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Criminal legal aid and plea-bargaining

(Overview of International Standards and Recommendations for Georgian Legal Aid)

Consultant: Alex Tinsley

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20 February 2017

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INTRODUCTION

A. THE ASSIGNMENT

1. Preliminary points

1.1 About the assignment and its scope

On 1 February 2017, following earlier correspondence in late 2016, the United Nations Development Programme ("UNDP") contracted with the author, Alex Tinsley (the "consultant") for the completion of an international consultancy assignment regarding legal aid and plea bargaining. This report is the substantive output envisaged under that report. An activity report is provided separately.

1.1.1 Project / funding context

The assignment falls within the joint UNDP and United Nations Children's Fund ("UNICEF") project "Enhancing Access to Justice and Development of a Child-friendly Justice System in Georgia", principally funded by the European Union ("EU") under the financing instrument "Support to the Justice Sector Reform in Georgia" signed in May 2015.

Terms of reference and specific scope

Under the TORs in the contract of 1 February 2017, the consultant's assignment is to:

- Conduct research on international standards on legal aid in plea bargaining based on the practice of four EU Member States, Council of Europe ("CoE") recommendations and case-law of the European Court of Human Rights ("ECtHR");
- Draft a report with recommendations for the Georgian LAS;
- Provide a final activity report.

The specific questions to be dealt with in the context of the research (the "Reference Questions"), previously agreed in correspondence between the UNDP in 2016, are these:

- Is the appointment of defence counsel mandatory during plea bargaining?
- Should there be the right to free legal aid for all defendants in the course of plea bargaining?
- If representation is mandatory, can the defendant be later obliged to pay the costs of defence?

A previously included question – what is the best applicable model for the Georgian legal system? – was omitted by agreement on the basis that this would require greater familiarity and with the Georgian system. Accordingly, the study is to be focused on international standards.

The terms of the Reference Questions were then further discussed in the context of a Skype conversation of 27 January 2017. The following points were clarified:

- By "plea bargaining", the Reference Questions refer to mechanisms akin governed by Chapter XXI of the current Code of Criminal Procedure of Georgia ("GE-CCP"). The consultant proposed to use the working definition referred to below when selecting comparative examples, selecting examples where the plea-bargaining system is clearly articulated in law to aid comparison.
- The Reference Question asking whether appointment of defence counsel is mandatory effectively asks whether it is possible for the right to defence counsel to be waived, such that a person may go unrepresented in the context of plea-bargaining;
- By "during plea bargaining" is understood in the broad sense covering both the negotiation phase and representation during the court phase. Any distinctions in this regard in the comparative practice of other EU Member States may be highlighted if they exist;
- The "right to legal aid for all defendants" in the course of plea bargaining is intended to capture the current situation in the Georgian system, i.e. all defendants are entitled to publicly-funded defence irrespective of their means. Again, the international standards and comparative practice should be examined in their own right to establish whether legal aid is the subject of means tests or other limitations in the specific context of plea bargaining; and
- Though the Georgia-focused question was omitted, the consultant would seek to address the underlying reason for the study (discussed below), which arises from the specific characteristics of the current defence and funding model applied in Georgia.

2. Methodology

2.1 Working definition of plea-bargaining

For the purposes of this study, the consultant has relied upon the following definition of plea-bargaining: "a process regulated by law and resulting in criminal liability, under which criminal defendants agree to accept guilt in exchange for some benefit from the state, most commonly in the form of reduced charges and/or lower sentences". This definition is modelled on that used by the non-governmental organisation Fair Trials,[1] which was designed with a full international range of systems in mind, but adapted for the purposes of this study so as to select only procedures (a) regulated by law, to facilitate comparison, and (b) resulting in criminal liability proper, excluding diversionary systems which wold not be useful comparators for present purposes.

[1] See 'A Fair Deal: Negotiating Justice', available here.

