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Deal-making in criminal proceedings: the need for minimum standards for trial waiver systems

Report[1]
Committee on Legal Affairs and Human Rights
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Summary

The Committee on Legal Affairs and Human Rights stresses the importance of fair trials in criminal proceedings. It notes that in many member States, regular criminal trials have gradually been replaced by different forms of trial waiver systems (plea bargaining).

Trial waiver systems have clear potential advantages. They save resources that would be required for systematically holding full trials in open court and help the fight against organised crime by allowing prosecutors to offer "deals" to potential crown witnesses.

But trial waiver systems also have serious drawbacks. They are open to abuse by both the prosecution and the defence. In particular, the secrecy of "deal-making" undermines the public's trust in the judiciary and the fair and non-discriminatory application of the law.

The committee therefore considers that appropriate safeguards are needed in order to ensure that member States enjoy the potential benefits that trial waiver systems may offer whilst minimising the threat to human rights. These include making the involvement of a lawyer obligatory, imposing a minimum level of investigation into the crime underlying the plea agreement and the disclosure of the results of the investigation, requiring judicial scrutiny of key elements of the plea agreement (including the credibility and voluntary nature of the underlying confession and the appropriateness of the sanction resulting from the plea agreement), limiting the extent of the "trial penalty", prohibiting the waiver of appeal rights, and monitoring indicators of racial or wealth bias or discrimination.

1. Reference to committee: Doc. 14371 Reference 4326 of 13 October 2017.

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A. Draft resolution[2]

1. The Parliamentary Assembly recalls the obligation of member States to ensure fair trials in criminal proceedings. The safeguards foreseen in the European Convention on Human Rights (ETS No. 5, "the Convention"), in particular its Article 6, are designed to protect the innocent and to promote equality of arms between the prosecution and the defence in the interest of material justice.

2. It notes that in many member States of the Council of Europe and in States having observer or other status with the Council of Europe or the Assembly, regular criminal trials have gradually been replaced by different forms of trial waiver systems (also called plea bargaining, guilty pleas, abridged trials or summary procedures). In a number of countries, only a minority of criminal convictions are still based on regular trials.

3. The rapid development of trial waiver systems, in particular in central and eastern Europe and in the successor countries of the former Soviet Union, is partly due to efforts by the United States to promote American-style plea bargaining as part of the technical assistance provided to the newly established democracies for the reform of their judicial systems. Given the marked differences in the criminal justice systems within Europe and between Europe and the United States, such a transposition is fraught with risks that need to be counteracted in order to minimise abuse. In particular, the extensive powers of the prosecution (prokuratura) in the criminal justice systems of certain eastern European countries must be counter-balanced by a stronger defence and a more active role of the court if "plea bargaining" is not to deteriorate into blackmail.

4. Trial waiver systems have clear potential advantages:

4.1. they save resources that would be required to fully and thoroughly investigate all suspected crimes and systematically hold full trials in open court. Some less serious, although frequently committed types of delinquency may not justify the investment in each case of scarce law-enforcement and judicial resources required for a regular trial;

4.2. they facilitate concentration of the limited law-enforcement resources on well-defined priority fields of criminal activity;

4.3. they can help the fight against organised crime, money laundering and other forms of complex criminality, where inroads into closed criminal structures can be facilitated by the prosecutors' ability to offer "deals" to potential crown witnesses;

4.4. they allow suspects who confess and are ready to accept a sentence to avoid a long pretrial investigation which might restrict their rights.

5. But trial waiver systems also have serious drawbacks:

5.1. they are open to abuse by both the prosecution and the defence. A prosecutor may threaten a defendant with an inappropriately harsh sentence if he or she does not confess, even in the absence of sufficient evidence; and a defence counsel may lure an overburdened prosecutor in a complex case into accepting a partial confession and a mild sanction whilst disregarding other, more serious criminal activity. Typically, the first type of abuse victimises young and poor offenders whereas the second type benefits wealthy white collar criminals;

5.2. by saving prosecutors the need to make their case in open court, widespread trial waivers in time affect the authorities' very ability to carry out solid investigations;

5.3. the secrecy of "deal-making" undermines the public's trust in the judiciary and the fair and non-discriminatory application of the law;

5.4. by increasing the case-processing capacity of the criminal justice system, without increasing its resources, plea bargaining increases the overall number of criminal convictions. This increase ("net-widening effect") may be inconsistent with optimal penal policy and the cost of any resulting higher prison population may well negate the judicial resources saved by trial waivers.

6. The Assembly considers that appropriate safeguards are needed to ensure that member States enjoy the potential benefits that trial waiver systems may offer, whilst minimising the threat to human rights, in particular the right to a fair trial.

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2. Draft resolution adopted unanimously by the committee on 10 September 2018.

7. It welcomes and encourages the sharing of good practices that have already been introduced in several member States, including:

7.1. the mandatory involvement of a lawyer (Croatia, Estonia, France, Georgia, Ireland, Luxembourg, "the former Yugoslav Republic of Macedonia" and Switzerland);

7.2. the imposition of minimum requirements for investigations and the disclosure of their results (Finland, Germany and Luxembourg);

7.3. the requirement of judicial scrutiny of key elements of the plea agreement and the limitation of the differential between the sanction resulting from a full trial and that offered as part of a plea bargain (Germany);

7.4. the prohibition of the waiver of the right to appeal and the possibility to revoke an agreement in certain circumstances (Germany).

