In practice, lawyers

160 Fair Trials, *Roadmap to the EU: Advancing procedural rights in Albania*, p. 10, available at: t.ly/YSFH

161 Article 3(2) of the Directive on the right of access to a lawyer.

162 *See, e.g.*, ECtHR, *Beuze v. Belgium*, *op.cit*.

163 *Ibid*., §126.

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 not to incriminate himself and for his right to remain silent."[164] 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, pointing out discussion of the case, organisation of the defence, collection of evidence favourable to the suspected person, preparation for questioning, support [of an accused in distress] and checking of the conditions of detention".[165]

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 and 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.

In most countries studied, the law specifically requires that accused persons be assisted by a lawyer when negotiating sentence bargaining agreements.

- In Hungary, assistance is mandatory only from the point where the parties declare they do not exclude the possibility of an agreement as initiated by the other party, i.e. only after the parties agreed to enter into a negotiation process. If the person does not wish to retain a lawyer, the prosecution shall appoint a lawyer without delay and ensure that they can familiarise themselves with the case materials of the investigation. If no agreement is concluded, the appointment of the lawyer is terminated.
- In Slovenia, mandatory assistance starts when the parties have decided to enter into an agreement and does not apply to previous interactions with the police or prosecutor. Research in Hungary and Slovenia suggests that the potential benefits of an agreement are more likely to be enjoyed by accused persons who have a lawyer present in the investigative phase, before making their first statements to the police. But in general, persons may be questioned by the police in the absence of a lawyer, and may make incriminating statements, before the negotiation process begins. Only one out of forty people are assisted by a lawyer at the police station at the beginning of the investigation.[166] This places people at a serious disadvantage before the negotiations even begin.
- In France and Belgium, the assistance of a lawyer is mandatory when the person admits guilt in response to the prosecutor's offer.[167] In France, this implies that should the person decide not to be assisted by a lawyer,

164 *Ibid*., §128.

165 ECtHR, A.T. v. Luxembourg, no 30460/13, Judgment of 14 September 2015, §64, available at: t.ly/i5ID

166 The data comes from case files reviewed by the Mirovni Institute in the context of this research.

167 Article 495-8 of the French Code of Criminal Procedure and 216, §3.1 of the Belgian Code of Criminal Procedure

sentence bargaining agreements cannot be concluded. However, the law also provides that the prosecutor may, before proposing a sentence, inform the person that they intend to make an offer.[168] This leaves room for the possibility of informal negotiations over the sentence. Mandatory assistance is not foreseen in this context.

In the context of guilty pleas at the preparatory hearing, the law (in Hungary and in Slovenia where this system is available) does not systematically require the mandatory assistance of a lawyer at the pre-trial hearing despite the fact that the person will be asked if they plead guilty. This lack of mandatory assistance therefore extends to the informal negotiations that often occur in the context of such a hearing. This means that prosecutors may approach accused persons before the hearing and convince them to opt for a guilty plea in court, despite the person being unadvised and unassisted.

- In Hungary, it is only if a defence lawyer is already appointed or retained that the preparatory session cannot be held in their absence. [169] Otherwise, there is no mandatory assistance at the pre-trial hearing. However, the court must appoint a defence counsel and postpone the hearing where (i) the court has doubts as to whether the accused understood the charges and the warnings included in the summons to the preparatory session or where (ii) the person motions for appointing a defence counsel.[170]
- In Slovenia, mandatory legal assistance is not required at a pre-trial hearing.[171] This means that in a significant number of cases, accused persons are not assisted when pleading guilty at the pre-trial hearing.[172] In principle, however, the prosecutor is required to apply prosecutorial guidelines applicable to negotiations in sentence bargaining agreements in the context of a guilty plea at the pre-trial hearing.[173]

Even when a lawyer assists the person in either trial waiver system, systemic issues beyond procedural rights affect the effectiveness of their defence. First, in most studied countries and contrary to what can exist in common law countries, defence counsels are 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. Second, legal

168 Article 495-8 of the French Code of Criminal Procedure.

169 Article 499(5) of the Hungarian Code of Criminal Procedure. According to the same provision, the presence of the prosecutor and the accused person is always obligatory at the preparatory session.

170 Article 502(4) of the Hungarian Code of Criminal Procedure

171 However, there may be other circumstances prescribed by law in which defence is mandatory e.g. if the accused is in pre-trial detention, if the sentence is eight years' imprisonment or more, etc. If the defence is mandatory on these grounds, then the accused must be represented by a lawyer at the pre-trial hearing

172 On this subject, *see also* The Peace Institute, *National Study on the Right to Access to a Lawyer and the Right to Legal Aid of Suspects and Accused Persons in Criminal Proceedings*, 2018, available at: t.ly/cemT

173 General Instructions regarding negotiations and proposing sanctions in cases of admission of guilt and admission of guilt agreements, Supreme Public Prosecutor's Office of the Republic of Slovenia, 26 October 2012.

aid lawyers are underfunded and face an ever-increasing caseload to administer. They may therefore be incentivised to participate in the general effort towards efficiency and speediness.[174] Legal aid schemes may also be inadequate in a trial waiver setting, as fees are essentially pegged to hearings and trials (and not to negotiations and preparation of a defence outside the trial context). In Italy and Albania, where criminal legal schemes pay lawyers a flat fee per case regardless of its complexity or of the number of hearings; it is more beneficial for the latter to dispose of cases quickly. This may incentivise lawyers to advise their clients to enter trial waiver mechanisms, for economic reasons that are entirely independent from the merits of the case and of their client's interest. The lack of timely access to the case file or to the prosecutor's sentencing motion also makes it difficult for lawyers to effectively advise their clients.

Finally, the recent judgment by the ECtHR in *V.C.L. and A.N. v. the United Kingdom* serves as a reminder that the assistance of a lawyer is not a solution on its own. In that case, both lawyers assisting the minors knew they had been the victims of human trafficking. Yet, neither raised the issue to vacate their clients' pleas.[175] Effective judicial review is crucial to ensure the fairness of trial waiver processes.[176]

Evidentiary issues in cases of multiple accused persons

In cases that involve multiple accused persons, the admission of guilt by one person may 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. For example, a judge interviewed in Hungary explained that in cases with multiple accused persons, there is a risk that the authorities may pressure the most vulnerable person, who may be so interested in making incriminating statements against other accused persons that the credibility of their statements becomes highly questionable.

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."[177] 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

174 Jacqueline S. Hodgson, *The Metamorphosis of Criminal Justice, op.cit.*, p.73.

175 ECtHR, *V.C.L. and A.N. v. the United Kingdom*, *op.cit.*, §§197-199.

176 *Ibid.*, §201.

177 ECtHR, Navalnyy and Ofitserov v. Russia, nos. 46632/13 and 28671/14, judgment of 4 July 2016, §105, available at: t.ly/KWv1

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."[178] 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 judgment issued on the basis of his plea-bargaining agreement could have been reversed, thus depriving him of the negotiated reduction of his sentence."[179]

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. Domestic laws do not appear to sufficiently regulate the admissibility of evidence obtained during trial waiver negotiations or the impartiality of courts who may adjudicate both on the trial waiver and at the trial of co-accused persons.

Evidentiary issues when an agreement is not reached or an agreement or plea is rejected

Across the researched countries, what is done with the record of the negotiations (formal or informal) or of a guilty plea at the hearing if the case proceeds to trial varies greatly.

- In Hungary, the obligation to remove the records of negotiations from the case file only applies if the parties do not reach an agreement, but not if an agreement is concluded and further rejected by the court. In such cases, the content of the negotiations and admissions of guilt may be used as evidence during the subsequent trial.
- In the context of guilty pleas at the pre-trial hearing in both Slovenia and Hungary, the admission of guilt made in court may be used as evidence in the ensuing trial if the Court rejects it and may result from unassisted informal negotiations with the prosecutor.
- In Albania and Italy, should the negotiation fail, there is no obligation to remove statements made in the context of the negotiations from the case

178 *Ibid*.

179 ECtHR, *ibid*., §109; *See also*, CJEU, *AH and others*, C-377/18, 5 September 2019, §51, available at : t.ly/LW9O (the Court of Justice of the EU has ruled in a similar case that article (1) the Directive on the presumption of innocence "does not preclude that an agreement in which the accused person recognises his guilt in exchange for a reduction in sentencing, which must be approved by a national court, expressly mentions as joint perpetrators of the criminal offence in question not only that person but also other accused persons, who have not recognised their guilt and are being prosecuted in separate criminal proceedings, on the condition that that reference is necessary for the categorisation of the legal liability of the person who entered into the agreement and, second, that that same agreement makes it clear that those other persons are being prosecuted in separate criminal proceedings and that their guilt has not been legally established.").

file. In Albania, agreements concluded but rejected by the Court cannot be used as evidence in a subsequent trial. However, there is no obligation to physically remove the agreement from the case file and research suggests that judges in fact do take it unofficially into consideration as evidence corroborating the person's guilt.

Evidence obtained during trial waiver negotiations should not be deemed reliable because of the various reasons why a person might admit guilt, even when innocent, or might admit being guilty of charges that do not reflect what actually happened. As with cases involving multiple accused persons, domestic laws do not appear to sufficiently regulate the admissibility of evidence obtained during a trial waiver system or issues surrounding the impartiality of courts who may adjudicate both on the trial waiver and at the trial of the same person, when a trial waiver fails. Exceptionally in Slovenia and Belgium, judges who have rejected an agreement must exclude themselves from further proceedings in the same case.

6.3. Lack of effective judicial oversight and accountability mechanisms

The judiciary has seen its role limited in relation to overseeing trials, conducting proceedings and assessing evidence. The increased use of pre-trial disposition systems, including trial waiver systems, have not been accompanied by the effective judicial review of these systems, in law and in practice. As highlighted by both the CEPEJ and the Council of Europe's Committee on Legal Affairs and Human Rights, trial waiver systems may remove any potential human rights violations from scrutiny in an open courtroom.[180] The lack of effective judicial review and accountability mechanisms carry risks both for the rights of the defence and for systems' fairness and efficiency.

Increased and unaccountable prosecutorial powers

The drive towards efficiency and limiting the role of courts and trials has been accompanied by a significant increase in prosecutorial powers through pre-trial dispositions of cases including trial waiver systems, conditional disposals and penal orders.[181] Prosecutors have to manage significant caseloads, while safeguarding the core principles of the traditional truth-seeking inquisitorial process.[182] This has been a lack of resources and an unwillingness to try alternative policy solutions such as decriminalisation.[183] Prosecutors are effectively enforcing

180 CEPEJ, *European judicial systems – Efficiency and quality of justice - 2018 Edition, op.cit.*, p.302; 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.*, §19.

181 *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.

182 Erik Luna, Marianne Wade, *The Prosecutor in transnational perspective*, *op.cit.*, p.38.

183 Marianne Wade, "Meeting the demands of justice whilst coping with crushing caseloads?", *op.cit.*, p.26.

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. For example, in France and England & Wales, researchers have found that the increasing burden on prosecutors to manage caseloads has impacted their normative role from objectively investigating and prosecuting criminal cases to managing an overburdened and broken system.[184]

This shift in powers is based on the misguided belief that prosecutors can oversee investigations and deal with cases in an impartial and independent manner in the same way as courts. But the pre-trial investigation phase is partisan by nature, not neutral. Prosecutors are not impartial and independent judicial authorities and are not in a position of controlling procedural fairness in the same way as courts.[185] Their key role is to oversee investigations and they are inclined, through institutional pressure, to focus on bringing charges and obtaining sentences. Moreover, prosecutorial decisions are taken outside public scrutiny, 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.

Evidentiary issues when the trial waiver system fails

A trial is not just the place where guilt or innocence is publicly determined. It also provides the opportunity for judicial and public oversight of police and prosecutorial practices. In the absence of a trial, procedural rights violations are left unaddressed. These can include: lack of access to a lawyer during the first interview by the police, poor-quality interpretation services, lack of access to case materials and translations, unlawful arrests or searches, police violence and other forms of coercion.

The right to an effective remedy for fundamental rights violations is protected by various European instruments.[186] There is a general obligation in EU law to guarantee the effective judicial protection for violations of rights under the EU law, which is embedded in Article 47 of the Charter and corresponds to Article 13 ECHR. This is entrusted to all courts across the EU.[187]

184 Jacqueline S. Hodgson, *The Metamorphosis of Criminal Justice, op.cit.*, pp.72-79; Virginie Gautron, *op.cit.*, §23 (free translation), available at: t.ly/7Gip

185 *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: t.ly/hdCD , where it was ruled that German prosecutors do not provide a sufficient guarantee of independence from the executive when issuing an EAW.