2.2 Sources consulted

In light of the TORs the consultant has considered:

- Case-law of the ECtHR in relevant areas;
- Recommendations, reports and other instruments of the Council of Europe ("COE");
- Legislation and other instruments of the institutions of the EU articulating ECtHR case-law; and
- Legislation and, where available, practice information regarding eight (8) EU Member States.

2.3 Scope of research within each source

The above materials have been considered in light of the Reference Questions. The information supplied does not seek to be exhaustive on other points (e.g. parameters of judicial review of plea agreements). However, the issue of the necessity of legal aid provision and/or mandatory defence cannot be considered in isolation from the other safeguards (or lack thereof) in the relevant system. Comment on the broader aspects is included wherever it is known and considered relevant.

2.4 Analysis of international standards

The international standards (in particular the case-law of the ECtHR) in this area may fairly be described as inchoate, as few cases are directly relevant. Accordingly, it has been necessary to draw inferences from the available case-law and assess how the existing principles may sensibly be applied to the context of plea-bargaining. Such analysis is distinguished by a separate heading where needed.

2.5 Analysis of comparative national law

The consultant has selected eight (8) EU countries based on availability of information, the consultant's own familiarity with the justice systems from prior work, and the objective of covering a range of different justice traditions and economic situations. The countries selected are: Belgium, Bulgaria, England & Wales Estonia, Finland, France, Germany and Italy. The examples are largely based on the consultant's own desk research. In addition, the consultant has conferred with local legal contacts to obtain information as to the practical situation; such information is provided by the words "in practice" and is not otherwise referenced. Links are supplied to the legislative texts, but references to individual provisions, as they are numerous, are contained in the body of the text. Inevitably, some examples are fuller than others. It should be noted that all countries (except England & Wales), as EU Member States, are bound by Directive 2016/1919/EU on the right of access to legal aid and reforms of provisions law covered in this report are possible by 2019 at the latest.

3. Context of the assignment

3.1 Legal aid and plea-bargaining Georgia

Plea bargaining in Georgia is governed by the provisions of Chapter XXI of the Georgian Code of Criminal Procedure, which will be well known to the reader and are not rehearsed here. However, it is appropriate to draw out some of the specific features of the system, for the purpose of contrast and comparison with other examples:

- Plea bargaining available in all cases – there is currently no restriction upon the offences for which proceedings may be concluded by way of a procedural agreement;
- Sentence and charge bargaining – the Georgian system is one of the comparatively few examples of those permitting negotiation as to both the partial withdrawal charges and sentence;
- Mandatory access to a lawyer – a plea bargain cannot be entered into without the involvement of defence counsel, which encompasses both the negotiation phase and the court phase;
- Legal aid available for all persons – publicly-funded representation is available for all defendants for the procedural agreement, an exception to the general approach whereby legal aid for criminal proceedings is available to those defined as socially vulnerable (i.e. on a means basis);
- No reimbursement – currently, in respect of mandatory defence in plea bargaining, there is no system of reimbursement in place. All costs are currently met by the Georgian LAS.

3.2 Criticisms of plea-bargaining in Georgia

As will, again, be well-known to the reader, the system of plea-bargaining has been criticised to various degrees by institutions ranging from the ECtHR (discussed herein) to non-governmental organisations[2] to the Office of Democratic Institutions and Human Rights.[3] It is not part of the TORs to examine the Georgian plea-bargaining system in detail and engage with such criticisms. However, the common theme seems to be a concern as to pressure on accused persons (arising from detention, heavy potential sentences etc.) calling into doubt the voluntary nature of the bargain. This underlines the importance of the safeguard offered by the involvement of defence counsel and should be kept in mind when studying the standards on mandatory defence, funding, waiver etc. and the defence models developed in other countries, each with its own traditions and problems.