8. The Assembly calls on all member States and States having observer or other status with the Council of Europe or the Assembly to implement the following safeguards, whose effectiveness will ultimately depend on the existence of a truly independent judiciary to:

8.1. make the involvement of a lawyer obligatory, as a condition for the validity of a plea bargain, if need be funded by legal aid, so as to ensure that defendants, in particular vulnerable ones such as young offenders, are treated fairly – as required by Article 6.3.*c* of the European Convention on Human Rights;

8.2. impose a minimum level of investigations into the crime underlying the plea agreement and the disclosure of the results of the investigation, to enable the defendant to make an informed choice, in accordance with the right to presumption of innocence under Article 6.2 of the Convention, and to protect the confidence of the general public in the fairness of the criminal justice system;

8.3. require judicial scrutiny of key elements of the plea agreement, regarding in particular the credibility and voluntary nature of the underlying confession and the appropriateness of the sanction resulting from the plea agreement;

8.4. limit the differential between the sanction resulting from a full trial and that offered as part of a plea bargain ("trial penalty"), thus avoiding unfair pressure on the accused whilst ensuring that sanctions remain within an appropriate range and justice is seen to be done;

8.5. prohibit the waiver of appeal rights, in order to ensure sufficient control, at the national level, of the actual practice of lower courts in the field of plea bargaining;

8.6. foresee the possibility of revoking a plea agreement in certain circumstances, in particular when new facts arise or become known which make the plea agreement inappropriate and require further prosecutorial action; in such a case, a confession made as part of the agreement must not be used against the defendant;

8.7. minimise the use of pretrial detention against persons suspected of less serious crimes by making use of alternative measures;

8.8. monitor indicators of racial or wealth bias or discrimination in the reduction of sentences following guilty pleas, and take appropriate awareness-raising, training and, if need be, disciplinary measures in order to counteract any such bias or discrimination;

8.9. ensure that the law-enforcement authorities and the criminal courts are properly resourced so as to avoid excessive recourse to trial waiver systems for purely budgetary reasons and to enable the meaningful implementation of the safeguards recommended above;

8.10. ensure proper monitoring and control by courts and law-enforcement bodies to avoid blackmail, pressure or any other manipulation aimed at compelling suspects to engage in a trial waver system.

B. Draft recommendation[3]

1. The Parliamentary Assembly refers to its Resolution … (2018) "Deal-making in criminal proceedings: the need for minimum standards for trial waiver systems".

2. It invites the Committee of Ministers to:

2.1. undertake a comprehensive study on the use of trial waiver systems in the Council of Europe's member and observer States;

2.2. address a set of recommendations to member States designed to ensure that in the use of trial waiver systems the threat to human rights, in particular the right to a fair trial, is minimised.

3. Draft recommendation adopted unanimously by the committee on 10 September 2018.

C. Explanatory memorandum by Mr Boriss Cilevičs, rapporteur

1. Introduction

1. Different types of out-of-court settlement procedures, in particular plea bargaining (or "guilty pleas" "summary procedures" or "abridged trials"), are widely used in many Council of Europe member States in criminal proceedings concerning different types of offences. As a rule, but not necessarily, these procedures involve explicit recognition of guilt. In my work as rapporteur of the Monitoring Committee, I was confronted with the massive use of plea bargaining in so-called new democracies. Such "plea bargaining" procedures can ensure a substantial acceleration of the criminal process and save significant resources. However, their application, which is becoming more and more widespread, also carries serious risks as regards compliance with the "classical" principles of the rule of law, in particular on fairness of trials. Given the importance this practice has taken in recent years, it is surprising that hardly any universally accepted international standards exist in this regard.

2. The Parliamentary Assembly therefore decided to study the application of these procedures in practice, in particular plea bargaining, and to analyse good practices, risks and problems, with the aim of drawing up relevant recommendations for member States.

3. My research as rapporteur[4] on this topic has confirmed the impressions from my Monitoring Committee experience. The practice is even more widespread than I had realised, and, in some cases, quite worrisome. It seems that normal trials, with all the procedural protections under Article 6 of the European Convention on Human Rights (ETS No. 5, "the Convention") are slowly becoming the exception and "deal-making" the rule.[5] In particular, it is not completely clear how the protections under the Convention can be applied in practice to ensure that innocent people are not coerced into "bargains" that will land them with a criminal record, or worse.

4. As agreed by the Committee on Legal Affairs and Human Rights, on the basis of my introductory memorandum, the topic as outlined in the title of the motion for a resolution underlying this report ("Out-of-court settlement procedures in criminal justice: advantages and risks") is too wide to be covered in a single report. "Out-of-court settlement procedures" would normally include the whole field of what criminologists refer to as diversion, i.e. "diverting" the response to (generally) minor criminality away from criminal sanctions of any kind, towards treatment or care programmes, perpetrator/victim conciliation efforts or alternative sanctions of different kinds. Such "diversion" can intervene at a very early stage in the criminal process, for example as soon as the police identifies a suspect, or at a later stage, after the police has brought charges; it can be formal or informal, it can be regulated in detail by law or left to the discretion of police officers or prosecutors. But contrary to deal-making practices in criminal proceedings, these alternatives to trial do not result in criminal convictions. Instead, they divert people away from criminal prosecution altogether. Such diversionary strategies are clearly useful and interesting, in particular in order to help fight prison overcrowding and "over-criminalisation";[6] and they raise interesting legal and political issues in their own right. Diversion has been criticised from two opposing sides: some see it as undercutting the strict enforcement of the law and others as yet another example of "widening the net" of repressive social responses to perceived deviant behaviour.[7] But these issues, however interesting, should be addressed in a separate report so that the present report does not become too broad and thereby necessarily superficial.