186 Articles 6 and 13 of the ECHR; Article 47(1) of the Charter; Article 12 of the Directive on the right of access to a lawyer; Article 10 of the Directive on the presumption of innocence. For more on the right to an effective remedy and evidentiary remedies in particular, see Fair Trials, *Unlawful evidence in Europe's Courts: principles, practice and remedies*, available at: t.ly/06Dg

187 CJEU, Case C-64/16, *Associação Sindical dos Juízes Portugueses*, 27 February 2018, §34, available at: t.ly/TMBY

Generally, for a remedy to satisfy the requirements of Article 47 of the Charter, it has to be effective both in law and in practice. In particular, the judicial authority providing effective judicial protection has to offer an opportunity to examine the applicant's complaint on its merits, reviewing both the relevant facts and law, and to offer an appropriate preventive or at least compensatory remedy. In a well-established series of case law, the ECtHR has clarified the criteria for an effective remedy within the meaning of Article 13 ECHR. Namely, a mechanism examining a potential violation of fundamental rights must be accessible, prompt,[188] and offer minimum guarantees of fairness by ensuring conditions that enable the applicant to challenge a decision that restricts their rights (e.g., adversarial proceedings based on equality of arms).[189] The complaint must also be addressed on its substance.[190]

In the context of waivers of fundamental rights, the ECtHR has made clear that it is trial courts' duty to establish in a convincing manner whether confessions and waivers are voluntary, and a failure to do so amounts to depriving accused persons of the possibility to remedy a situation, which is contrary to the requirements of the Convention.[191]

In many EU countries, it is typically at the trial hearing that challenges for violations of fundamental or procedural rights, including unlawful arrest, search, torture, inhuman or degrading treatment, are brought to the attention of an impartial and independent court.[192] The right to an effective remedy is organised as such: the remedy for a violation often arrives very late in the game, after courts are able to assess the overall fairness of the proceedings, when a person is ultimately tried.[193] 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.[194]

But in the context of trial waiver systems, courts have limited power to review the fairness of the proceedings on their own motion and accused persons are not incentivised to challenge rights violations, as this may lead the court to reject the request to approve a trial waiver agreement. Courts must generally verify whether the specific procedural requirements exhaustively set out in law have been met for the specific trial waiver. These include that the accused person was properly informed of their rights, had access to a lawyer during the negotiation or at the hearing, that the agreement was formalised in writing and that the person voluntarily consented.[195] Courts generally do not, however, have the power

188 ECtHR, *Çelik and İmret v. Turkey*, No. 44093/98, judgment of 26 January 2005, § 59, available at: t.ly/URVg

189 ECtHR, *Csüllög v. Hungary*, No. 30042/08, judgment of 7 September 2011, § 46, available at: t.ly/ro1G

190 ECtHR, *M.S.S. v. Belgium and Greece*, No. 30696/09, judgment of 21 January 2011, § 387, available at: t.ly/eewm

191 ECtHR, Bozkaya v. Turkey, No. 22744/07, judgment of 5 December 2017, §49, available at: t.ly/09od

192 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.

193 ECtHR, *Beuze v. Belgium*, *op.cit*.

194 Fair Trials, *Unlawful evidence in Europe's Courts, op.cit*.

195 Depending on the trial waiver mechanism and on the country studied.

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.[196]

Fundamental rights violations during the pre-trial phase can actually 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.[197] 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.

Finally, in most studied countries, the right of appeal is restricted after a trial waiver mechanism has been entered into, which prevents convicted persons from complaining of procedural rights violations after the judgment is rendered. As noted by the Council of Europe's Committee on Legal Affairs and Human Rights, if accused people are not able to appeal decisions endorsing trial waiver agreements, including on grounds of procedural rights violations, it is questionable how domestic courts can enforce these rights.[198]

On an individual level, trial waiver systems may deprive a person of their right to an effective remedy, whereas they could, in a trial, obtain better outcomes than the sentence reduction they hope to receive by consenting to a trial waiver system. In a system where accountability mechanisms for police and prosecutor misconduct rest almost exclusively on a challenge by the accused person at trial, trial waiver systems inevitably create a wide accountability gap and an incentive for law enforcement to disregard fundamental rights. Prosecutors and police operate in the shadow of any judicial oversight and are not held accountable for their actions.[199] This is particularly problematic as trial waiver systems appear likely to incentivise police and prosecutors to use all necessary means to obtain confessions as early as possible to finalise their investigation. This can only perpetuate the growth of violations, disregard for procedural safeguards and undermine trust in the criminal justice system.

196 In Belgium, however, courts must verify proprio motu that the person's procedural rights were respected, including that they were assisted by a lawyer when giving their statement to acknowledge guilt, if the lawyer had access to the case file, if the agreement was recorded etc. Judges must reject the agreement if it is not the case.

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

198 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*., §33.

199 On this topic, *see also* K.C. J. Vriend, *Avoiding a full criminal trial: Fair trial rights, diversions, and shortcuts in Dutch and international criminal proceedings*, 2016, p.226, available at: t.ly/QJEo

Judicial review of consent

Effective oversight over a person's consent must go beyond direct and apparent coercion and address external factors that may lead someone to admit guilt, including the disproportionate benefit of entering into a trial waiver system compared to going to trial.[200] Our research indicated that there is often no specific process for judges to effectively verify the validity of a person's consent and generally no judicial guidelines or specific legal criteria that the court must specifically assess. In practice, the way in which courts effectively assess the following is generally insufficient and arbitrary: whether the person understands the agreement; the consequences of admitting guilt; the existence of reasonable doubt as to the person's ability to consent; and whether the confession is voluntary. Our research does not indicate that courts routinely consider the systemic incentives to admit guilt.[201] Even when someone has been directly coerced into admitting guilt, evidence of coercion will rarely come to the attention of courts, as it would not appear in the negotiation records (when they exist) and because the accused person, who often does not want the agreement or plea to be rejected, is not incentivised to bring a challenge.

- In Albania, the review carried out by courts is superficial and the main focus is to ensure that the accused person has agreed to the trial waiver.
- Lawyers and judges interviewed in Slovenia and Hungary also highlighted the diverging practice of courts in relation of the depth and content of questioning at the hearing. Some judges question the accused person in detail and ask them numerous questions aimed at finding out whether they actually recognise the charges against them. Other judges simply ask the accused a yes-no question at the preparatory session. Ultimately, courts tend to accept that the person consented voluntarily and knowingly. In Hungary in 2019, courts rejected a guilty plea at the preparatory session in only 7.94% of cases.[202]

Such a limited review appears inadequate. On an individual level, ineffective judicial oversight over whether consent is real may foster miscarriages of justice, in particular in systems where accused persons, often under the advice of their lawyers, will consent irrespective of guilt or innocence, to avoid a long and costly process, spending time in detention or detrimental consequences on their ability to find or maintain their home or a job.

200 Rebecca K. Helm, "Constrained Waiver of Trial Rights?", *op.cit.*, p.431.

201 See section 6.1 "The myth of voluntary consent" and in particular "Systemic incentives to waive the right to a trial". In Belgium however, a case came to the attention of Fair Trials in which a court rejected a sentence bargaining agreement because it considered that the accused person could not voluntarily consent to the agreement. He was a young adult in pre-trial detention and extremely keen to be released. These external factors brought doubt on the truthfulness of his admission of guilt.

202 Hungarian Chief Public Prosecutors Office, *The main statistical data regarding prosecutorial activities before criminal courts, Activities in the year 2019*, *op.cit*.

Limited review of the charges and evidence beyond the admission of guilt

The review of the evidence beyond the admission of guilt is limited in practice, even where courts are required to review it. Time pressures and efficiency objectives are driving courts to limit their degree of scrutiny. There is a risk that they simply rubber stamp agreements or guilty pleas with limited examination of the evidence.

In Hungary, prosecutors and judges identified the lack of clarity on courts' obligation or power to check the adequacy of the charge against the evidence, and what they should do if they disagreed with the legal classification of the offence included in the indictment or the agreement. Moreover, according to defence lawyers, courts often do not carry any evidentiary procedure, and the facts and classification established in the indictments are very likely to form the basis of the judgment.

In addition, in none of the researched jurisdictions, are courts required to order and examine evidence not already contained in the case file. This adds to the fact that in most of the researched countries, the defence is not entitled, in law and or in practice, which can lead judges to base their decisions on inculpatory and partial evidence presented by the prosecutor only.

Finally, in the absence of effective remedies for procedural rights violations in the course of the investigation (see above), and in particular of 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 evidence with limited probative value, including statements obtained under duress or in violation of the right to a lawyer.

On an individual level, the lack of sufficient review by courts beyond the admission of guilt may lead to miscarriages of justice, with innocent people at risk of being wrongly convicted. Where it appears clear that accused persons plead guilty for numerous reasons and where they will not challenge the trial waiver process, courts' examination of the evidence is often key to assess whether the person was in fact constrained to admit guilt. On a systemic level, the risk that courts rubber-stamp prosecutors' requests in disregard of the quality and sufficiency of the investigations fosters a culture in which proper investigations – and the truth – become secondary, if not a waste of time.

Prosecutor-imposed sentences – unchecked discretion and a risk of higher sentences

In the context of sentence bargaining agreements, judges are bound by the agreed upon sentence. In some jurisdictions, if they consider the penalty disproportionate, they cannot reduce it, as they must either accept or reject the agreement altogether. It was observed in the context of guilty pleas at the pre-trial hearing that although courts have the power to reduce the sentence requested by the prosecutor, they generally rubber stamp the request and impose the sanction. A judge in Hungary explained that courts are reluctant to deviate from the prosecutor's sentencing motion in favour of the accused person,

because they know that the prosecutor will then appeal, which runs counter to the intention of speeding up the proceedings. In 2019, in 66.4% of cases, courts imposed the same sanction as the one in the sentencing motion.

This raises concerns, as a lack of sentencing guidelines or published average sentences per type of offence, and wide sentence ranges leave a wide margin of discretion for prosecutors in the two forms of trial waiver system studied. The trend observed in our research is that prosecutor-imposed sentences can be higher than the sentence a court would normally impose. This denies the key benefit of trial waiver systems for accused persons. For example:

- A judge interviewed in Hungary said prosecutors' sentencing motions had far exceeded the judicial practice in terms of length of sentences.
- In Slovenia, lawyers also criticised the inflexibility of the prosecution when determining sentences through a spreadsheet system, which undermines the principle of individualised sanctions. Yet these sentences are sometimes accepted without review by courts.
- In Albania, among the sample of cases studied were cases where the charge was the failure to obey a police order. In these cases, prosecutors requested – and were granted by courts – a sentence that was 85% higher than the one that would normally be imposed by a court.[203] This is likely due to the relationship between police and prosecutors. It also shows that prosecutors might not be taking into account the facts of the cases and the character of the person when deciding on the sentence.
- In Cyprus, interviewed lawyers explained that very often there is no evidence that the person benefited from a sentence discount by pleading guilty.

On an individual level, it is unclear whether persons who admit guilt assuming they will get a lower sentence actually do get fair deals. Accused persons and their lawyers have no means of clearly estimating the penalty that would normally be applied by a court following a full-blown trial. It is therefore impossible for them to evaluate whether the sanction proposed by the prosecutor is in fact lower than the one that would be imposed by a court following a trial. On a systemic level, this is worrying as harsher prosecutorial decisions in respect of sentencing may participate to a general judicial trend towards harsher punishment.[204]

Limited record keeping and lack of accountability

In most countries, there are legal requirements to record trial waiver agreements and acknowledgment of guilt, but not of the negotiations themselves. For example, in Albania, there is no reference in the law on the need to keep a record of the negotiations preceding a sentence-bargaining agreement. As noted by practitioners interviewed, no records of the negotiations are kept. In Hungary, the law requires that the agreement reached in the course of the negotiations and the negotiations shall be recorded, but there is no detailed regulation as to

203 Res Publica, *Judgments upon Agreement*, 2019, p.41.

204 *See* section 6.5, "Blind spots: the need for further research", and in particular "No sentencing benefits?".

the form and the content of the records. In Slovenia, practitioners interviewed explained that what is recorded varies greatly from a case to another. Out of the 30 sentence bargaining cases analysed, none included recordings of negotiations. A record of the trial waiver process, the discussions and the agreement is key to allow a person to challenge the process and obtain a remedy. In the *Natsvlishvili*, the ECtHR stressed the importance of keeping a record of the negotiation and the agreement for the purpose of judicial review.[205] Judge Gyulumyan also raised this point in her dissenting opinion to highlight the limited reach of the records in this case and therefore the inability of the domestic court to evaluate the fairness of the negotiations without access to a full recording of interactions between the prosecution and the accused.[206]

6.4. Amplification of discrimination

There is plenty of evidence that justice systems widely discriminate against vulnerable people and people from certain racialised and ethnic groups, who "face discrimination at all levels of Europe's criminal legal systems, from racial profiling by police to structural bias in judicial and prosecutorial decision-making. Such discrimination results in worse outcomes for people of colour, including overrepresentation in pre-trial detention and receiving harsher sentences."[207] Discrimination is also rooted in socio-economical inequalities and impacts people experiencing poverty. As noted by the European Parliament, structural racism and discrimination is "mirrored in socio-economic inequality and poverty, and these factors interact and reinforce each other."[208]

Our research provides further evidence of the enhanced pressure on people suffering discrimination in the criminal justice system to waive their full trial rights. Trial waiver systems may therefore reproduce and increase vulnerabilities and social exclusion. The groups identified in this section often intersect. Individuals disadvantaged often simultaneously experience different forms of structural discrimination which can have the effect of further amplifying risks of abuse, rights violation, and social exclusion.