3.3 The underlying issues raised by the Reference Questions

The challenge for the LAS is to ensure it supports that essential safeguard whilst also addressing the resources problem it currently faces. As noted above, there is currently unconditional mandatory defence in plea-bargaining, irrespective of means. At the same time, plea-bargaining is widely used as a proportion of the total criminal caseload. And, currently, no system of reimbursement of mandatory

[2] Transparency International Georgia, *Plea bargaining in Georgia: Negotiated justice*, December 2010, here.
[3] See the OSCE/ODHIR Joint opinion on the criminal procedure code of Georgia, August 2014, available here.

defence costs for plea-bargaining is foreseen. As a result, the LAS' resources are consumed to a significant degree by defence in plea-bargaining. The current policy justification for this is that the LAS pays this price for savings made elsewhere (i.e. not having trials). However, other options need to be explored. The underlying objective of this study is to explore whether – whilst complying with international fair trial standards – the LAS' resources may be spent more effectively.

In broad terms, the consultant has approached this first by considering what is *permissible* and/or *required* as a matter of international standards (focusing on ECtHR case-law in Part I, Chapter A), and then looked at the practices of EU Member States to examine how they organise their own systems within the confines of those obligations (Part I, Chapter D). This is not to say that the EU Member States studied necessarily achieve full compliance, but they provide examples of alternative models, complete with pros, cons and risks. The consultant's synthetic analysis is contained in Part II. Though not required for the assignment, some high-level suggestions to the LAS are then made in the final Part. More detailed recommendations could be made on the basis of further consultation.

I – REVIEW OF STANDARDS

A. ECtHR CASE-LAW

The Reference Questions relate specifically to plea-bargaining, a specific aspect of criminal procedure which is not extensively discussed in the case-law of the ECtHR. Accordingly, this Chapter begins by reviewing the available case-law on plea-bargaining, with a focus on the treatment of defence counsel (Section 1 below). As is made clear, these cases do not themselves answer the Reference Questions. Accordingly, the Chapter then reviews relevant aspects of ECtHR case-law on the right of access to a lawyer in Article 6(3)(c) ECHR, drawing out possible answers to the Reference Questions.

1. Plea-bargaining case-law

1.1 The available cases on plea-bargaining

1.1.1 Natsvlishvili and Togonidze v Georgia

Natsvlishvili and Togonidze v Georgia[4] remains the lead case considering whether a plea bargain infringed Article 6(1) ECHR. The ECtHR's starting point is its view that "where the effect of plea bargaining is that a criminal charge against the accused is determined through an abridged form of judicial examination, this amounts, in substance, to the waiver of a number of procedural rights" (para. 91). The plea-bargaining safeguards are assessed in light of the validity of the waiver.

Drawing on its settled case-law regarding the validity of waivers, it establishes two conditions which had to be met – in the specific case – in order for that waiver to be valid: (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 between the parties had to be subjected to sufficient judicial review" (para. 92).

In assessing whether those tests were met, the ECtHR noted that the first applicant had been represented by two qualified lawyers of his choosing, and that they had represented him from the outset including in initial questioning, in the plea bargain negotiation, and during the judicial approval phase (para. 93). The lawyer's involvement also appears to have been highly material to the assessment of whether the waiver was given in a "genuinely voluntary manner". The ECtHR notes that enquiries were made of the applicant and his lawyer by the court as to whether there had been any

[4] *Natsvlishvili and Togonidze v Georgia* App. No 9043/05 (Judgment of 29 April 2014)

undue pressure, and relies on the fact of the agreement being signed by the applicant's lawyer in establishing that it constitutes an "incontrovertible" record of the deal (paras. 93 and 94).

1.1.2 Litwin v. Germany

Litwin v. Germany[5] concerned an agreement reached under the relevant provision (Article 257a) of the German Code of Criminal Procedure (discussed in this report). The applicant did not plead guilty, but waived his right of appeal further to an agreement reached in pre-court discussions, on at least an expectation of receiving a lower sentence (an agreement thus meeting the definition applicable in this study). His new lawyer, instructed subsequently, sought to restore the *status quo ante*, effectively reneging on the agreement. The national courts considered whether the waiver had been valid, finding that there was no basis on which to find that there had been any undue influence. The same issue was argued at the ECtHR.