5. The present report on the specific issue of "deal-making" in criminal proceedings is reflected in the new title agreed at the committee meeting in March 2018. It is understood that different forms of agreements in criminal proceedings involve partial or full waivers of the defendant's right to a normal trial.

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4. The Committee on Legal Affairs and Human Rights appointed Mr Boriss Cilevičs (Latvia, SOC) as rapporteur on 12 December 2017.

5. See "The Disappearing Trial – Towards a rights-based approach to trial waiver systems", Fair Trials International, 27 April 2017: https://www.fairtrials.org/the-disappearing-trial-report/.

6. See for example the entry in the Encyclopedia Britannica, https://www.britannica.com/topic/diversion; https://www.aclu.org/blog/juvenile-justice/youth-incarceration/diversion-keeps-kids-out-criminal-justice-system-too-many; Online Lexikon der Kriminologie, www.krimlex.de/artikel.php?BUCHSTABE=&KL_ID=53 (in German).

7. See for example the Restorative Justice tutorial on this point at: http://restorativejustice.org/restorative-justice/about-restorative-justice/tutorial-intro-to-restorative-justice/lesson-5-implementation-issues/diversion-or-net-widening/#sthash.c3ee7pwJ.dpbs.

2. Deal-making in criminal proceedings – prevalence in practice and recent trends

6. The practice of deal-making in criminal proceedings is originally an American or, more generally, a Common Law phenomenon. Plea bargaining took off in America around 1920, when Prohibition led to a dramatic increase in the number of criminal offences. Bargains with suspects to plead guilty in return for lighter punishment seemed to be the only way to cope. After the end of Prohibition, plea bargaining remained. In 1970, the United States Supreme Court broadly recognised the constitutionality of this practice.[8] After this its spread was unstoppable. By 1980, only 19% of defendants in federal criminal cases went to trial, and since 2010, this figure has remained below 3%.[9] Plea bargaining is linked to the traditional adversarial nature of criminal trials in Common Law systems, where – as dramatised in numerous Hollywood movies – the prosecutor and the defence attorney "fight it out" before the jury, a fight merely moderated by the judge, who acts as a neutral "referee". Acquittals are not infrequent; much, if not everything, depends on the professionalism and engagement of the prosecutor and the defence attorney. Truth is understood as procedural – as whatever the jury decides, in light of the evidence put before it. By contrast, most "continental", Roman law-based legal systems traditionally foresee an "inquisitorial" criminal procedure: the judge, in serious cases often a collegiate court with one judge acting as rapporteur, actively seeks the truth, in an "inquisitive" way, not relying exclusively on requests for evidence introduced by the prosecution and the defence. The prosecution is legally bound to follow the evidence wherever it may lead, in a neutral way, both in favour and against the suspect, with the assistance of the police. The role of the defence lawyer is basically limited to pleading on behalf of the accused, highlighting the aspects of the case that speak in his favour and minimising the negative ones. Typically, in adversarial systems, the prosecution has a high degree of discretion as to whether to prosecute at all, and if so, for which crime. By contrast, in the continental ("inquisitorial") legal systems, the prosecution is bound by the "principle of legality", meaning that if there is sufficient evidence for a crime, charges must be brought. In actual practice, prosecutorial discretion is limited by different checks and balances also in the common law systems, and the principle of legality is in turn fraught with so many exceptions that in reality, prosecutors have considerable discretion also in continental legal systems. Such discretion clearly opens the way to negotiations. The wider the prosecutorial discretion, the wider the scope for "deal-making", for better or for worse.

7. Empirical research carried out by Fair Trials International in 90 jurisdictions shows that different types of "trial waiver systems" have progressed enormously over the past 25 years all over the world. Between 1990 and the end of 2015, the number of countries with trial waiver systems increased from 19/90 to 66/90, across different legal systems and traditions. In some jurisdictions, "deals" have come to largely replace trials – for example in the United States. In some jurisdictions, this process took place rapidly, over just a few years. In the new democracies of central and eastern Europe, and in particular in the former Soviet Union, there is a clear correlation with efforts by US advisers to promote the American model of plea bargaining, as was the case in Georgia under President Saakashvili. The Georgian plea bargaining practice has been widely criticised, for example by Thomas Hammarberg, the Council of Europe Commissioner for Human Rights.[10] The Georgian delegation has kindly provided me with statistical data that show that the number of judgments based on plea bargains has decreased since its peak in 2010/2011 until 2017 from 16 000 to 10 000. But the 2017 number was still more than double that of judgments based on "essential consideration" (regular trials) in the same year.

