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

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## A. Draft Resolution

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having observer or other status with the Council of Europe or the Assembly, regular criminal trials have gradually been replaced by different forms of trial waiver systems (also called plea bargaining, guilty pleas, abridged trials or summary procedures).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.
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;

**Amendment 1**

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*In the draft resolution, at the end of paragraph 8.3, insert the following words: ", and to envisage adequate accountability for intimidation, duress and other abuse in the course of plea bargaining;"*

- 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 waiver system.

## **B. Draft Recommendation**

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.