The ECtHR found that, since the applicant's counsel had given the waiver in court, the declaration of waiver itself did not raise an issue (para. 39). It then examined whether the negotiations leading to the agreement put the waiver in question (paras. 40-47). In this regard, having established that the agreement did indeed purport to bind the applicant to waive his right of appeal (though this was in fact impermissible under national law), the ECtHR found that the waiver was nevertheless attended by sufficient guarantees. It found, inter alia, that the applicant had been represented by counsel at the time of the waiver and throughout the proceedings (para. 47).

1.2 The gap in the case-law

As can be seen from the above cases, the ECtHR places considerable emphasis upon the presence of defence counsel as a safeguard. Yet, there is no case relating directly to plea-bargaining in which the *absence* of a lawyer at either the negotiation or court phase has been said to render the waiver of trial rights invalid, resulting in a violation of Article 6(3)(c) ECHR. Accordingly, it is not yet possible to say whether such a waiver can, for the ECtHR, be effective in the absence of legal representation.

Yet, the consultant was asked to offer a prospective view on this question: is access to a lawyer likely to be considered necessary by the ECtHR in the context of plea-bargaining? Clearly, the issue is not whether Georgia may validly *exclude* representation in plea-bargaining for someone wishing to appoint a lawyer and in a position to appoint one. The question, rather, is whether the state is obliged to make available a lawyer in the context of plea-bargaining, and whether the accused can be allowed to waive that entitlement without a violation of Article 6 ECHR arising as a result. This, in turn, depends upon the general case-law of the ECtHR Article 6(3)(c) ECHR, discussed below.

[5] *Litwin v. Germany* App. No 29090 (Judgment of 3 November 2011)

2. Mandatory defence

The starting point is that "mandatory defence", in the sense that this concept is understood in some national systems (as in Bulgaria, Estonia, Germany, Italy) – that is, an obligation to be represented with no possibility of waiver – is never imposed by the ECHR. The case-law, rather, places some broad limitations on states' freedom to impose such systems. The cases establish that defence may be appointed contrary to a person's wishes when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice (*Croissant v. Germany*,[6] para. 29). The decision to allow an accused to defend himself in person or to assign him a lawyer falls within the margin of appreciation of the Contracting States, which are better placed than the ECtHR to guarantee the rights of defence in their justice systems (*Correia de Matos v. Portugal*[7]).

Thus, the ECtHR case-law does not establish any obligation of mandatory defence, but allows states to do so. It therefore offers no help in relation to plea-bargaining. Rather, the question whether the state must ensure legal defence in plea-bargaining depends on the general Article 6(3)(c) case-law.

3. Right to legal aid

The state is obliged to make available free legal assistance under Article 6(3)(c) ECHR subject to two conditions: first, the applicant must lack sufficient means to pay for legal assistance; secondly, the "interests of justice" must require that legal aid be granted (as recently re-stated in *Mikhaylova v. Russia*,[8] para. 78). For structural reasons, these are considered in reverse order below.

3.1 Merits test: the "interests of justice"

Whether the interests of justice require representation is judged by reference to the seriousness of the offence [1]; the severity of the possible sentence [2]; the complexity of the case [3]; and the personal situation of the applicant [4] (see *Mikhaylova v. Russia*, cited above, para. 79; *Quaranta v. Switzerland*,[9] paras. 32-36). Factors under each head relevant to plea-bargaining are reviewed below.