8. Whilst the "American model" is itself subject to serious criticism,[11] it is questionable whether the transposition of the "American model" is at all appropriate in jurisdictions with a very different legal and judicial culture, for example in terms of the chance of acquittal when a "deal" offered by the prosecution is refused by an accused person. The fairness of trial waiver systems hinges on the "balance of power" between the prosecution and the defence. This balance may be reasonably appropriate in the United States (provided the defendant can afford a qualified and well-motivated lawyer), but less so in the "inquisitorial" systems in western Europe (where judges play a particularly strong role) and not at all appropriate in the eastern

8. *Brady v. United States*, 397 U.S. 742 (1970).

9. See *The Economist* of 9 September 2017, "A deal you can't refuse, The troubling spread of plea-bargaining from America to the world".

10. See the Report by Thomas Hammarberg following his visit to Georgia from 18 to 20 April 2011, document CommDH(2011)22 on "Administration of justice and protection of human rights in the justice system in Georgia", paragraph 73.

11. See for example Emilio C. Viano, Plea Bargaining in the United States: a Perversion of Justice, *Revue internationale de droit pénal*, 2012/1 (Vol. 83), pp. 109-145, with numerous other references. The most drastic characterisation of the American model I found in a Hungarian PhD thesis: "Have we sold out true justice for the cheap convenient fast-food of plea bargaining McJustice?" (Samantha Joy Cheesman, A comparative analysis of plea bargaining and the subsequent tensions with an effective and fair legal defense, University of Szeged, 2014, p. 234.

European systems of criminal procedure, which are still dominated by an overwhelmingly strong prosecution service ("prokuratura"), in the tradition of the former Soviet Union. Notwithstanding such compatibility issues, the U.S. Department of Justice's Office of Overseas Prosecutorial Development Assistance and Training (OPDAT), established in 1991, has provided guidance and training as part of U.S. foreign-aid efforts after the break-up of the Soviet Union, which was strongly geared towards promotion of plea bargaining.[12]

9. In order to show the magnitude of the trend, here is a table summing up data collected by the NGO Fair Trials concerning the timing of the introduction of trial waiver systems and prevalence of "deals" as a percentage of all criminal convictions in member States of the Council of Europe:

Country (member of the Council of Europe)	**Year of introduction of a TWS***				**% of TWS***
	Pre-1990	**1990-1999**	**2000-2009**	**2010-2016**	
Albania			X		
Armenia			X		
Austria	X				
Bosnia and Herzegovina			X		41% (2015)
Croatia			X		6 % (2014)
Czech Republic				X	07% (2014)
Denmark			X		
Estonia		X			64% (2014)
Finland				X	
France			X		
Georgia			X		8% (2012)
Germany			X		
Hungary		X			23% (2014)
Iceland			X		
Ireland	X				
Italy	X				4% (2008)
Lithuania			X		
Luxembourg				X	
Netherlands			X		
Norway			X		
Poland		X			43% (2015)
Romania				X	
Russian Federation	X				64% (2014)
Serbia			X		4% (2014)
Spain	X				7% (2014)
Switzerland			X		
"The former Yugoslav Republic of Macedonia"				X	
Turkey	X				
Ukraine				X	
United Kingdom	X				70% (2014)

* TWS = Trial Waiver Systems: plea bargaining, abbreviated trials and co-operating witness procedures

% of TWS = Percentage of cases resolved through trial waiver systems

10. The data collected by Fair Trials may even underestimate the true prevalence of "deal-making" in criminal proceedings, as informal types of "deal-making", which often precede legislative action to somehow recognise and codify this practice, are difficult to quantify. But it is evident from these data that the trend towards the replacement of the traditional criminal trial by different types of trial waiver systems is very strong. We therefore need to address the advantages and risks involved in these practices.

12. *The Economist* (*supra* note 9), p. 3.

3. Different types of trial waiver systems

11. In accordance with the huge differences between legal systems, there are also different types of trial waver systems, which also carry many different names (for example “plea bargaining” or “guilty pleas”, “summary procedures” or “abridged trials”). What these practices have in common is the acceptance, by the person accused of a criminal offence, to waive his or her right to a full trial in exchange for a counterpart promised by the State. Among the types of trial waver system described in some detail by the above-mentioned Fair Trials study are those involving co-operation with so-called crown witnesses, who provide evidence against others in return for lenient punishment for themselves. Incentives offered by the State may concern facts (some impugned facts left un-investigated or not taken into account in return for the recognition of other, less serious facts by the accused); or they may concern the charges brought by the prosecution, for an offence carrying a lower punishment than another, related offence, for example manslaughter instead of murder). The advantages and risks vary somewhat depending on the type of trial waiver system in question, but many issues concern all variations of this practice.

4. Advantages and risks of trial waiver systems

4.1. Saving scarce judicial resources

12. The main reason why trial waver systems have had so much success is that they seem to help save the scarce resources available for the criminal justice system by avoiding many full-scale trials. It has been argued that especially in countries with a high rate of low- or mid-level crime and an under-resourced judiciary, the adoption of trial waver systems is the best way to avoid either de facto impunity for numerous perpetrators or the over-use of pretrial detention, when suspects are held in detention for a long time until their trial can finally be scheduled.