Migrants and undocumented persons

People who are perceived to have fewer ties to a country might also have fewer options when contemplating a waiver of their right to a trial. The overuse of pre-trial detention impacts migrants and undocumented persons disproportionately, as there is a common assumption that they present more serious risks of absconding.[209] Sentencing disparities also impact migrants and

205 ECtHR, *Natsvlishvili and Togonidze v. Georgia, op.cit.*, §94.

206 ECtHR, *Natsvlishvili and Togonidze v. Georgia, ibid.*, dissenting opinion of Judge Gyulumyan, §3.

207 Fair Trials, *Disparities and discrimination in the European Union Criminal Legal System*, January 2021, p.3, available at: t.ly/kiBW

208 European Parliament, Resolution of 19 June 2020 on the Anti-racism Protests Following the Death of George Floyd, 2020/2685(RSP), available at: t.ly/lpSh

209 Fair Trials, *Disparities and discrimination in the European Union Criminal Legal System*, *op.cit.*, pp.8-9.

foreign nationals.[210] The heightened chances of detention, either pre or post trial, increase the pressure to cooperate or enter into trial waiver systems to avoid being placed behind bars.

The gamble is very risky as a criminal conviction can often impact a person's immigration status. In Cyprus, when individuals are arrested and prosecuted for illegal entry and/or residence before they manage to file an asylum application, they often admit guilt without understanding that their conviction will lead them straight into administrative detention for deportation purposes.

Moreover, it is generally difficult for accused persons to understand their rights and the consequences of waiving them. This difficulty is amplified for accused persons who do not speak the national language. Access to interpretation services is often limited. This clearly disadvantages individuals whose first language is not the officially spoken one.

Minorities and racialised groups

Out of court processes with significantly less oversight and accountability may increase the risk of biased treatment against certain groups. In the US, prosecutors are more likely to offer, in similar cases, plea deals that include prison sentences to Black and Latino accused persons, as opposed to white accused persons who are more frequently offered a plea deal involving a non-custodial sentence.[211] In Europe, there is a lack of research on the specific impact of trial waiver systems on minorities and racialised groups. However, since there are other disparities that impact minorities and racialised groups in European criminal justice systems,[212] it is likely that similar trends would emerge.

People experiencing poverty or on low incomes

The cost of a trial, and in particular concerns about being able to afford legal representation and possible court costs, often drives people to enter trial waiver systems.[213] Concerns over trial costs are amplified for people experiencing poverty.

---

210 Fair Trials, *Disparities and discrimination in the European Union Criminal Legal System*, *op.cit*. pp.10-11;.*See also*, Virginie Gautron, Jean-Noël Retière, "La décision judiciaire: jugements pénaux ou jugements sociaux ?, Mouvements 2016/4, n°88, available in French at: t.ly/kqdU ; Hilde Wermink, Sigrid van Wingerden, Johan van Wilsem & Paul Nieuwbeerta, "Studying Ethnic Disparities in Sentencing:The Importance of Refining Ethnic Minority Measures", *Handbook on Punishment Decisions*, 1st Edition, 2017, pp. 239-264 ; Samantha Bielen, Peter Grajzl, Wim Marneffe, "Blame based on one's name? Extralegal disparities in criminal conviction and sentencing," *European Journal of Law and Economics, Springer, vol. 51(3), 2021*, pp.469-521, available at: t.ly/h0xL

211 Besiki Kutateladze, Whitney Tymas, Mary Crowley (Vera Institute of Justice), Race and *Prosecution in Manhattan, Research Summary*, 2014, available at: t.ly/yA6Y

212 *See e.g.*, Fair trials, *Uncovering antiRoma discrimination in criminal justice systems in Europe, 2020*, available at: t.ly/Bcb1 ; *See also*, Virginie Gautron, Jean-Noël Retière, *op.cit.*; ECtHR, *Lingurar v. Romania*, no 48474/14, judgment of 16 April 2019, available at: t.ly/WlWq ; Council of Europe: European Commission Against Racism and Intolerance, (ECRI), *Report on Hungary (Fourth Monitoring Cycle)*, 2009, available at: t.ly/xGwu , *see also* , Institute for Criminal Policy Research and Fair Trials, *Prison: Evidence of its use and over-use from around the world*, 2017, available at: t.ly/rwpP

213 *See also* section 6.1 "The myth of voluntary consent".

For example, in Italy, it emerged from interviews that people experiencing poverty, who afford complex legal defence or high-level technical expertise, risk being induced into entering a trial waiver agreement. In Hungary and Slovenia, prosecutors may even promise a waiver of court fees should the person agree to enter into a trial waiver. This adds to the financial pressure on accused persons on low incomes to waive their right to a trial.

Under the Directive on legal aid, EU Member States are permitted to make legal aid conditional to the satisfaction of a means test,[214] a merits test,[215] or both.[216] However in many European countries that apply a means test, legal aid remains insufficient, so that people on low incomes access legal aid nor can they afford a private lawyer. 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.[217]

The Directive on legal aid failed to cover court costs and other costs associated with criminal proceedings.[218] As a result, a person may qualify for legal aid that would cover their lawyer's fees, but not other costs.[219] In addition, the very low level of legal aid fees generally do not allow lawyers to prepare their client's defence adequately. As a result, people experiencing poverty are more likely to navigate the criminal justice system unadvised. They are placed in a weaker position compared to other accused persons, as they make their decisions without understanding their rights or the consequences of accepting a trial waiver offer. This is problematic as they already are in a vulnerable financial situation that the enforcement of the trial waiver agreement can in many cases aggravate, e.g. with disproportionate sentences, including fines and imprisonment, imposed with limited oversight. This creates discrimination and further entrenches a two-tier justice system. Wealthy accused persons could accept the temporary economic disadvantage and be acquitted at the end of a full trial, whereas others do not have another choice but to accept the trial waiver and be convicted.[220] Being on a low income can mean a case is dealt with behind closed doors, a more severe penalty is imposed, less procedural rights are guaranteed and there are fewer opportunities to challenge violations.

214 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).

215 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).

216 Article 4(2) of the Directive on legal aid.

217 CEPEJ, *European judicial systems – Efficiency and quality of justice - 2018 Edition, op.cit.*, p. 84.

218 *See* Fair Trials, Practitioners' tools on EU Law – Legal Aid, pp. 26-27, available at: t.ly/R0Vx

219 CEPEJ, *European judicial systems – Efficiency and quality of justice - 2018 Edition, op.cit.*, p.72.

220 Rebecca K. Helm, "Constrained Waiver of Trial Rights?", *op.cit.*, p.433.

Children

Research suggests that children and adolescents are more likely to plead guilty to crimes they did not commit.[221] They are prone to making decisions to comply with authority, to be overly influenced by short-term benefits and to have limited understanding of bargaining processes.[222]

Disabled and neurodivergent people

There are similar concerns about adults with disabilities.[223] It was also found that accused persons with stress and anxiety issues or those on the autistic spectrum often plead guilty in order to get the process over with quickly.[224]

6.5. Blind spots: the need for further research

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.[225] 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 in some of the researched jurisdictions makes it difficult to determine whether they have achieved these goals. In Italy, for example, trial waiver systems were introduced in 1988 to remedy backlogs and delays, yet in 2020 the Ministry of Justice is still facing the same problems and is looking at expanding the scope of trial waiver systems rather than looking at the roots of the structural problems that overload criminal justice systems.[226]

There is a real urgency to address these concerns and even more the risks that trial waiver systems further incentivise criminalisation and conviction, risk higher rates of miscarriages of justice and have unintended but potentially costly

221 Rebecca K. Helm, Valerie Reyna, Allison Franz, Rachel Novick, "Too young to plead? Risk, rationality, and plea-bargaining innocence problem in adolescent", *Psychology, Public Policy, and Law*, 2017; Reveka V. Shteynberg, Allison D. Redlich, "To Plead or Not to Plead: A Comparison of Juvenile and Adult True and False Plea Decisions", *Law and Human Behavior, Vol. 40, No. 6*, 2016, pp. 611–625.

222 Thomas Grisso et al., "Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants", *Law and Human Behavior, Vol. 27*, 2003, pp. 333-363, available at: t.ly/DKnv ; Tarika Daftary-Kapur, Tina M. Zottoli, "A first look at the plea deal experiences of juveniles tried in adult court", *The International Journal of Forensic Mental Health, 13(4)*, 2014, pp. 323–336.

223 Allison D. Redlich et al., "Self-Reported False Confessions and False Guilty Pleas among Offenders with Mental Illness", *Law and Human Behavior Journal, Vol. 34(1)*, 2010; *see also* Samuel R. Gross et al., "Exonerations in the United States, 1989 Through 2003", *Journal of Criminal Law and Criminology, vol. 95, n°2*, 2005, pp. 523–560, available at: t.ly/nhkw ; Richard J. Bonnie, "The Competence of Criminal Defendants with Mental Retardation to Participate in their Own Defense", *Journal of Criminal law and Criminology, Vol. 81, Iss. 3*, 1990, pp. 439–440, available at: t.ly/kCok

224 Rebecca K. Helm, R. Dehaghani, D. Newman, "Guilty plea decisions, moving beyond the autonomy myth", *op.cit.*, p.20

225 *See* section 4.1 "Trial waiver systems".

226 Report published by the Italian Ministry of Justice in 2021, available at: t.ly/996q

effects on incarceration downstream. However, there is limited data collected on these systems. which means that authorities cannot assess their impact, either in terms of benefits or negative effects.

Despite their increasing use throughout Europe, trial waiver systems are not monitored or assessed by authorities. 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.[227] 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.[228] 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.

This research confirms that data collection and impact assessment of trial waiver systems in Europe are still entirely lacking. The authorities do not ensure thorough collection of data and analysis on the use of trial waiver mechanisms in any of the studied countries. In Cyprus and Italy for example, disaggregated data on trial waiver systems and full trials is collected partially or not at all, and is not centralised at national level.

In addition, 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 should be the parameters of a cost-benefit analysis of trial waiver systems. The CEPEJ 2018 report confirms that states' expenditures on justice have not decreased.[229]

The lack of data also means that there is no monitoring of trail waiver systems' use by practitioners, which, in view of the limited safeguards and restricted judicial oversight, raises serious rule of law concerns. Potential negative effects of trial waiver systems are left unknown.

No sentencing 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 in some systems, as described above, judicial review is restricted and courts are bound by the agreed upon sentence and have no power to change it. Although they can reject an agreement where they consider that the sentence is disproportionate, they rarely do so.[230]

227 Fair Trials, *The disappearing trial, op.cit.*, p.32.

228 Fair Trials, *ibid.*, p.36.

229 CEPEJ, *European judicial systems – Efficiency and quality of justice - 2018 Edition, op.cit.*, p.32.

230 See section 6.3 "Lack of effective judicial oversight and accountability mechanisms".

The concern that prosecutors are setting harsher sentences than courts was widely reported in our research.[231] These concerns have serious implications. Harsher prosecutorial decisions in respect of sentencing may be part of a general judicial trend towards harsher punishment. Prosecutorial sentencing practices influence courts to raise the average sentences generally imposed, despite the general principle that sentences need to be individualised.

In Slovenia, a year after the introduction of sentence bargaining agreements, the Bar Association reported a tougher sanctions policy in courts, noting that the prosecutor's offer set a 'criterion' of punishment for courts. Moreover, the research revealed that the structure of the sanctions imposed also changed. Suspended sentences are the most common sentence in Slovenian criminal justice system. Since the introduction of the new trial waiver systems in 2012, the percentage of suspended sentences has been consistently decreasing (from 77% to 67%), while the share of prison sentences has been increasing (from 15 % to 20-23%). The share of criminal fines imposed has also been rising, particularly from 2017 onwards.

In Hungary, the interviews strongly indicate that there is a need for a comprehensive and representative research into the possible changes to sentencing practices. Research indicates that in 2019, in the vast majority of cases, courts imposed the sanction requested by the prosecution in the sentencing motion rather than an alternative, more lenient sentence.

Further data collection and research is needed to identify whether convicted people benefit from trial waiver systems in terms of sentence outcomes and whether harsher sentencing in the context of trial waiver systems is fuelling the general trend towards harsher punishment.

Overcriminalisation and net-widening effect

Even though on an individual case-by-case basis, trial waiver systems may improve the efficiency of proceedings, the time and costs involved on a collective level mean that these measures may increase rather than reduce caseloads. This is a particular concern in states that have, in parallel, adopted a criminalisation policy and legislated to expand the scope of their criminal codes.[232]

Under the pretence that trial waiver systems are making justice more efficient, states are continuously increasing the workload of criminal justice authorities, by criminalising an ever-increasing number of behaviours, instead of finding alternative methods of resolution eg through health, education or social services. But even if trial waiver systems are speeding up proceedings, they are not enabling judicial actors to stay on top of ever-increasing caseloads and clear case backlogs.

231 See section 6.3 "Lack of effective judicial oversight and accountability mechanisms" and in particular "Prosecutor imposed sentences – unchecked discretion and a risk of higher sentences".