3.1.1 The ECtHR's four factors

3.1.1.1 Seriousness of the offence

There is very little discrete authority as to the seriousness of the offence separately from the severity of the potential penalty. The ECtHR has however suggested the fact of the offence concerning conduct involving the exercise of fundamental rights (assembly) will mean it cannot be said there is little at stake for the person (*Mikhaylova v. Russia*, para. 99). By and large however this criterion appears to

[6] *Croissant v. Germany* App. No 13611/88 (Judgment of 25 September 1992).
[7] *Correia de Matos v. Portugal* App. No 48188/99 (Decision of 15 November 2001).
[8] *Mikhaylova v. Russia* App. No 46998/08 (Judgment of 19 November 2015).
[9] *Quaranta v. Switzerland* App. No 12744/87 (Judgment of 24 May 1991).

be treated synonymously with the severity of the possible sentence. Clearly therefore the same approach will apply in respect of plea-bargaining.

3.1.1.2 Severity of the possible sentence

Where deprivation of liberty is at stake, the interests of justice in principle call for legal representation (originally *Benham v. United Kingdom*,[10] para. 61). The interests of justice will require legal aid where there is a merely theoretical possibility of even short-term detention arising for administrative offences (*Mikhaylova v. Russia*, para. 90). One admissibility decision[11] suggests this might not apply to a risk of very short-term loss of liberty in a very simple case, though no judgment confirms this. A risk of ulterior deprivation of liberty in default of payment of fines appears to qualify.[12] However, this is not to say that public funds do not have to be available where deprivation of liberty is not at stake.[13] Lesser, but intrusive, sentences, e.g. those requiring treatment, may warrant the grant of legal aid.[14] The potential award of civil damages linked to the criminal verdict has been held to satisfy the interests of justice test.[15]

3.1.1.3 Complexity of the case

The ECtHR has found the interests of justice test satisfied where the case raised issues such as: the lawfulness of actions of public authorities as a condition of the offence;[16] the conclusions to be drawn from the suspect exercising fundamental rights (ibid); the compatibility of a provision of national law with the ECHR;[17] admissibility of evidence;[18] and the potential range of sentencing options.[19] In relation to appeal proceedings, the ECtHR has regard to the jurisdiction of the appeal court and the issues on appeal, e.g. the constituent elements of offences, the degree of liability of co-defendants and the treatment of defences at first instance.[20] The ECtHR has found the criterion satisfied where the appeal was on procedural points which could make a difference to the outcome of proceedings.[21] Conversely, the ECtHR has seen no issue under Article 6(3)(c) when the case involves the trial of simple factual issues which the defendant can address from his own knowledge.[22] These factors provide considerable guidance on the approach to plea-bargaining (see Part II below).

[10] *Benham v. United Kingdom* App. No 19380/92 (Judgment of 10 June 1996).
[11] *Mato Jara v. Spain* App. No 43550/98 (Decision of 4 May 2000).
[12] See, in opposite sense, *Barsom and Varli v. Sweden* App. No 40766/06 (Decision of 4 January 2008).
[13] *Zdravko Stanek v. Bulgaria* App. No 32238/04 (Judgment of 6 November 2012), para. 38.
[14] *Lagerblom v. Sweden* App. No 26891/95 (Judgment of 14 January 2003), para. 53.
[15] *Zdravko Stanek v. Bulgaria*, cited above, para. 39.
[16] *Mikhaylova v. Russia*, cited above, para. 91.
[17] *Pham Hoang v. France* App. No 13191/87 (Judgment of 25 September 1992), para. 40.
[18] *Popatov v. Russia* App. No 14934/03 (Judgment of 16 July 2009), para. 24.
[19] *Quaranta v. Switzerland*, cited above, para. 34.
[20] *Shilbergs v. Russia* App. No 20075/03 (Judgment of 17 December 2009), para. 122.
[21] *Pakelli v. Germany*, cited above, paras. 37-40.
[22] see, e.g. *Guney v. Sweden* App. No 40768/06 (Decision of 17 June 2008), p. 5; *Mato Jara v. Spain*, cited above.