13. But the advantages of plea bargaining are not limited to countries with high crime rates and under-resourced law enforcement. Finland, which cannot be suspected of belonging to this group of countries, reportedly brought in plea-bargaining in 2015 after a number of findings by the European Court of Human Rights of violations of the right to a trial in due time.[13]

14. In many countries, the judiciary (in a wide sense, to include both the prosecution and the courts) is severely overburdened and understaffed. In such a situation, there are, theoretically, three possibilities: 1) the law-enforcement bodies give up on fully investigating and prosecuting every crime for which there is enough prima facie evidence to justify bringing a case, and set priorities by application of more or less objective criteria; 2) the law-enforcement bodies try to do the impossible, but a lot of cases remain pending until they are prescribed; and in the worst case, as unfortunately observed in many countries, the accused, innocent or not, will have spent a lot of time in pretrial detention in the meantime; and 3) the law-enforcement bodies try to “cut corners” on procedure and deal with cases without a full investigation of all related facts and without a full trial (by using partial or full trial waiver systems).

15. Obviously, at least the first two of these possibilities are not particularly appealing. Ideally, law-enforcement authorities should have sufficient resources to deal with all cases in such a way that there is no impunity and that all procedural safeguards of regular criminal trials are respected. But in the real world, that is not likely to happen. The unpleasant scenarios are far more likely: the white collar crime suspect (or his well-versed, expensive lawyer) intimidates an overworked and underpaid public prosecutor whose job performance is measured in terms of numbers of cases resolved or, worse, numbers of convictions obtained, by hinting at truckloads of documents to be sifted and armies of witnesses to be heard – whilst offering the prosecutor to plead guilty to a small fraction of the criminal activity he or she has actually committed, in return for a short (preferably suspended) sentence. Or – and this would be just as unacceptable – the other way round: the small-time (or first-time, or young) offender against whom the evidence is at best shaky is coerced into a “deal” leading to a criminal record and possibly some prison time, without a lawyer advising him that the chances of acquittal would be quite good; or he is assisted by a legal aid lawyer, again overworked and underpaid, who depends on more cases coming his way, and is therefore loath to being perceived as throwing sand into the cogwheels of justice. The second scenario is particularly likely to be “successful” in countries with high conviction rates and large spreads between minimum and maximum sentences in their criminal codes.

13. Ibid.

16. Also, while a "deal" clearly requires less resources than a full trial, case by case, it is not so clear that the widespread use of trial waiver systems really does save the State resources overall. Increasing the judicial system's capacity to process more cases will lead to more convictions and thus more people being sentenced to prison. Given the high cost of imprisonment, this may well compensate or even outweigh the resources saved by avoiding many full trials; and as we have seen in an earlier Assembly report promoting alternative sanctions,[14] the true cost of massive imprisonment is not limited to the State paying for room and board of the prisoners: the net-widening effect of trial waver systems, which enable the State to prosecute and convict more people, produces social costs in many other respects. By permitting prosecutors and courts to process cases rapidly, in high numbers, plea bargaining could be operating as a driver of mass incarceration and mass criminalisation.[15]

4.2. Avoidance of full investigations and side-stepping of procedural protections for the accused

17. Trial waiver systems can help avoid the need for the full investigation of all facts related to an alleged crime and to take evidence. This saves judicial resources, as mentioned above. It can also spare victims of certain types of crime the trauma of having to testify in open court, confronting the perpetrator and reliving the crime. This is particularly relevant in cases concerning crimes against children and sexual offences in general. On the other hand, trial wavers can also lead to the (partial) impunity of the perpetrators of "complicated", resource-intensive (mostly "white-collar") crimes, or, on the contrary, to the conviction of innocent people coerced into plea bargains by the threat of much more severe punishment in case of a full trial and the low statistical chance of acquittal by the court. The phenomenon of innocent people pleading guilty was extensively documented in the United States.[16] According to the Fair Trials study,[17] the element of coercion in plea bargaining is the strongest when there is a particularly high perceived benefit to pleading guilty to a lesser charge, in the form of a high sentence differential between those pleading guilty and those going to trial – tellingly called "trial penalty" in the American discussion.[18] The coercion becomes almost irresistible when the threat of the death penalty is involved, as in an American case described by Fair Trials.[19] Studies have also observed a clear relationship between long mandatory minimum sentences and the development of plea bargaining. Prosecutors openly admit that they use harsh minimum sentences to win plea bargains.[20]

18. Empirical research has shown that false confessions in a plea-bargaining context are a particularly serious problem. Of 149 Americans absolved of crimes in 2015, 65 had pleaded guilty.[21] The Innocence Project[22] found that about 10% of rape and murder convicts whose innocence they were able to prove had pleaded guilty. These figures probably still underestimate the scale of the problem, as exoneration work concentrates on particularly serious crimes where sentences are long and there is more likely to be forensic evidence. For the vast majority of (lesser) crimes, false confessions under the threat of the "trial penalty" are likely to be even more frequent. A 2013 experimental study by Lucian Dervan and Vanessa Edkins[23] shows that a majority of "innocent" subjects (accused of cheating) "confessed" as part of a "plea bargain" to avoid (minor) penalties. Another study suggests that guilty participants are no more likely to plead guilty if offered a bigger rather than smaller incentive. But innocent people are more likely to make false confessions as the incentive (i.e. the "trial penalty") rises.[24] This shows that limiting the "trial penalty" (or the "rebate" for a confession), as in Germany and Spain, is an important safeguard.