232 *See generally*, Jacqueline S. Hodgson, *The Metamorphosis of Criminal Justice, op.cit.*, chapter 2.

In addition, by permitting prosecutors and courts to process more cases in less time, trial waiver systems are driving more criminalisation and more incarceration.[233] In Slovenia, interviewed lawyers reported prosecutors sometimes initiate plea negotiations when the person's conduct in the indictment does not constitute a criminal offence. The US example shows that plea bargaining could be operating as a driver of overcharging, mass incarceration and mass criminalisation.[234] By "permitting prosecutors and courts to process cases rapidly and even en masse, systems may respond to the advent of trial waivers not by reducing backlogs and court dockets, but by prosecuting more cases".[235]

There is not enough research and data collection to clearly assess the impact of the use of trial waiver systems on the number of criminal proceedings in Europe.

Prison overpopulation

The combination of overcriminalisation, easier to secure convictions and harsher sentences may have an impact on conviction and incarceration rates. [236] Again, the US example shows us that "the explosion in prison population in recent decades is not in fact due to longer sentences being administered, but primarily due to decisions by prosecutors to charge more crimes as felonies, leading to a higher number of plea deals and a higher overall conviction rate."[237]

In Slovenia, sentence bargaining agreement became applicable in 2012. Between then and 2020, the proportion of suspended sentences has consistently decreased from 77% to 67%), while prison sentences and fines have both increased from 15 % to 20-23% and from 4 % to 20 % respectively. The high costs of imprisonment, including indirect long-term societal costs, might be the same or higher than the costs saved by avoiding full trials.[238] In Hungary, there had been a decrease in the number and proportion of pre-trial detainees from 2014 to 2019 when the trend was reversed. From 2019 to 2020, the total number of pre-trial detainees jumped from 16.59% to 20.4% of the total prison population.

Data collection is needed to examine whether there is any direct correlation between the variation of prison population and the use of trial waiver systems in Europe.

---

233 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.*, §16.

234 Fair Trials, *The disappearing trial, op.cit.*, p.17.

235 *Ibid*.

236 *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.*, §16, referring to Fair Trials, *The disappearing trial, op.cit.*, p.17.

237 Fair Trials, *The disappearing trial*, *ibid.*, p.17; *see also*, John F. Pfaff, "The Causes of Growth in Prison Admissions and Populations"', Fordham Law Review, 2012, available at: t.ly/kYir

238 *See e.g.* Parliamentary Assembly of the Council of Europe, Promoting alternatives to imprisonment (rapporteur: Ms Vučković), Doc.13174, available at: t.ly/p6zxl, Resolution 1938 (2013), available at: t.ly/x40Y and Recommendation 2018 (2013), available at: t.ly/2CWg

Miscarriages of justice and poor-quality investigations

The risk of wrongful conviction increases when cases are processed through trial waiver systems.[239] This phenomenon is vastly documented in the US.[240] As noted above, innocent people are pushed to enter into trial waiver systems for a variety of personal and structural reasons. 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 Hungary, the impact of trial waiver systems on the likelihood of miscarriages of justice could not be assessed. However, concerns were raised in both the context of guilty pleas and sentence bargaining that there is a risk that guilty pleas or agreements do not fully reflect the reality of the facts of the case, or are not classified in a way that the defence considers appropriate. Although the relationship between these two facts is not clear, it is interesting to note that both in Slovenia and Hungary, the acquittal rate has dropped since the introduction of trial waiver systems. In Slovenia it went from 21% in 2008 to 13% in 2019 and 10% in 2020.

Table: Convictions, acquittal rate, sentences (2010 – 2020) in Slovenia[241]

Year	Number of convictions	Acquittal rate	% suspended sentence	% prison sentence	% criminal fine
2010	8.509 ↓	21 % =	77 % =	15 % ↓	5 % =
2011	8.223 ↓	20 % ↓	77 % =	15 % =	5 % =
2012	9.296 ↑	18 % ↓	76 % ↓	17 % ↑	4 % ↓
2013	10.156 ↑	17 % ↓	72 % ↓	20 % ↑	5 % ↑
2014	10.375 ↑	12 % ↓	74 % ↑	20 % =	6 % ↑
2015	8.006 ↓	13 % ↑	74 % =	21 % ↑	6 % =
2016	7.244 ↓	14 % ↑	75 % ↑	20 % ↓	7 % ↑
2017	6.796 ↓	14 % =	71 % ↓	20 % =	11 % ↑
2018	6.713 ↓	14 % =	68 % ↓	23 % ↑	12 % ↑
2019	6.843 ↑	13 % ↓	67 % ↓	23 % =	15 % ↑
2020	5.810 ↓	10 % ↓	67 % =	22 % ↓	16 % ↑

In systems where trial waivers agreements heavily rely 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

239 Marianne Wade, "Meeting the demands of justice whilst coping with crushing caseloads?", *op.cit.*, p.7.

240 *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: t.ly/el8v

241 Joint Annual Reports of the Supreme Public Prosecutor's Office. It should be noted that guilty pleas at the pre-trial hearing and sentence bargaining agreements were introduced in 2012.

complete. Investigators have less incentive to ensure that rules on evidence and procedure are complied with if there is little risk that they will be scrutinized at trial.[242] In many legal systems, the evidence becomes irrelevant following a guilty plea, as the review of the evidence beyond the admission of guilt is limited in practice. So by pleading guilty, a suspect will typically waive their right to challenge the admissibility of evidence.

This issue was highlighted by the Council of Europe in 2018, which stressed that trial waiver systems can "[a]ffect the ability to carry out solid investigations".[243] Further data collection and research is needed to assess the potential correlation between the operation of trial waiver systems and miscarriages of justice in Europe.

Role of the police in trial waiver systems

From a legal perspective, the police do not generally have a role to play in proposing and negotiating agreements or guilty pleas. These are in principle within the exclusive powers of the prosecutor. In most jurisdictions, the police are formally prohibited from making promises on behalf of the prosecutor and influencing a person to admit guilt in exchange for more lenient outcomes. However, the police do influence outcomes in trial waiver systems. First, prosecutors will rely on police investigations to assess whether the case is suitable for a trial waiver system, another alternative resolution mechanism or for a trial. They will likely take into account the police's recommendation (see Hungarian example).

Second, the police are the gatekeepers of people's rights during the investigation. They are tasked with connecting them with a lawyer before questioning if requested, to provide them with information about the charges and their procedural rights, and to appoint an interpreter where the person does not speak the official language. In some jurisdictions, they also decide on giving access to the case file to the person and their lawyers.[244] But they are also often driven to obtain admissions of guilt during questioning. As such, their two roles – as rights providers and investigative authorities – may be in conflict when it comes to implementing procedural rights.

In Cyprus, the research indicates that the prominent role of the police during the investigation phase can irremediably impact the outcome of a case. They may make promises to persuade suspected persons to confess or otherwise cooperate while at the same time influencing them to waive their right to legal assistance. Third, the relationship between the police and prosecutors may also influence the conduct of prosecutors in these negotiations. In Albania, prosecutors' proposed

242 Fair Trials, *The disappearing trial, op.cit.*, p.15.

243 *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.

244 In Slovenia, the police has that power until the investigation file is transferred to the prosecutor's office.

sentences in sentence bargaining agreement negotiations were 85% higher than what a Court would impose for failure to obey a police order.[245]

Exceptionally in Hungary, the police can be delegated powers from the prosecutor to accept a suspected or accused person's request to negotiate an agreement under the prosecutor's instructions.[246] Their task is not restricted to act as an intermediary between the prosecution and the defence. In addition, the police must inform the prosecutor if the defence wishes to start negotiations[247] and may do so if they consider a case appropriate for sentence bargaining. Interestingly, one police officer explained that because of their caseload, prosecutors will not be able to identify the cases where an agreement could be initiated unless they are brought to their attention by the police. In practice however, he explained that the police see no real 'benefit' in sentence bargaining agreements because it constitutes extra work and because it is not a performance indicator in the evaluation of their work (unlike other types of alternative resolution mechanisms). It is likely that these incentives have similar impacts in other jurisdictions.

Research is needed to understand the unofficial role the police play in trial waiver systems, how their relationship with prosecutors influences the process and how their role can be regulated and overseen.

Role of victims in trial waiver systems

The role of victims in trial waiver systems and how they may influence their use and outcomes also requires further research. In some jurisdictions, policymakers see trial waiver systems as advantageous for victims who avoid secondary victimization at trial and who may benefit from compensation from the accused person.[248] But their role in the trial waiver process remains unclear and this research indicates that victims may very well hamper a trial waiver process in some jurisdictions. In Hungary, prosecutorial guidelines impose on prosecutors to include in the agreement the payment for the "total financial loss caused to the victim" as a condition for both starting negotiations and validating the agreement. If an accused person is unable to pay damages, the agreement must be rejected by the court. The research revealed a case in which no agreement was ultimately reached because the accused person could not undertake to pay the damages fully, which was a precondition of the prosecution for an agreement.

In addition, the evaluation of the total financial loss may stall negotiations, particularly if the victim takes part in the discussions. In another case in Hungary, the accused person agreed to pay damages to the victim but in exchange was exempted from paying court costs. In Albania, victims' power is even greater as they have to consent to the amount of damages agreed upon between the person and the prosecutor when a civil claim is filed and accepted before the

245 Res Publica, *Judgments upon Agreement*, 2019, p.41.

246 Ádám Békés in: Péter Polt (ed.): *Kommentár a büntetőeljárásról szóló 2017. évi XC. törvényhez (Commentary of Act XC of 2017 on the Code of Criminal Procedure).*

247 Government Decree 100/2018, Article 157.

248 In Hungary and Slovenia, avoiding secondary victimisation was mentioned by policy makers when designing trial waiver systems.

hearing. The agreement must be rejected by the court if the victim does not consent. Research in Albania indicates that the involvement of the victim in the negotiation process means that, in practice, prosecutors simply fail to notify the victims to proceed faster.

Research is needed to understand where victims stand in relation to trial waiver systems and how civil claims related to criminal prosecution may affect the outcome of a criminal case in this context. Research is also needed to understand how the rights of victims are respected in trial waiver contexts.

Conclusions and recommendations

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 amount of cases coming into the system. In some jurisdictions, legislative intervention came after these practices had already informally been implemented by practitioners. At their core, trial waiver systems serve as a regulation mechanism and address the needs of prosecutors and courts. But there is still limited evidence that these institutions have ultimately benefitted from them. There is evidence that they are instead creating risks for accused persons, and for the integrity and trust in the justice system as a whole.

Our research indicates that some trial waiver systems are, in practice, initiated principally by accused persons rather than by prosecutors. But it would be too simplistic to take this as an indication that trial waiver systems are in the interest of accused persons. In a system where delayed proceedings and court backlogs could mean spending months or years in pre-trial detention, where legal aid would not cover legal fees or the court costs associated with a trial, or where a person's chances of being acquitted appear to be minimal due to bias or lack of access to evidence, there is a lot of pressure to admit guilt in exchange for some benefits. The systemic failures of the system coerce accused people to opt for the least worse choice. It is difficult, in this context, to treat a person's consent to waive their right to a trial as voluntary.

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. Instead managing caseloads "take[s] 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."[249] This results in an important discrepancy between how justice is perceived by the general public, and how it is delivered in most cases,[250] which undermines the legitimacy of the criminal justice system.[251] The trend towards trial waiver systems illustrates the criminal justice system's deep roots in punishment, as an objective in itself, which serves the ever-expanding criminalisation policies of governments today.[252]

As states, on the one hand, continue to under-invest in criminal justice systems, including in courts, human resources and legal aid, and, on the other hand, 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

249 Virginie Gautron, "L'impact des préoccupations managériales sur l'administration locale de la justice pénale française", *op.cit.*, §23.

250 Marianne Wade, "Meeting the demands of justice whilst coping with crushing caseloads?", *op.cit.*, pp. 25 and 27, available at: bit.ly/3DJHeUn.

251 *Ibid.*, pp. 27-28.

252 Jacqueline S. Hodgson, *The Metamorphosis of Criminal Justice, op.cit.*, p. 72.

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 becomes a secondary consideration.

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 one jurisdiction will not necessarily be adequate in another. This report, however, identifies a number of overarching reforms.

7.1. Research and impact assessment

As Fair Trials has recommended in the past,[253] states should collect data on trial waivers systems to evaluate the impact of these systems on fundamental rights and the rule of law. The data collected should include:

- 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.
- 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.

253 Fair Trials, *The disappearing trial, op.cit.*, p.73.

- 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.

7.2. Structural Reform: right sizing criminal justice systems to limit systemic incentives to waive trial rights

Structural reforms are needed to reverse the drive towards efficiency over justice.

Decriminalisation

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

States should implement reforms to limit strictly recourse to pre-trial detention, and make sure that it is only used as a measure of last resort.[254] These reforms should include:

- Strict requirements for courts to ensure that pre-trial detention is not used as a measure 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

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.[255]

254 *See* Fair Trials' recommendations in A Measure of Last Resort?", *op.cit.*, and in Pre-Trial Detention Rates and the Rule of Law in the European Union – Briefing to the European Commission, April 2021, available at: bit.ly/3oQYAe5

255 *See also* Fair Trials' recommendations in Fair Trials, *Disparities and discrimination in the European Union Criminal Legal System*, *op.cit.*, pp.12-13.