3.1.1.4 The personal situation of the applicant

The cases take account of factors such as: the suspect being a young adult of foreign origin from an underprivileged background and a long-term drug user with no real occupational training and a long criminal record;[23] and the person not speaking the local language and being unable to draft appeal grounds himself.[24] Clearly, the emphasis is on the inability of the person to understand legal implications, which will be relevant to plea-bargaining. The legal aid cases do not concern this specifically, but the prominence given the suspect's youth, in other areas (e.g. the validity of a waiver of the right to counsel[25]) suggests that this should, equally, be relevant to the interests of justice.

3.1.2 Confessions and the interests of justice test

3.1.2.1 The Salduz principle

In *Salduz v. Turkey*,[26] the ECtHR underlined the importance of the investigative stage, as the evidence obtained then determines the framework within which the offence will be considered at trial (para. 54). It noted the vulnerability of the accused, which can only be properly compensated for by the assistance of a lawyer, whose task is protect the suspect's right not to incriminate himself (ibid); the ECtHR then famously asserted that Article 6(1) requires, as a rule, access to a lawyer as from the first interrogation by police (para. 55), so that a confession obtained in the absence of a lawyer cannot be used to found a conviction (ibid). The principle has since been developed to cover other areas posing a risk of incrimination, e.g. identity parades.[27] The rule is now articulated in EU law (see Section B).

3.1.2.2 The *Salduz* principle and the "interests of justice"

Notably, the ECtHR has previously justified its finding that access to a lawyer was required as from the early stages by reference (in passing) to the interests of justice test, e.g. where the offence for which the person was questioned carried a sentence of imprisonment.

აღსანიშნავია ის, რომ ევროსასამართლომ მართლმსაჯულების ინტერესზე მითითებით უწინ დაასაბუთა საკუთარი დასკვნა, რომლის თანახმადაც ადვოკატზე წვდომა სავალდებულოა საქმისწარმოების ადრეული სტადიიდან იმ შემთხვევებში სადაც ჩადენილი დანაშაული თავისუფლების აღკვეთით დასჯადია. შესაბამისად, იქ სადაც სალდუზის საქმე ითხოვს ადვოკატზე წვდომას, მართლმსაჯულების ინტერესის ტესტი დაკმაყოფილებულია. მიუხედავად იმისა, რომ ეს საკითხი არ არის სათანადოდ გარკვეული პრეცედენტულ სამართალში, შესაძლოა ძალიან ფაქიზი იყოს ზღვარი იმ სიტუაციას შორის, როცა ადვოკატზე წვდომა აუცილებელია პროცესის სამართლიანობის უზრუნველსაყოფად

[23] *Quaranta v. Switzerland*, cited above, para. 35.
[24] *Biba v. Greece* App. No 33170/96 (Judgment of 26 September 2000), para. 29.
[25] *Panovits v. Cyprus* App. No 4268/04 (Judgment of 11 December 2008).
[26] *Salduz v. Turkey* App. No 36391/02 (Judgment of 27 November 2008)
[27] *Laska and Lika v. Albania* App. No 12315/04 (Judgment of 20 April 2010), paras. 63-72.

და იმ სიტუაციას შორის, როცა სახელმწიფომ უნდა უზრუნველყოს აუცილებელი წარმომადგენლობა. სწორედ ამ დროს წარმოიშვება სახელმწიფოს ვალდებულება.

[28] It thus appears that, where *Salduz* requires access to a lawyer, the "interests of justice" will be met. Indeed, though the point is underexplored in the case-law, there can surely be no margin between situations calling for access to a lawyer in order to ensure the fairness of the proceedings, and those where the state must make available legal representation: that is precisely when the duty arises.

3.1.2.3 The analogy with plea-bargaining

As noted by the ECtHR, the waiver of the right to silence in police interrogation may have a decisive impact on the outcome of the case. The same must surely apply to the legal act of self-incrimination in a plea bargain (effectively a waiver of the right not to incriminate oneself). *A fortiori* because it is subject only to limited judicial review subsequently, unlike the confession which may be excluded. If one accepts that plea-bargaining in principle calls for legal representation on the same basis, then one can safely assume that the "interests of justice" test will be met in relation to plea-bargaining.