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14. See the report on "Promoting alternatives to imprisonment" (rapporteur: Ms Natasa Vučković, Serbia, SOC), Doc. 13174, and Resolution 1938 (2013) and Recommendation 2018 (2013).
15. Fair Trials study, *supra* note 5, p. 17: one in three Americans is estimated to have been arrested by the age of 23, and more than 2 million of them are in prison.
16. See the cases documented at www.innocenceproject.org and http://guiltypleaproblem.org.
17. *Supra* note 5.
18. Fair Trials study, *supra* note 5, p. 17, notes by way of example that in 2012, the average sentence for US federal narcotics defendants who entered into a plea bargain was five years and four months, while the average sentence for those who went to trial was 16 years.
19. *Brady v. US*, 397 U.S. 742 (1970). The U.S. Supreme Court found that "deep sentencing discounts", including departure from the threat of the death penalty, did not render a plea bargain involuntary.
20. In a letter to then US Attorney General Eric Holder in 2014, prosecutors stated that "mandatory minimum sentences are a critical tool in persuading defendants to cooperate" (Fair Trials study, *supra* note 5, p. 17).
21. Owen Bowcott, "'Global epidemic' of US-style plea bargaining prompts miscarriage warning", *The Guardian*, 27 April 2017.
22. An NGO specialising in the use of DNA evidence to re-examine convictions, https://www.innocenceproject.org/dna-exonerations-in-the-united-states/.
23. Lucian E. Dervan and Vanessa A. Edkins Ph.D., The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Problem, 103 *J. Crim. L. & Criminology 1* (2013).
24. *The Economist*, *supra* note 9, p. 5.

19. Trial waiver systems may also undermine the important function of criminal trials of ensuring public scrutiny of the proper functioning of the police and the prosecution, thus protecting public trust in the criminal justice system. The wide-spread practice of plea bargaining, which avoids the need for testing the evidence and making a solid case in open court, can even make the police and prosecution lose the habit and in the long run the skills needed for rigorous criminal investigations. The reduced scope of public scrutiny can also reduce accountability for human rights abuses (beatings, even torture) that typically occur during the period between the arrest and the beginning of the trial and thus weaken an important deterrent against such abuses.

20. In this context, it is interesting to note that the prevailing practice of plea bargains in the United Kingdom has been found responsible for a reduced number of rape convictions.[25] These tend to be displaced by lesser charges after a defendant offers to plead guilty to a lesser sexual offence. This can have devastating consequences for the victim, for example when a charge of sex with a minor is used instead of rape, because it suggests the victim consented. According to Ministry of Justice records, only 38% of rape cases in 2008 won a conviction for rape itself.

21. On the other hand, it is undeniable that offering a "deal" to a suspect who may be willing to co-operate may well enable law enforcers to "crack open" a larger case, by obtaining evidence from the co-operating suspect against other perpetrators, who may otherwise be simply out of reach for law enforcement. Such tactics, when employed fairly, can be a legitimate tool, in particular in the fight against organised crime, and have been used extensively and successfully in Italy (*pentiti*) and the United States.

5. Necessary safeguards for the rights of the accused

22. As we have seen, trial waver systems carry substantial risks, but they also have undeniable advantages, and are probably simply unavoidable. Even legal systems such as the German one, which have traditionally shunned any "deal-making" outside the courtroom in criminal matters, have come around to recognising this practice, albeit reluctantly. To my knowledge, legislators in these countries have taken to regulating a *de facto* practice that could simply not be eradicated.

23. Surprisingly, the European Court of Human Rights has not yet had the opportunity to develop specific standards in this field. To my knowledge, only two of its cases deal with plea bargaining. In the first, *Deweer v. Belgium*, the Court found a violation of Article 6.1 of the European Convention on Human Rights, noting that "[t]o sum up, Mr Deweer's waiver of a fair trial attended by all the guarantees which are required in the matter by the Convention was tainted by constraint".[26] In the second case, *Natsvlishvili and Togonidze v. Georgia,*[27] the Court accepted the validity of a guilty plea despite some worrisome elements of the case at hand, including the waiver of the right to appeal.

24. In view of the opportunities provided by plea bargaining, but also its possible pitfalls, it is important to introduce and enforce in actual practice some safeguards that will protect the rights of the accused to the extent possible. The purpose is to minimise the risk of human rights violations, whilst preserving the advantages of this practice, in particular in terms of efficiency. My fact-finding activities – in particular, the hearing before the committee in June 2018 – have therefore focused on collecting ideas and proposals for such safeguards, which I summed up in the draft resolution. The aim is to properly regulate the practice of "trial wavers", which will not go away, whether we like it or not.[28] Here are some safeguards that I suggest we recommend:

5.1. Obligatory involvement of a lawyer

25. Access to a lawyer is important even when the defendant has the benefit of a full trial. In a plea bargaining situation, it is vital: as our experts explained during the hearing in June, only a lawyer can advise the defendant on his chances of acquittal in case of a trial, and only a lawyer can explain the full consequences of entering into a deal entailing a criminal conviction. This is especially valid in the case of

25. Rachel Williams, "Fewer rape convictions because plea bargains prevail, report suggests", *The Guardian*, 20 March 2010.
26. Application No. 6903/75, judgment of 27 February 1980 (paragraph 54).
27. *Supra* note 21.
28. Attempts in different parts of the United States to ban plea bargaining have failed miserably (see *The Economist*, *supra* note 9, p. 6).

minors. The involvement of a lawyer has already been made mandatory, as a condition of the validity of a plea agreement, in Croatia, Estonia, France, Georgia, Ireland, Luxembourg, "the former Yugoslav Republic of Macedonia" and Switzerland.[29] Surprisingly, to our German expert, this is still not the case in Germany.