- The EU and Member States as part of their Action Plans Against Racism[256] 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.[257]

7.3. Procedural safeguards

States must ensure that procedural rights safeguards are adapted to the trial waiver system procedure, in particular in terms of timing of access to the rights provided in the Directives.

- 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,[258] especially when informing children or adults in situations of vulnerability.
- Access to a lawyer:
  - 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.
- Legal aid:
  - 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 not be set at a level that creates financial pressure on lawyers to encourage their clients to waive their right to a trial.

256 EU Anti-racism Action Plan 2020-2025, available at: bit.ly/31EdYSh

257 *See also* Fair Trials' recommendations in Fair Trials, *Disparities and discrimination in the European Union Criminal Legal System*, *op.cit.*, pp.12-13.

258 Fair Trials, Letters of rights in plain language, 2021, available at: bit.ly/3pHZmct

    - Legal aid lawyers' fees should not be set at a level that creates financial pressure on lawyers to encourage their clients to waive their right to a trial.
- Access to 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.
- The right to interpretation and translation:
    - 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.

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 pre-trial 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.

7.4. Oversight and accountability

Oversight of trial waiver systems and accountability mechanisms over prosecutorial and police conduct are necessary to ensure the fairness of the criminal justice process.

Effective remedies for rights violations including on appeal

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, in first instance and on appeal. 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 legislations should impose the adequate recording of interactions between police, prosecutors and suspected and accused persons, irrespective of whether they are considered formal or informal, in order 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.

Effective judicial review of the investigation, evidence and charges

Judicial review should be sufficient to verify the integrity of an investigation and pre-trial phase, and the evidence and charges to guarantee the fairness of the process. This would also be a safeguard against possible biases that may influence prosecutors' decisions, in particular decision regarding a person's guilt.

- A confession should never constitute the only piece of evidence that is considered by the court. Courts should have the power and means to review the evidence to ensure that the 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

Judicial scrutiny over consent should be more than asking the accused to confirm their admission of guilt and whether they have understood the consequences of waiving their right to a trial. 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 (as outlined in recommendation 7.3 above).
- 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

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.
- 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.

Prosecutorial guidelines

Prosecutorial guidelines should be adopted to provide accountability, streamline and limit their discretionary powers. These guidelines could be either statutory or soft law, depending on legal systems and domestic institutional frameworks.

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.

- 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.

Annex – overview of trial waiver systems in the studied countries

This annex offers a non-analytical description of the two trial waiver systems - sentence bargaining agreements and guilty pleas - in place in the five countries studied in the context of this report.[259] This project also benefited from desk-based research conducted in France and Belgium by our pro-bono law firm partner Freshfields, which is included in this annex.

1. Italy

The type of trial waiver system used is the sentence bargaining agreement. The mechanism is named **"applicazione della pena su richiesta delle parti" (application of the sentence at the request of the parties) or "*patteggiamento*"**. It allows the accused person and the prosecutor to formally negotiate the sentence.

The *patteggiamento* was the first trial waiver system to appear in Europe. It was introduced with the new Italian Code of Criminal Procedure by the Presidential Decree No. 447 of 22 September 1988. The abbreviated trial, another alternative to trial which does not fall under this report's definition of a trial waiver system, was simultaneously introduced.

The *patteggiamento* was primarily created for efficiency reasons. It was aimed at reducing the number of pending trials and speeding up proceedings by reducing the number of court debates. It was also conceived as a mechanism to reward accused persons who admit guilt, as it would guarantee them the benefit of avoiding a lengthy criminal trial. In 2020, persistent court delays and backlogs led the Minister of Justice to recommend softening its conditions of accessibility to maximise its use.[260]

Scope of application

In Italy, agreements may be concluded in relation to all offences except for a limited number of serious offences such as crimes of child prostitution, child pornography and group sexual violence, and in the case of repeat offenders.[261] Another limitation is that the sentence imposed as part of the agreement may not exceed 2 or 5 years, depending on the type of sentence bargaining agreement

259 Section 6 , "Risks of trial waiver systems", provides an analysis of these trial waivers' practical implementation and possible risks to fundamental rights. The procedural safeguards associated to these mechanisms are discussed in that section.

260 2020 Italian Minister of Justice's Annual Report on the Administration of Justice, available at: bit.ly/3lUhtKV

261 Article 444(1) bis of the Italian Criminal Code of Procedure.

applied.[262] The agreements cannot be used in proceedings against children. For some economic crimes such as embezzlement or extortion, the accused person must fully reimburse the amount of profit made as a pre-condition to conclude an agreement.[263]

Timing and initiation of the process

In contrast to the other countries studied, only the accused person may initiate negotiations with the prosecutor, at any stage of the proceedings and up until the end of the pre-trial hearing.[264] In practice, negotiations usually take place at the pre-trial hearing. The parties ask for a recess to negotiate, and it sometimes only takes a few minutes. When the prosecutor does not consent to the bargain, they must justify the reasons.

Content of the negotiations

Parties may only discuss and agree on the sentence (e.g., type, length, amount of the fine), as opposed to the facts of the case and the legal classification of the offence. Contrary to other countries studied, the accused person must not acknowledge guilt as a precondition to enter the agreement. The conviction can be excluded from the criminal record at the request of the person concerned. If an agreement is reached and validated by the court, payment of court costs, accessory penalties and security measures (with the exception of confiscation) do not apply.

Form and content of the agreement and recording obligations

There is no specific formality for the agreement, which can be made orally.[265] If the agreement is reached during the pre-trial hearing, it must however be recorded in writing in the minutes of the hearing when it is presented to the court. There is no obligation to keep a record of the negotiations.

Determination of the sentence by prosecutors

The law provides that the proposed sentence can include a fine, an alternative to detention or a custodial sentence, reduced by up to one third of what a court would normally impose within the limits set by law and after taking into account all the circumstances of the case. In practice, all circumstances are weighted by the prosecutor, a sentence is approximated and then it is reduced by one third. After the one third discount, custodial sentences may not exceed two or five years of imprisonment depending on the type of bargaining agreement applied.[266]

262 Article 444(1) of the Italian Criminal Code of Procedure.

263 Article 444(1)(b) of the Italian Criminal Code of Procedure and Criminal Court of Cassation, Section VI, sentence no. 9990 of 2017.

264 When the prosecutor decides to initiate criminal proceedings on the basis of the elements collected during the investigations, a preliminary hearing will take place. This is the moment where the court decides, at the prosecutor's request, if the person will be sent to trial or not. If there are no elements to support the accusation, the preliminary judge pronounces a judgment of non-prosecution. If the accusation is supported by suitable elements, the preliminary judge orders a trial.

265 Article 446(2) of the Italian Code of Criminal Procedure.

266 Article 444(1) of the Italian Code of Criminal Procedure.

Judicial oversight

Courts verify that the request is admissible, that the offence falls within the scope of application of the procedure and whether the legal qualification of the offence is correct.[267] Should the court establish that these conditions are not met, the agreement is rejected, and the proceedings continue through a normal trial procedure. Judges' power is nonetheless limited to either validating or rejecting the agreement, without the possibility of modifying its content.

Courts must also assess the adequacy of the sentence since the Constitutional Court ruled in 1990 that the mechanism was contrary to the constitutional requirement that judges evaluate the proportionality between the severity of the punishment and the seriousness of the offence and stressed the need for legislative intervention. The law thus now provides that courts must also verify the proportionality of the sentence. However, if judges consider the penalty to be disproportionate, they cannot amend it, as they must either accept the proposed sentence or reject the agreement altogether.

The validity of the person's consent is not systematically assessed at the pre-trial hearing, as their presence is not mandatory. If the accused person is present, they will express their consent in person and their statement will be recorded in the minutes of the hearing. If they are not present, their lawyers will represent them and confirm their consent. It is only if the court considers it appropriate, meaning that it has a doubt as to the person's consent, that it can order their personal appearance.[268]

Consequences if the agreement is not reached or is rejected

There are no specific rules preventing prosecutors from using statements or documents from the sentence bargaining procedure in further proceedings. However, if the court rejects the agreement and proceeds with a regular trial, the judge's file will be wiped clean and the prosecutor will have to present all the evidence again, as if it were a normal trial.

Right to appeal

The accused person may not appeal the decision of the court to validate or reject the agreement.[269] The prosecutor and the accused person may nonetheless submit the case to the Court of Cassation, but only on limited grounds that do not include the violation of fundamental rights in the investigation phase. Grounds to appeal pertain to the validity of the person's consent, the inappropriateness or illegality of the sentence or an error of law relating to the charges.

Frequency of use in practice

The sentence bargaining agreement procedure is not widely used. In Italy, from 2011 to 2017, the number of cases in which the mechanism was used decreased

267 Article 444 of the Italian Code of Criminal Procedure.

268 Article 446(5) of the Italian Code of Criminal Procedure.

269 Article 448(2) of the Italian Code of Criminal Procedure.

from 1.30% to 1.06% of the total number of cases that reached the indictment phase. As it appears from interviews conducted with legal practitioners in the context of this research, the lack of success of plea bargaining may be explained by the parallel success of the abbreviated trial, which is commonly used in Italy. The abbreviated trial allows for a more effective defence and can lead to the acquittal of the accused person.

2. Slovenia

In Slovenia, both sentence bargaining agreements and guilty pleas at the pre-trial stage are used. They are named respectively ***"sporazum o priznanju krivde"* (admission of guilt agreement)** and ***"predobravnavni narok"* ([guilty plea at the] pre-trial hearing)**. They were introduced with the amendment of the Criminal Procedure Act No. 91/11 of 14 November 2011.

Other mechanisms which do not fall under this report's definition of a trial waiver system, such as conditional disposals (or suspension of the prosecution) and penal orders, already existed since 1994. In 2011, the legislator noted that the proportion of cases resolved through these alternatives to trials was still insufficient, in part because they were too limited in their scope as they applied only to less serious criminal offences.[270] The toolbox available to prosecutors was thus increased in 2011 by introducing admission of guilt agreements and confessions at the pre-trial hearing. As to their objective, the legislator expressly mentioned the lack of simplified proceedings to tackle the issue of lengthy trials.[271]

2.1 Sentence bargaining agreement

The admission of guilt agreement, a sentence bargaining agreement by which the accused person and the prosecution formally negotiate the sentence.

Scope of application

The law does not prescribe any limitations of use of sentence bargaining agreements with regard to types of crimes or the characteristics of the accused person.[272] Agreements can be concluded in proceedings against children too. In practice, agreements are resorted to in complex criminal cases where the cooperation of the accused person is comparatively useful for the state. In

270 Tratnik Zagorac, A., *Pogajanja o priznanju krivde v kazenskem postopku*, GV Založba, Ljubljana, 2014, p.105.

271 Draft Act Amending the Slovenian Criminal Procedure Act, 2 June 2011, p. 2.

272 Article 450(a) of the Slovenian Criminal Procedure Act.

Slovenia, prosecutorial guidelines give additional guidance to prosecutors as to the type of situations in which an agreement should be favoured.[273]

Timing and initiation of the process

The negotiation of an agreement can be initiated by the accused person, their lawyer and the prosecution.[274] Agreements may be concluded very early on in the investigation phase, and up until the beginning of the main trial hearing. Lawyers interviewed explained that in practice, agreements are negotiated close to or shortly after the indictment becomes final, so that they have had access to the case file.[275] Sometimes, agreements are also concluded after the pre-trial hearing, where courts can, for example, decide on motions to exclude evidence, which might give lawyers a better idea of the prospects of the case.

When the law was first introduced, prosecutors were initiating the majority of negotiations (two thirds of all negotiations in 2012). By 2019, the majority of negotiations were initiated by the defence.[276]

Content of the negotiations

Negotiations relate to the sentence (e.g., type, length, amount of the fine). Formally, charges are not subject to negotiation.[277] Other elements may be negotiated in the context of sentence bargaining agreements, as the prosecutor and the accused person may agree on (i) the manner of executing the sentence; (ii) the abandonment of criminal prosecution of offences not covered by the admission of guilt; (iii) the allocation and amount of the costs of criminal proceedings; and (iv) the fulfilment of some acts including cooperating with the prosecution; paying damages to the victim; participating in a mediation process with the victim; or other acts required by the prosecution.[278]

The accused person must moreover acknowledge guilt as a precondition to enter the agreement.

Form and content of the agreement and recording obligations

The agreement must be formalised in writing and include a description of the offence; of the nature, length, and amount (where appropriate) of the sentence;

273 For example, the guidelines provide that agreements should be resorted to where there is solid evidence that the person committed the offence; when there is an assessment that the defendant will plead guilty; when it is needed to obtain evidence from the accused person to investigate others or other crimes; where protection of victims and witnesses is needed and where by concluding an agreement, they are not required to testify at main hearings. The guidelines also provide those agreements should be avoided where prosecution may be abandoned or where setting a precedent may be useful.

274 Article 450(a) of the Slovenian Criminal Procedure Act.

275 See section 6.2 "Lack or insufficient procedural safeguards leading to uninformed consent", and in particular "Limited access to case materials".