3.1.3 The "interests of justice" test and plea-bargaining in general

However, even if one does not make that assumption, it can alternatively be argued that plea-bargaining adds further elements of complexity such that it will, of itself, meet the interests of justice test even if the case would not in the context of an ordinary procedure. The alternative view is that the interests of justice will be met or not met in plea-bargaining based on the usual criteria. This issue is considered in more detail below in Part II after consideration of the comparative law, which sheds considerable light on the way Article 6(3)(c) obligations are interpreted by individual states.

3.2 Means test

3.2.1 Means criteria in criminal cases

It appears clear that it is permissible for the burden of proving insufficient means to rest with the person asserting it (a proposition originally framed in *Croissant v. Germany*[29], which the ECtHR has since recognised as a guiding principle.[30] *R.D. v. Poland*[31] has been read as recognising, as a matter of approach, that it is for national authorities to assess means based on the evidence (para. 45).

There is as yet no general principles indicating what factors can and cannot be taken into consideration. In the above case *R.D. v. Poland* the ECtHR found a violation of Article 6(3)(c), noting that the national courts had found the applicant eligible for a dispensation from costs in the first instance proceedings on the basis that these would represent a "disproportionate burden" upon him; yet shortly after, legal

[28] See *Shabelnik v. Ukraine* App. No 16404/03 (Judgment of 19 February 2009), para. 58, referring to *Benham v. United Kingdom*.
[29] Cited above, para. 37.
[30] e.g. *Orlov v. Russia* App. No 21 June 2011, para. 114.
[31] *R.D. v. Poland* App. No 29692/96 (Judgment of 18 December 2001).

aid was refused on a means basis for the intended cassation appeal (at 45-46). In *Carasena v. United Kingdom*,[32] the ECtHR took no issue with a national court's refusal to order legal aid where the applicant had substantial assets, which he was in the process of trying to sell in order to retain private counsel (pp. 12-14). In some cases, the ECtHR has had to conduct its own assessment of the applicant's means, where the national authorities have not done so.[33] It has taken note of, for instance: the fact of a person having been in prison, their income declared for tax purposes and the nature of their business;[34] a person's uncontradicted assertion that he lacked means;[35] and the fact of a person having been represented by a humanitarian organisation.[36]

3.2.2 Reimbursement of legal aid costs

The key cases are reviewed in *Ognyan Asenov v. Bulgaria*.[37] Article 6(3)(c) is relevant not just to the decision whether to grant a person legal aid, but also the decision whether to require him to repay it upon being convicted;[38] it is not contrary to Article 6(3)(c) that the accused has to pay the costs of his legal aid counsel after final conviction unless his means are insufficient (ibid). It is only in the enforcement procedure (…) that the financial situation of the convicted person plays a role (…) it is immaterial whether he had sufficient means during the trial, only his situation after the conviction being relevant.[39] The case-law has not yet finally answered the question whether it is permissible for a state to continue to seek reimbursement of costs against a convicted person after he has established that he lacks sufficient means to bear them.[40] It appears that a violation of Article 6(3)(c) may arise if the possibility of being ordered to bear the costs if convicted inhibits the person from asking for legal aid counsel,[41] though there is no example of this yet.