26. Also, for this essential safeguard to function, legal aid lawyers provided to impecunious defendants must be properly remunerated so that they can afford to spend the time necessary for the effective representation of the defendant's interests, and they should not be in a situation of dependency regarding the prosecution, which should be prevented from influencing the selection of public defenders or legal aid lawyers.

5.2. Minimum requirements for investigations and the disclosure of the results of the investigation

27. The risk of a situation in which an innocent person is coerced into entering a plea bargain, by a prosecutor who was unable to collect sufficient evidence for a conviction following a normal trial, must be minimised. One possibility to minimise such abuses would be to make the validity of plea agreements conditional upon fulfilment of minimum standards regarding the investigation of the facts and the evidence found, and on the disclosure of the results of the investigation to the suspect and his or her lawyer. Disclosure of the results of the investigation enables the defendant's lawyer to properly assess the chances of acquittal in case of a trial. Such disclosure would also help dissipate the impression that trial wavers in criminal proceedings are suspect "backroom deals", an impression which undermines public trust in the judiciary. According to the Fair Trials study, disclosure requirements in favour of defendants who have indicated an interest in a trial waiver already exist in Luxembourg and in Finland. Such good practices deserve to be spread to other jurisdictions.

5.3. Requiring judicial scrutiny of key elements of the plea agreement

28. In order to prevent abuses at the level of the police or the prosecution, a minimum amount of judicial scrutiny of the results of the "bargaining process" must be ensured. The scrutiny must also cover the procedure followed – in particular, the court must obtain confirmation from the defendant that the trial waiver was truly voluntary. This confirmation should be obtained by the court in the absence of the prosecutor, to avoid intimidation. Judicial scrutiny should also encompass the credibility of the confession, which is usually part of the agreement. The court must be convinced of the truth of the confession, a mere formal admission of the crime should not be considered sufficient.

29. According to the German Law on agreements in criminal proceedings (*Verständigungsgesetz*), based on a Grand Senate judgment of 3 March 2005,[30] the self-incriminatory confession must be sufficiently detailed and concrete so as to allow verification of its conformity with the results of the investigation as reflected in the case file. This means that an empty "formal confession" or "slim confession" is not a sufficient basis for a conviction. The Federal Constitutional Court requires that the veracity of all confessions made in the framework of a "deal" must be verified during a court hearing, in other words not merely by a verification of the file. The process of verification must be documented in such a way that further investigative steps do not appear to be necessary. According to the German Federal Constitutional Court, these transparency and documentation requirements belong to the "core" of statutory regulation and must be implemented carefully in practice. These requirements are designed to prevent so-called "informal agreements", which are the most exposed to the risk of abuse. Nevertheless, according to the Fair Trials study, a judicial "plausibility check" for the confession underlying the "deal" is not required in many jurisdictions permitting trial wavers. In the United States, it is even permissible that a defendant accepts a conviction without admitting the factual basis of the charges (so-called "Alford plea"[31]); which leads to numerous cases in which prosecutors entered into plea deals with full knowledge that a defendant is in fact innocent.[32] By contrast, German law strictly prohibits "fact bargaining". Even judgments based on plea bargains must be in conformity with the trial objective of search for material truth.

30. But even the German rules, which seem to be reasonably protective of the interests of innocent defendants, do not appear to be applied correctly in practice. According to a 2012 study prepared at the request of the Federal Constitutional Court (*Bundesverfassungsgericht*), which was called upon to scrutinise

29. Fair Trials study, *supra* note 5, p. 52.
30. Judgment of 3 March 2005, BGHSt 50, 40-64 (in German).
31. Named after the case of *North Carolina v. Alford*, 400 US 25 (1970), in which the United States Supreme Court upheld a plea bargain in which the defendant, threatened by the death penalty, pleaded guilty to second degree murder while denying responsibility for the crime as a matter of fact.
32. Fair Trials study, *supra* note 5, p. 16, paragraph 33.

the constitutionality of the above-mentioned Law (*Verständigungsgesetz)*, almost 60% of the judges polled in the study admitted that the bulk of the agreements they dealt with were not properly documented and only 28% of the judges indicated that they verified the credibility of the agreed confession. As the Fair Trials study presents Germany as one of the countries in which judges in cases involving trial wavers may take a comparatively more active role in examining evidence for verifying the defendant's confession,[33] I am quite worried about the situation in this respect in other jurisdictions, where the judges' duties are less clearly defined than in Germany.

31. The German Constitutional Court, in a judgment of 19 March 2013,[34] found the Law itself to be generally in conformity with the Constitution, but not its application. The Constitutional Court therefore called upon the legislature to closely watch relevant developments and take appropriate measures in order to prevent the occurrence of an unconstitutional practice. Our German expert, Professor Beulke, noted during the hearing in June that in the wake of the Constitutional Court's restrictive judgment, the practice of plea bargaining before German courts has diminished considerably. Its main field of application is now economic ("white collar") crime, which requires complicated, resource-intensive investigations and where penalties are fairly lenient anyway, by comparison to crimes against the person.