276 Slovenian Supreme Public Prosecutor's Office, Joint Annual Reports of 2012, 2013 and 2019.

277 Article 450(b)(2) of the Slovenian Criminal Procedure Act.

278 Article 450(b)(1) of the Slovenian Criminal Procedure Act.

and of any other conditions available to the parties including abandoning the prosecution of other charges, exemption of court costs, etc.[279] Moreover, minutes must be kept by prosecutors of the course of the negotiations, the proposals made and the conditions of admission.[280] The content of the minutes is not regulated in detail. Both for the minutes and the agreement, prosecutors use a standard form prepared by the Supreme State Prosecutor's Office.[281] The minutes are signed by the prosecutor, the accused person, their lawyer, the recorder of the minutes and the interpreter, if present.

Determination of the sentence by prosecutors

In a trial setting, courts can lower sentences below statutory minimums following specific reduction rules provided for in the law, in particular where mitigating circumstances are found.[282] In a sentence bargaining agreement setting, even more advantageous reduction rules apply which allow prosecutors to negotiate sentences down to approximately one third of the otherwise reduced sentence.[283] Prosecutorial guidelines further limit prosecutorial discretion within the range established by law.[284]

Judicial oversight

To approve the agreement, courts must verify (i) the legal validity of the agreement and process; (ii) the person's consent (validity of the waiver, that the admission of guilt was given knowingly, freely and voluntarily); (iii) that the admission of guilt is supported by other evidence in the case file; and when appropriate, (iv) whether the person has fulfilled their other obligations under the agreement.[285] If any of these requirements has not been met, the agreement is rejected, and the proceedings continue as if the person never admitted guilt, through a normal procedure.[286] The power of judges is however limited to either validating or rejecting the agreement, without the possibility to modify its content. Courts

279 Articles 450(a)(4) and 450(c)(1) of the Slovenian Criminal Procedure Act.

280 Article 3(3) of the General Instructions.

281 Interview with a State Prosecutor, 18 November 2020.

282 For example, if the statutory minimum is imprisonment for fifteen years, it may be reduced by up to ten years; if the statutory minimum is imprisonment for three or more years, it may be reduced by up to one year, if statutory minimum is imprisonment for one year, it may be reduced by up to three months; etc. (article 51(1) of the Slovenian Criminal Code).

283 For example, if the statutory minimum is ten or more years of imprisonment, it may be negotiated down to three years of imprisonment; if the statutory minimum is imprisonment for three to ten years, it may be negotiated down to three months; if the statutory minimum is imprisonment for less than three years, it may be negotiated down to one month. Where the law prescribes a minimum sentence of less than one year of imprisonment, the imposed sentence may be a fine instead of imprisonment (article 51(2) of the Slovenian Criminal Code).

284 For example, the guidelines specify that the starting point for the length of the proposed criminal sanction must be predominantly in accordance with the sanctions imposed by the courts and the objective and subjective circumstances of the offence; that the proposed sentence should not be less than two-thirds of the sentence that would in a similar case be imposed by a court.

285 Article 450 (ç)(2) of the Slovenian Criminal Procedure Act.

286 Article 450 (ç)(3) of the Slovenian Criminal Procedure Act.

may not dismiss the case if they find that the person is innocent but must simply reject the agreement and send the case file back to the prosecutor.

Consequences if an agreement is not reached or is rejected by the court

Should the negotiation fail, or should the court reject the agreement, all the documents used and the statements made during the negotiations or at the hearing must be removed from the case file and cannot be further used as evidence against the person in further proceedings.[287] Additionally, judges who have rejected an agreement must exclude themselves from further proceedings in the same case.[288]

Right to appeal

The court's refusal to approve the agreement is not subject to appeal.[289] A judgment sentencing a person on the basis of an agreement is only subject to appeal in limited circumstances, contrary to judgments following a trial. The accused person may only appeal against such a judgment on the ground of a substantial violation of provisions of the criminal procedure, exhaustively listed by law, e.g., if the judgement rests on unlawfully obtained evidence or on evidence obtained on the basis of such inadmissible evidence (fruit of the poisonous tree).[290] An appeal may also be available where the violation of defence rights have rendered the process unlawful.[291]

Frequency of use in practice

Sentence bargaining agreements are not frequently used. In 2019, only around 5% of all accused persons concluded such agreements.[292]

Prosecutors find the procedure quite bureaucratic and time-consuming, as it is necessary to arrange legal representation, arrange court interpreters for those who do not speak the language, arrange for the detained persons to be brought to the state prosecutor's office, keep minutes of the negotiations and draw up the agreement, and the negotiations are usually not completed after only one meeting.[293] Prosecutors interviewed for this research moreover explained that guilty pleas at the pre-trial hearing (see 2.2 below), achieve the same objectives with comparatively less effort, time and costs. Another reason could be that, as reported by lawyers, suspected and accused persons rarely accept agreements because sentences offered by prosecutors are unrealistically high in view of the specific circumstances of the case.

287 Article 450(a)(5) of the Slovenian Criminal Procedure Act.

288 Article 39(2) and 40(1) of the Slovenian Criminal Procedure Act.

289 Article 450 (ç)(4) of the Slovenian Criminal Procedure Act.

290 Article 371(1)(8) of the Slovenian Criminal Procedure Act.

291 Article 371(2) of the Slovenian Criminal Procedure Act.

292 Slovenian Supreme Public Prosecutor's Office, Joint Annual Reports from 2016 to 2019.

293 See section 6.2, "Lack or insufficient procedural safeguards leading to uninformed consent".

2.2 Guilty plea at the pre-trial hearing

The second type of trial waiver system used in Slovenia is the guilty plea at the pre-trial hearing, by which the accused person pleads guilty and waives their right to a trial in exchange for a more lenient sentence.

Scope of application

The law does not prescribe any limitations on the use of guilty pleas with regard to types of offences, nature and length of sentences or accused persons' status.

Timing and initiation of the process

Guilty pleas occur at the pre-trial hearing stage. This hearing is a mandatory phase of the (regular) proceedings, which takes place after the filing of the indictment. All accused persons are summoned to the pre-trial hearing. In the summons they are informed that at the hearing they may plead guilty or not guilty.[294]

Content of the negotiations

Contrary to sentence bargaining agreements, no negotiations are foreseen between the accused person and the prosecutor in the context of guilty pleas at the pre-trial hearing. Accordingly, there are no specific safeguards or applicable regulation. In practice, however, 'informal' negotiations do take place between the parties, including in courtroom hallways before the pre-trial hearing starts. They revolve around the maximum penalty the accused person could receive in the case of a guilty plea. There is some acknowledgement that informal negotiations have become part of the regular practice, as prosecutorial guidelines explicitly state that the rules for the determination of sentences established in the context of sentence bargaining agreements apply to the determination of a sentence in the context of informal negotiations before the pre-trial hearing.[295] When a person pleads guilty at the pre-trial hearing stage, courts are bound not to go beyond the sentence requested by the prosecution.[296]

Formalities

There are no formalities pertaining to the informal agreement between the parties or to the informal negotiations. The prosecutor and the accused person may make an oral agreement before the pre-trial hearing, which the prosecutor will suggest to the court with a proposed sentence.

294 Article 285.a(3(1) of the Slovenian Criminal Procedure Act.

295 General Instructions regarding negotiations and proposing sanctions in cases of admission of guilt and admission of guilt agreements, Supreme Public Prosecutor's Office of the Republic of Slovenia. 26 October 2012.

296 Article 285.a(3(1) of the Slovenian Criminal Procedure Act.

Determination of the sentence by prosecutors

The rules are the same as those applicable when the parties conclude a formal sentence bargaining agreement, except for the exceptional discounts only available in the sentence bargaining context.[297]

Judicial oversight

When a person pleads guilty at the pre-trial hearing, the court must assess whether (i) the person understood the nature and consequences of the admission of guilt; (ii) the guilty plea was given voluntarily; (iii) the guilty plea is supported by other evidence in the case file; (iv) the person's admission of guilt is real and supported by other evidence.[298]

If the court accepts the admission of guilt, it immediately hears the parties on sentencing. The court is however bound by the sentence requested by the prosecutor in the sense that it may not impose a harsher sentence. Where the court has reasonable doubts about the guilty plea, it must refuse to accept it. If it rejects the guilty plea, the case proceeds to a trial.

Consequences if the court rejects the plea

Contrary to what is provided for sentence bargaining agreements, and although pleading guilty at the pre-trial hearing may result from informal negotiations with the prosecutor, the admission of guilt made in court may be used as evidence in the ensuing trial. However, as in the case of rejected agreements, judges who have rejected a guilty plea at the pre-trial hearing must exclude themselves from the rest of the proceedings.

Finally, prosecutorial guidelines provide that if negotiations fail, prosecutors must propose at the main hearing the same sanction they had informed the accused person of during the failed negotiations.[299]

Right to appeal

The court's decision to reject a guilty plea is not subject to appeal.[300] Moreover, the person may not revoke their guilty plea after it has been accepted by the court.[301] As is the case for sentence bargaining agreements, a judgment sentencing a person based on a guilty plea is subject to appeal in very limited circumstances (see above).

Frequency of use in practice

Guilty pleas at the pre-trial hearing are more frequently used than sentence bargaining agreements. From 2015 to 2019, 23% to 28% of all accused persons

297 Article 5(2)1 of the Slovenian Criminal Code.

298 Article 285.(ç)(6) of the Slovenian Criminal Procedure Act.

299 Article 10(2) of the General Instructions.

300 Article 285.(c)(2) of the Slovenian Criminal Procedure Act.

301 Article 285.(c)(3) of the Slovenian Criminal Procedure Act.

pleaded guilty in court. Guilty pleas at the pre-trial hearing are seen by prosecutors interviewed as less burdensome, faster, and less costly than formal agreements, and as allowing them to achieve the same result in a more efficient way.[302]

3. Albania

In Albania, the type of trial waiver system used is the sentence bargaining agreement. The mechanism, named 'judgment upon agreement', allows the accused person and the prosecutor to formally negotiate the sentence.

In 1995, Albania had already introduced two alternatives to trial in its legislation, namely the direct trial (a fast-track procedure) and the abbreviated trial, directly inspired by the Italian system. The direct trial procedure is rarely used.[303] On the contrary, the abbreviated trial procedure is requested by accused persons in most of the cases that are nowadays committed to trial.[304]

Despite the significant use of abbreviated trials, cost-efficiency considerations led the Albanian legislator to introduce the judgment upon agreement in 2017. At the time of its adoption, it was presented as a way to reduce expenses for all parties involved and to free up time for the prosecution to investigate more offences.[305] Moreover, it was argued that it would benefit accused persons as they would receive a lower sentence than if their case was committed to trial.[306]

Scope of application

This sentence bargaining procedure can be used for all criminal offences which are punishable with a maximum of 7 years of imprisonment.[307] It cannot be used in proceedings against children. In practice, prosecutors seem to propose and accept agreements for relatively minor offences (e.g. driving under the influence, electricity theft, theft, building without a permit).

Timing and initiation of the process

Both parties can initiate discussions to conclude an agreement at any time during the pre-trial phase and until the beginning of the trial.

302 *See e.g* the Slovenian Supreme Public Prosecutor's Office, Joint Annual Report 2014.

303 According to the General Prosecutor's Office *Report on the State of Criminality for the year 2019*, out of the 30,748 criminal proceedings registered that year (not including 15,599 sets of proceedings that were dismissed) the prosecution requested a direct trial in in only 220 cases.

304 According to information from the Prosecutor's Office attached to the First Instance Court of Tirana, in 2019, out of the 3,092 cases that were committed, in 2,450 cases (almost 80%), the accused person filed a request for abbreviated trial.

305 Draft amendment of the Albanian Code of Criminal Procedure, explanatory report, 28 December 2016, available in Albanian at: bit.ly/3lUoU50

306 *Ibid*.

307 Article. 406/d(2) of the Albanian Code of Criminal Procedure.

Content of the negotiations

Negotiations relate to the sentence (e.g., type, length, amount of the fine). The charges are not subject to negotiation. In practice, although not provided by law,[308] prosecutors have the power to drop some of the charges during the negotiation or to offer to terminate the prosecution of other offences that are not covered by the admission of guilt. Other peripheral elements may be negotiated. For example, the prosecutor and the accused person may agree on (i) the payment of damages to the victim (who must approve the content of the agreement in that respect for the agreement to be valid) and (ii) the allocation and amount of the costs of criminal proceedings. The accused person must moreover acknowledge guilt as a precondition to enter the agreement.

Form and content of the agreement and recording obligations

The agreement must be formalised in writing and always include a description of the offence, a statement of the person's admission of guilt and the type and extent of the sentence agreed upon by the parties.[309] It must be signed by both parties and the defence lawyer.[310] If there is a victim who has the official status of civil claimant (i.e., a complaint has been filed and accepted), the agreement must also include their consent as to the amount of damages to be paid by the accused person.311 There is no obligation to keep a record of the negotiations.

Determination of the sentence by prosecutors

Prosecutors have the discretion to offer sentences within the limits of the law. There are no prosecutorial guidelines or regulation limiting their margin of action. This research has shown that on average, a custodial sentence imposed on the basis of an agreement is reduced by 15% of what a court would usually impose.

Judicial oversight

When the parties have reached an agreement, they shall send it to the court for approval, together with all the acts of the preliminary investigation. The approval hearing is held in camera and is therefore not in public. The presence of the prosecutor, accused person and defence lawyer is mandatory.[312] If the accused person, who has been duly summoned, does not attend the hearing without legitimate reasons, the court must reject the agreement.[313]

At the hearing, the judge must verify (i) the accuracy of the legal qualification of the criminal offence and the circumstances of its commission; (ii) the person's consent (validity of the waiver, that the admission of guilt was given knowingly, freely and voluntarily); (iii) that the admission of guilt is supported by other evidence in the case file; and that (iv) the punishment set in the agreement is

308 Article 406/d(5) of the Albanian CPC provides that there can be no partial admission of charges.

309 Article 406/d(a), (b) and (c) of the Albanian Code of Criminal Procedure.

310 Article 406/d(ë) of the Albanian Code of Criminal Procedure.

311 Article 406/d(d) of the Albanian Code of Criminal Procedure.

312 Article 406/dh(2) of the Albanian Code of Criminal Procedure.

313 Article 406/ë (1)(c) of the Albanian Code of Criminal Procedure.

proportionate.[314] Should the court establish that any of these requirements has not been met, or should the accused person withdraw their consent,[315] the agreement must be rejected, and the proceedings continue as if the person never admitted guilt, through a normal procedure. Courts power is nonetheless limited to either validating or rejecting the agreement, without the possibility to modify its content.[316] Courts can also decide to dismiss the case if they find, for example, that the impugned act does not constitute a criminal offence or if it is established that it did not take place.

Consequences if an agreement is not reached or is rejected by the court

Should the negotiation fail, there is no obligation to remove statements during the negotiations from the case file. They can therefore, in principle, be admitted as evidence at trial. However, since there is no obligation to record the negotiations, there will rarely be a recording of statements made in that context, except if the person has filed a memo to the prosecutor requesting an agreement.

Should an agreement be rejected by the court, the statements made by the accused person during the hearing and the agreement cannot be used against them in subsequent proceedings.[317] However, there is no obligation to remove the text of the agreement from the case file.

Right to appeal

Neither the accused person, nor the prosecutor has the right to appeal the court's decision endorsing or rejecting the proposed agreement. The prosecutor only has a limited right to file an appeal against a court decision dismissing the case.[318]

Frequency of use in practice

The sentence bargaining agreement procedure is not widely used in Albania. The limited take-up of sentence bargaining agreements may be because relevant authorities are not yet familiar with this fairly new mechanism. For example, in 2018, 12% of the cases brought before the Tirana District Court were concluded by an agreement. On average, the sentence following a sentence bargaining agreement is reduced by 15%, at the discretion of the prosecutor, which is less than the automatic one third reduction applied in the context of abbreviated trials, which are more commonly used in Albania. This research also seems to indicate that the victims' right to oppose the agreement on the ground that the damages are insufficient may also constitute an obstacle to the conclusion of such agreements.

314 Article 406/e(1)(a) to (ç) of the Albanian Code of Criminal Procedure.

315 Article 406/ë (1)(a) of the Albanian Code of Criminal Procedure.

316 Article 406/e(4)of the Albanian Code of Criminal Procedure.

317 Article 406ë (3) of the Albanian Code of Criminal Procedure.

318 Article 406(f) of the Albanian Code of Criminal Procedure.

4. Hungary

In Hungary, both sentence bargaining agreements and guilty pleas at the pre-trial stage are used, respectively named the "***egyezség a bűnösség beismeréséről***" (settlement to plead guilty) and the ***"előkészítő ülésen való beismerés"*** (confession at the preparatory session). Both were introduced following the adoption of the new Code of Criminal Procedure that came into effect on 1 July 2018. Penal orders, fast track proceedings and conditional disposals pre-existed trial waiver systems. They were and still are widely used but did not resolve the overburdening of the system.[319] In 2018, the introduction of the two new mechanisms was justified as the length of investigations and proceedings kept rising.[320] In the draft bill of the new Code of Criminal Procedure, it was stated that they would save time and resources for the state321 and that it would incentivise accused persons to cooperate with investigative authorities since it would result in a more lenient sanction. [322]

4.1 Sentence bargaining agreement

A sentence bargaining agreement by which the accused person and the prosecution formally negotiate the sentence.

Scope of application

The law does not prescribe any limitations of use with regard to types of crimes or the characteristics of the accused person. Agreements can be concluded with children. In practice, they are resorted to in serious or complex criminal cases where the cooperation of the accused person is comparatively useful for the state (e.g., drug-related offences, organised crime, white-collar crime, etc.).

Timing and initiation of the process

Sentence bargaining agreements can be initiated by the accused person, their lawyer and the prosecution.

The law only prescribes that the agreement should be concluded at any time before the indictment is issued. However, contrary to other jurisdictions, prosecutorial guidelines require sentence bargaining agreements to be concluded only in cases that are fully investigated. In practice, it appears from the research that prosecutors are only willing to conclude agreements when the investigation is well advanced.

319 In 2017, the year preceding the coming into force of the new trial waiver systems, 23.1% of all indictments was filed in the framework of a fast-track proceeding. See Ügyészségi Statisztikai Tájékoztató (Büntetőjogi szakági terület). A 2017. évi tevékenység (The statistical information leaflet of the prosecution – criminal field. Activities in the year 2017). Chief Public Prosecutor's Office, 2018, bit.ly/3ygkBWD, p. 33, Table 35

320 Bűnözés és igazságszolgáltatás (Criminality and criminal justice). Chief Public Prosecutor's Office, 2017, http://ugyeszseg.hu/repository/mkudok264.pdf

321 Draft Bill T/13972 of the Hungarian Code of Criminal Procedure, explanatory report.

322 *Ibid*.

Content of the negotiations

Negotiations relate to the sentence (e.g., type, length, amount of the sentence or applicable measure). Formally, the facts of the case and the legal classification of the offence are not subject to negotiation. Nonetheless, in practice, some informal negotiation around charges is possible where there is a legal debate around the classification of certain facts. Other optional elements may be negotiated. The prosecutor and the accused person may also agree on (i) the abandonment of criminal prosecution of offences not covered by the admission of guilt; (ii) the allocation and amount of the costs of criminal proceedings; and (iii) the fulfilment of some acts including cooperating with the prosecution; paying damages to the victim; participating in a mediation process with the victim; or other acts required by the prosecution.[323]

Form and content of the agreement and recording obligations

The agreement must be formalised in writing and include a description of the offence; a statement of the person's admission of guilt; the nature, length, and amount (where appropriate) of the sentence;[324] and any other conditions available to the parties. Moreover, there is a general obligation to record the negotiations, but no detailed regulation exists as to the form and the content. In practice, this research indicates that the practice of recording the negotiation process varies greatly. Records can take the form of audio and video recordings or in writing. In many cases, negotiations are either not recorded or partially recorded.

Determination of the sentence by prosecutors

Courts can lower sentences below statutory minimums following specific reduction rules provided for in the Criminal Code where mitigating circumstances are found.[325] Exceptionally, in a sentence bargaining setting, the lower limits provided for in the law can be applied by prosecutors.[326] Even more lenient sentences can also be applied when the person cooperated significantly with the investigation.[327]

Judicial oversight

To validate agreements, courts must verify (i) the legal validity of the agreement and process; (ii) the person's consent (validity of the waiver, that the admission of

323 Article 411 of the Hungarian Criminal Code of Procedure.

324 Article 410(2) of the Hungarian Criminal Code of Procedure.

325 Prosecutors may apply the general rule that if even the minimum punishment applicable under the Criminal Code for a given criminal offence is deemed too harsh, they can agree to a less severe punishment under some conditions e.g., if the minimum punishment to be imposed for a criminal offence is (i) 10 years of imprisonment, it may be reduced to a minimum of five years of imprisonment; (ii) if it is five years of imprisonment, it may be reduced to a minimum of two years of imprisonment; (iii) if it is two years of imprisonment, it may be reduced to a minimum of one year of imprisonment; and, (iv) if it is one year of imprisonment, it may be reduced to a lesser term of imprisonment, confinement, community service work or a fine, or these punishments cumulatively (Article 82 of the Hungarian Criminal Code.

326 Article 83(1) of the Hungarian Criminal Code.

327 Article 83(2) of the Hungarian Criminal Code.

guilt was given freely and voluntarily); (iii) that the admission of guilt is supported by other evidence in the case file; and when appropriate, (iv) whether the person has fulfilled their other obligations under the agreement. The hearing is public and the person must be present at the hearing to be interviewed by the court. If any of these requirements has not been met, the agreement is rejected, and the proceedings continue as if the person never admitted guilt, through a normal procedure. The power of judges is however limited to either validating or rejecting the agreement, without the possibility of modifying its content. Courts may not dismiss the case if they find that the person is innocent but must simply reject the agreement and the case proceeds to a normal trial procedure according to the general rules.

Consequences if an agreement is not reached or is rejected by the court

Should the negotiation fail, all the documents used and the statements made during the negotiations must be removed from the case file and cannot be further used as evidence against the accused in further proceedings.[328] However, this rule only applies if the parties do not reach an agreement, but not if an agreement is concluded and further rejected by the court. In such cases, the content of the negotiations and admissions of guilt may be used as evidence during the subsequent trial.

Right to appeal

The court's refusal to approve the agreement is not subject to appeal. If the agreement is approved, the right to appeal is extremely limited. It is only possible in case new facts and evidence are discovered or where the legal preconditions for the conclusion of an agreement were not fulfilled. The Court of Appeal may only amend the first instance judgment if it can be concluded without holding a trial that the accused person should have been acquitted or the procedure should have been terminated.

Frequency of use in practice

As in the other studied countries, sentence bargaining agreements are rarely used in Hungary. In 2019, of the total number of cases in which charges were brought, an indictment was only submitted based on a sentence bargaining agreement in 0.2% of all cases. Internal processes make the conclusion of formal agreements highly burdensome, as the leading prosecutor must be involved in the negotiations alongside the prosecutor assigned to the case, and the agreement reached must also be submitted to the superior prosecutor's office for approval. Moreover, internal guidelines require prosecutors to fully investigate the case before even entering a negotiation process to conclude an agreement, which renders the process unhelpful from an efficiency perspective.[329] For the same reason, prosecutors frequently refuse the accused person's request to negotiate.

328 Article 409(4) of the Hungarian Code of Criminal Procedure.

329 In a presentation held at a conference organised by the Hungarian University of Public Service on 20 November 2020, it was identified as one of the reasons for the lack of prevalence of sentence bargaining agreements.

The lack of familiarity of authorities with this fairly new mechanism (which has only been in application since July 2018) might also explain its limited take-up.

4.2 Guilty plea at the pre-trial hearing

The guilty plea or confession at the preparatory session of the court, by which the accused person pleads guilty and waives their right to a trial at the pre-trial hearing in exchange for a more lenient sentence.

Scope of application

The law does not prescribe any limitations on the use of guilty pleas with regard to types of offences, nature and length of sentences or accused persons' status. In practice, this research shows that they occur in relation to almost all types of criminal offences, but are typically made in simple cases, at the district court level, where there is strong evidence or when the person is caught in the act.

Timing and initiation of the process

Guilty pleas occur at the pre-trial hearing stage. The hearing is a mandatory phase of the (regular) proceedings, after the filing of the indictment. All accused persons are summoned to the pre-trial hearing. In the summons, they are informed that at the hearing they may plead guilty or not guilty.

Content of the negotiations

Contrary to sentence bargaining agreements, the law does not foresee any negotiations between the accused person and the prosecutor in the context of guilty pleas at the pre-trial hearing. In practice, however, 'informal' negotiations do take place between the parties, including in courtroom hallways before the hearing starts. These informal negotiations revolve around the maximum penalty the accused person could receive in the case of a guilty plea. Accordingly, there are no specific safeguards or applicable regulation.

According to the law, when the court accepts the confession at the preparatory session, it may not impose a harsher sentence than the one indicated in the prosecutor's sentencing motion.[330]

The prosecutor may file a sentencing motion ahead of or at the pre-trial hearing but is not obligated to do so. However, prosecutorial guidelines provide that sentencing motions should be the rule, not the exception. With such a motion, the accused person has full knowledge of the maximum penalty that can be applied by the court and thus is aware of the potential benefit they could obtain should they agree to plead guilty. In practice, prosecutors do not always file sentencing motions or inform the person of the sentence they would request at the hearing should they plead guilty. The person therefore often "negotiates" a plea without any knowledge of the possible benefit they may obtain in terms of sentencing.

330 Article 565(2) of the Hungarian Criminal Code.

Formalities

There are no formalities pertaining to the informal agreement between the parties or to the informal negotiations. The prosecutor and the accused person may make an oral agreement before the pre-trial hearing, which the prosecutor will suggest to the court with a proposed sentence.