5.4. Limiting the "trial penalty"

32. As we have seen, a high differential between the sanction resulting from a full trial and that offered as part of a plea bargain ("trial penalty") can result in strong pressure coercing defendants into a "deal" when they are innocent, or when the evidence against them is scant. An excessive "rebate" also risks fostering a public perception that the judiciary fails to uphold the rule of law. The German Supreme Court in Criminal Matters (in the above-mentioned Grand Senate judgment of 3 March 2005) has therefore stipulated that the sanction imposed by way of an agreement must not deviate from that to be expected after a full trial to the extent that the general rules of sentencing would be violated. This means that the agreement must not foresee a sentence that would be below the limit of what is still acceptable in view of the gravity of the crime and the degree of guilt of the defendant, even taking into account the generally accepted ground for reduction of the penalty for a defendant who has admitted to his or her crime.

5.5. Prohibiting the waiver of appeal rights

33. In order to maintain the possibility of redressing possible procedural and other violations in the process of "deal-making", the possibility of an appeal against the verdict must remain open. This is why the German Code of Criminal Procedure (as amended by the above-mentioned *Verständigungsgesetz*) explicitly excludes the waiver of the right to appeal as part of the agreement. By contrast, the European Court of Human Rights, in its *Natsvlishvili and Togonidze v. Georgia* judgment, has accepted that no appeal to a higher court against the plea-bargaining agreement was possible, finding that by accepting the plea bargain, Mr Natsvlishvili had knowingly waved his right to an ordinary appellate review. Therefore there was no violation of Article 2 of Protocol No. 7 to the European Convention on Human Rights (ETS No. 117). However, on the other hand, without the possibility of appellate review, it will be difficult for the higher courts to enforce the safeguards under the Convention (including those required by the European Court of Human Rights). This would undermine the principle of subsidiarity underlying the Convention and in time lead to the Court itself being obliged to "police" the national lower courts' application of plea bargaining rules.

5.6. Possibility to revoke an agreement in certain circumstances

34. In order to safeguard the principle of material justice underlying criminal procedure, the court must be able to revoke the agreement when legally or factually important circumstances were overlooked or have newly arisen and the court is therefore convinced that the agreed sanction is no longer appropriate.

5.7. Prohibiting the use of a confession as evidence after the failure or revocation of an agreement

35. The right to a fair trial requires that a confession made in the framework of negotiations about an agreement in criminal proceedings must not be used as evidence if the agreement fails or is revoked. This safeguard against the possible "entrapment" of a suspect is expressly foreseen in the German Code of Criminal Procedure as amended by the *Verständigungsgesetz* (paragraph 257c IV 3).

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33. Ibid., p. 54, paragraph 97.
34. Judgment of 19 March 2013, BVerfGE 133, 168-241 (in German).

5.8. Counteracting racial and social inequality

36. Studies in the United States show that there is a strong racial disparity in the reduction of sentences following guilty pleas. In view of the increasingly diverse composition of the population in many European countries, such risks of discrimination also exist in Council of Europe member States. This should be counteracted by appropriate training and sensibilisation mesures and by ensuring that relevant data is collected and acted upon.

37. Also, as a consequence of social inequalities, poorer suspects, who cannot afford to pay bail, are likely to be under greater pressure to plead guilty in order to get out of pretrial detention. Again, this must be countered, to the extent possible, by measures to reduce the abuse of pretrial detention.[35]

6. Conclusions

38. "Trial waivers" (or "deal-making in criminal proceedings", or "plea bargaining") have certain undeniable advantages, but they can also cause some real dangers for the rights of the defendant and for the rule of law. The question does arise how fair trials rights can be protected if there is no trial.[36] There are few international standards, if any, to regulate a practice that is expanding rapidly across the member States of the Council of Europe, and beyond. Trial waiver systems are in many more recently democratic jurisdictions an "American import", hard-sold through assistance programmes offered by the United States. The question inevitably arises whether such an "import" really suits criminal justice systems with such different traditions as those, for example, in former Soviet countries, where the Prokuratura is still feared for its overwhelming powers, where courts almost never acquit, and where defence lawyers still mostly play a marginal role.

39. As we have seen, the dramatic development of the practice of plea bargaining in many European countries has some advantages and some disadvantages. The disadvantages can and must be contained by the introduction of appropriate safeguards. Some such safeguards are suggested in the draft resolution. In the absence, so far, of strong guidance from the European Court of Human Rights (see paragraph 23 above), I also believe that it would be appropriate for the Committee of Ministers to develop some guidelines, which could take the form of a recommendation to member States, as suggested in the draft recommendation to the Committee of Ministers.

35. See Assembly Resolution 2077 (2017) on abuse of pretrial detention in States Parties to the European Convention on Human Rights.

36. Rebecca Shaeffer, Fair trial rights without the trials? Trial waiver systems in Russia, Ukraine and the South Caucasus, EHRAC Bulletin (European Human Rights Advocacy Centre), Winter 2017 (pp. 8-9).