Determination of the sentence by prosecutors

The sentencing motion of the prosecutor is made in accordance with the general principles of sentencing. The more lenient rules available to prosecutors in the context of sentence bargaining are not available to them in the context of informal negotiations leading to a guilty plea.

Judicial oversight

When a person pleads guilty at the pre-trial hearing, the court must assess whether (i) the person understood the nature and consequences of the confession given; (ii) the guilty plea was given voluntarily; (iii) the guilty plea is supported by other evidence in the case file; (iv) the person's admission of guilt is real and supported by other evidence.

If the court accepts the admission of guilt, it immediately hears the parties on sentencing. The court is however bound by the sentence requested in the prosecutor's motion in the sense that it may not impose a harsher sentence. Where the court has reasonable doubts about the guilty plea, it must refuse to accept it. If it rejects the guilty plea, the case proceeds to a normal trial.

Consequences if the court rejects the plea

The admission of guilt made in court may be used as evidence in the ensuing trial.

Right to appeal

If the court accepts the person's plea, none of the parties may appeal on the merits of the case. The appeal court may change the first instance judgment as far as establishing guilt and the classification of the offence in accordance with the indictment only if at the same time it acquits the accused person, terminates the criminal procedure, or changes the legal classification of the criminal offence. Furthermore, since 1 January 2021, appeal courts must annul the judgment if the first instance court has accepted the guilty plea in violation of the conditions set out in the law.

Frequency of use in practice

Guilty pleas at the pre-trial hearing are seen by prosecutors interviewed as less burdensome, faster and less costly than sentence bargaining agreements. Consequently, compared to sentence bargaining agreements, guilty pleas made at the pre-trial hearing stage are far more common in practice: in 2019, 27.66% of accused persons pleaded guilty at the pre-trial hearing, and the pleas were accepted by courts in 92.06% of the cases.

5. Cyprus

Cyprus is the only common law country in the five studied systems, which makes it an exception in the way trial waiver systems operate.
As is the case in many other common law countries, the criminal trial in Cyprus consists of two main stages, namely the decision on guilt or innocence and the decision on sentencing. The practice of pleading guilty in exchange for a more lenient sentence is well established in Cyprus. However, contrary to Hungary and Slovenia, there are no specific legal provisions regulating these guilty pleas. Some incentives to plead guilty are recognised by the relevant case-law. Pleading guilty at an early stage of the proceedings leads to a greater sentence reduction.[331] Others are considered informal, in the sense that charges may be reduced and/or amended in the context of informal negotiations with the prosecutor.

Scope of application and timing of the process

Guilty pleas apply to all types of offences. Prosecutors and police can approach suspected and accused persons at any time before the trial hearing. If a person makes a guilty plea at a later stage of the procedure, it is still taken into account for the reduction of the sentence, but to a lesser extent.

Content of the negotiations

As opposed to the other studied systems, charges may be reduced and/or amended in the context of informal negotiations with the prosecutor. The sentence, however, can never be negotiated by the parties. The prosecutor can only offer the accused person to request a lower sentence, but it is the prerogative of courts to decide on that sentence, as in normal trials. According to caselaw, the accused person will in principle benefit from a sentence reduction when pleading guilty. Another incentive is early release from pre-trial detention, as an admission of guilt could lead to immediate release if the person has already served the sentence imposed in pre-trial detention.

Judicial oversight

According to caselaw, when a person pleads guilty, courts have an obligation to verify that the admission of guilt corresponds to the facts of the case and the evidence before it. The admission of guilt alone is not enough to convict a person. If a judge finds that the facts of the case do not reveal the commission of an offence or if the accused person makes allegations that are contrary to the admission of guilt, the judge must reject the guilty plea and proceed with the trial as if the person had pleaded not guilty.[332]Sentencing is however always a prerogative of the court, which is not bound by the prosecutor's request.

331 Δημοκρατία v. Marilyn Basco Evia, Ποινική υπόθεση αρ. 336/19

332 Efstathiou v. The Police, 22 C.L.R. 191, Attorney-General of the Republic v. Mahmout (1961) C.L.R. 181, Polykarpou v. Police (1967) 2 C.L.R. 152, Kefalos v. Police (1972) 2 C.L.R. 1, Lytrides v. Municipality of Famagousta (1973) 2 C.L.R. 119, Philaktides v. Republic (1979) 2 C.L.R. 157, και Γεωργίου v. Σαμάρα (Αρ. 2) (1995) 2 Α.Α.Δ. 17).

Consequences if the Court rejects the plea

There are no specific rules preventing admission of guilt being used as evidence in the ensuing trial if the guilty plea is rejected.

Right to appeal

Accused persons who admitted guilt can only appeal against the sentence. Exceptionally, the conviction itself can be appealed when the facts of the case as those presented in the indictment do not reveal any criminal offence or when the accused did not understand the nature of the indictment or did not have the real intention to admit guilt.

Frequency of use in practice

Statistics on the number of accused persons convicted after admitting guilt are not available. However, it appears from the domestic research that the majority of appeals before the Supreme Court relate to sentencing after admission of guilt. It can be assumed that in the majority of cases in first instance, accused persons waive their right to trial.

6. France

In 2004, France introduced sentence bargaining agreements in its legislation under the name ***"comparution sur*** *reconnaissance préalable de culpabilité"* **(admission of guilt procedure)**.

Scope of application

This sentence bargaining procedure can be used for all criminal offences, except for the most serious offences including involuntary manslaughter, battery, and sexual harassment when they are punished by imprisonment exceeding 5 years.[333] They are excluded for minor offences that are not punished by imprisonment ("*contraventions*"). Prosecutorial guidelines give additional guidance to prosecutors as to the type of situations in which an agreement should be favoured.[334] This mechanism cannot be applied with children.[335]

Timing and initiation of the process

It may be initiated at the end of the preliminary investigation at the earliest, by the suspected or accused person, their lawyer or the prosecutor. However, the final decision to use this procedure rests with the prosecutor.[336] Therefore, even

333 Article 495(7) and (16) of the French Code of Criminal Procedure.

334 For example (i) when the suspected person acknowledges the facts and their qualification, (ii) in cases that are simple enough to be easily decided by trial courts, (iii) where there is sufficient foreseeability as to the punishment at stake (*i.e.* in case of sufficient consistent case law), and (iv) where a hearing before a criminal court is not necessary (Circular JUSD0430176C dated 2 September 2004 on the appearance further to prior admission of guilt, pp. 8-9.)

335 Article 495(16) of the French Code of Criminal Procedure.

336 Articles 495(7) and (15) of the French Code of Criminal Procedure.

if the legal requirements are met, the prosecutor may refuse to implement the mechanism when requested by the suspected or accused person.

Content of the negotiations

The law does not strictly provide for a negotiation between the parties over the sentence but allows the prosecutor to inform the suspected or accused person or their lawyer, by any means, of the proposal they intend to make, and they are free to accept it or not.[337] In practice, they have a possibility to respond. As negotiations are not strictly foreseen by law, there is no obligation to keep a record of negotiations. If necessary, the person may request to be granted a period of ten days to communicate whether they accept or refuse the prosecutor's punishment proposal.[338]

Determination of the sentence by prosecutors

As possible sentences, the prosecutor may suggest that the person undergo one or more of the main or additional penalties incurred for the offence(s). The nature and length of the sentence are determined by the prosecutor based on the Criminal Code general rules, with the following limit : if a custodial sentence is proposed, its duration may not exceed three years or half the prison sentence incurred. If a fine is proposed, its amount may not exceed the maximum fine applicable to the offence.[339]

Judicial oversight

Courts must verify that the suspected or accused person acknowledged guilt and accepted the sentence in the presence of their lawyer.[340] According to the 2004 Minister of Justice's Circular, courts must ensure that the person has freely and sincerely acknowledged to be responsible for the offence and that they knowingly accepted the proposed sentence.[341] In addition, courts must verify the proportionality of the sentence in light of the gravity of the offence and the personal circumstances of the suspected or accused person. However, if they consider the penalty to be disproportionate, they cannot amend it, as they must either accept the proposed sentence or reject the agreement altogether.[342] In case the agreement is rejected, proceedings must continue through a normal trial procedure.

337 Article 495(8) of the French Code of Criminal Procedure.

338 *Ibid*.

339 *Ibid*.

340 Article 495(11) of the French Code of Criminal Procedure.

341 Circular JUSD0430176C dated 2 September 2004 on the appearance further to prior admission of guilt, pp. 28-29.

342 Article 495(9) of the French Code of Criminal Procedure.

Consequences if an agreement is not reached or is rejected by the court

If an agreement is not reached or if it is rejected by the court, the declarations and information provided during the admission of guilt procedure cannot be used against the person at trial.[343]

Right to appeal

Both the accused person and the prosecutor can appeal the court's decision to approve the agreement.[344] France appears to be the exception in this respect.

Frequency of use in practice

In 2016, sentence bargaining agreements represented 13% of decisions of conviction at the correctional stage.[345]

7. Belgium

In 2016, Belgium introduced sentence bargaining agreements in its legislation under the name ***"reconnaissance préalable de culpabilité"*** **(admission of guilt procedure)**.

Scope of application

This sentence bargaining procedure only applies to offences which would not be punishable by a sentence of more than five years of imprisonment. This threshold does not refer to the statutory sentence, but to the sentence the prosecutor considers appropriate given the circumstances of the case. In addition, agreements cannot apply to offences with a statutory maximum sentence of more than 20 years of imprisonment, certain sexual offences and murder.[346]

Timing and initiation of the process

It may be proposed both by the prosecutor, the suspected or accused person and their lawyer,[347] at any stage of the procedure in first instance, and up until a judgment has been issued by the first instance judge. If at the preliminary stage an investigation is launched by the investigative judge, the admission of guilt procedure may only be initiated after such investigation is closed and the case has been referred to the first instance judge.[348]

343 Article 495(14) of the French Code of Criminal Procedure.

344 Article 495(11) of the French Code of Criminal Procedure

345 Rodolphe Houllé, Guillaume Vaney, *La comparution sur reconnaissance préalable de culpabilité, une procédure pénale de plus en plus utilisée*, Infostat Justice, n°157, December 2017, available at: bit.ly/3ycRljs

346 Article 216(1) of the Belgian Code of Criminal Procedure.

347 *Ibid*.

348 Article 216(1) and (2) of the Belgian Code of Criminal Procedure.

Content of the negotiations

The law does not provide a formal possibility for the parties to negotiate the sentence. The relevant legal wording suggests that the sentence is proposed by the prosecutor and that the suspected or accused person is free to accept or reject such proposal. However, it is understood that in practice, the person or their lawyer may negotiate the sentence to a certain extent and for example suggest an alternative sentence. If necessary, the person may request to be granted a period of ten days to decide whether they accept or refuse the prosecutor's punishment proposal.[349] There is no formal possibility to negotiate on the charges. In practice however, it is understood that defence lawyers may sometimes try to persuade the prosecutor of their own view on the charges, as a result of which certain charges may be dropped, replaced or adjusted.

As they are not strictly foreseen by law, there is no obligation to keep a record of negotiations.

As admission of guilt is required and entails an irrefutable presumption of civil law fault, the consequence is that the victim will only need to demonstrate the damage caused by the offence in order to establish civil liability.

Judicial oversight

When reviewing the agreement, courts must examine whether (i) the applicable legal requirements are met; (ii) the agreement is accepted in a voluntary and informed manner; (iii) the agreement contains a truthful report of the facts and provides an accurate legal qualification of such facts.350 They must also verify that the legal formalities foreseen for the sentence bargaining agreement were respected, namely that the person was assisted by a lawyer when acknowledging guilt, that the lawyer had access to the case file, that the agreement was recorded etc.[351] In addition, courts must assess the proportionality of the sentence in light of the gravity of the offence and the personal circumstances of the accused person.[352] If judges consider the penalty to be disproportionate, they cannot amend it, as they must either accept the proposed sentence or reject the agreement altogether.

Consequences if an agreement is not reached or is rejected by the court

If the court considers that one or more of the above requirements is not met, it rejects the request for validation of the agreement. In such a case, the case file will return to the prosecutor, with the additional guarantee that the case will be assigned to a different judge.[353]

349 Article 216(3.4) of the Belgian Code of Criminal Procedure.

350 Article 216(4.3) of the Belgian Code of Criminal Procedure.

351 *Ibid*.

352 *Ibid*.

353 Article 216(4.4) and (4.5) of the Belgian Code of Criminal Procedure.

Right to appeal

The right to appeal against a judgment validating the agreement is explicitly excluded by law.[354] The law does not contain any explicit wording as regards the possibility to appeal a judgment rejecting the agreement, but the prosecutorial guidelines exclude it.[355]

Frequency of use in practice

There are no available data yet as regards the number of cases terminated following sentence bargaining agreements.

354 Article 216(4.4) of the Belgian Code of Criminal Procedure.

355 Instruction letter from the Board of Attorneys-General, dated 10 March 2016, nr. 10/2016.

fairtrials.org

Fair Trials

Fair Trials
Avenue Louise 209A
1050 Brussels
Belgium

+32 (0)2 894 99 55

@fairtrials @fairtrials Fair Trials

Fairness, equality, justice