A gap arises from the fact that the cases mostly refer to orders for costs which have yet to be enforced. In that context, the ECtHR and former European Commission of Human Rights have referred with approval to provisions of national (regional) law providing for the deferment of enforcement where the person against whom they are ordered is unable to pay;[42] and provisions of civil law protecting certain income and assets from enforcement (food, fuel, professional equipment, limited agricultural land, the debtor's main home, minimum income and pensions and social security payments).[43] Broadly, it may be assumed that there is some equivalence between the factors which make a person eligible

[32] *Carasena v. United Kingdom* App. No 31541/96 (Decision of 29 August 2000)
[33] These are obviously relevant factors but they are often wrongly understood as general guidance to national authorities; they are in fact factual aspects of the ECtHR's own decision-making.
[34] *Pakelli v. Germany* App. No 8398/78 (Judgment of 25 April 1983), para. 34.
[35] *Tsonyo Tsonev v. Bulgaria (No 2)* App. No 2376/03 (Judgment of 14 January 2010), para. 39.
[36] *Twalib v. Greece* App. No 24294/94 (Judgment of 9 June 1988), para. 49.
[37] *Ognyan Asenov v. Bulgaria* App. No 38157/04 (Judgment of 17 February 2011), paras. 40-43.
[38] *X v. Germany* App. No 9365/81 (Commission Decision of 6 May 1982), report p. 231.
[39] *Croissant v. Germany*, cited above, para. 35
[40] see *Ognyan Asenov v. Bulgaria*, cited above, para. 43.
[41] Cited above, para. 44.
[42] *X v. Germany*, cited above, report p. 231, and *Croissant v. Germany*, cited above, para. 37.
[43] *Ognyan Asenov v. Bulgaria*, cited above, paras. 25-28 and 46.

for legal aid at the grant stage (i.e. insufficient means) and the factors which should protect a person from reimbursement of such costs after conviction (i.e. insufficient means).

3.2.3 Orders for contribution to legal aid costs

It is compatible with Article 6(3)(c) for an individual to be required to pay a contribution to the costs of providing legal assistance and has sufficient means to pay, either before the grant of legal aid as a condition for such grant[44] or after conviction.[45] It appears that the test is whether the sum is arbitrary or unreasonable, by reference to the person's means.[46] A contribution to costs of £240 (in 1997) was not considered arbitrary or unreasonable, bearing in mind the person's net salary levels at the time.[47] More recently, the ECtHR appeared not to have taken issue with consider a contribution equivalent to €170,[48] though the ECtHR found a violation on other grounds.

4. Waiver

Assuming the case calls for legal representation, triggering the state's obligation under Article 6(3)(c), can the accused (perhaps concerned about a contribution or reimbursement order) nevertheless waive the right and proceed alone without representation? As explained below, legally the answer is yes but the risks involved are so significant that one can readily see why many countries have opted for mandatory defence systems. These considerations are eminently relevant to plea-bargaining.

4.1 The general principle

The ECtHR frequently recalls 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, if it is to be effective for Convention purposes, a waiver of the right must be established in an unequivocal manner and be attended by minimum safeguards commensurate to its importance (…) A waiver of the right, once invoked, must not only be voluntary, but must also constitute a knowing and intelligent relinquishment of a right. Before an accused can be said to have implicitly, through his conduct, waived an important right under Article 6, it must be shown that he could reasonably have foreseen what the consequences of his conduct would be.[49]

4.2 The principle as applied to the right to counsel

In all of the cases concerning the right of access to counsel, the possibility of waiver is recognised. However, that right, being one which ensures the effectiveness of the other rights, requires the special

[44] *Morris v. United Kingdom* App. No 38784/97 (Judgment of 26 February 2002), para. 88.
[45] *Croissant v. Germany*, cited above, paras. 33-38.
[46] *Morris v. United Kingdom*, cited above, para 89.
[47] Ibid.
[48] *Orlov v. Russia* App. No 29652/04 (Judgment of 21 June 2011), para. 114.
[49] see, inter alia, *Pishchalnikov v. Bulgaria* App. No 7025/04 (Judgment of 24 September 2009), para. 77.

protection of the knowing and intelligent waiver standard;[50] one case suggests that, at least where a lengthy sentence is at issue, "individualised advice" may be required as to the consequences of the waiver of the right to counsel before such waiver can be effective.[51]

However, the consultant is not aware of any case in which the waiver of the right to counsel has been deemed impermissible under Article 6 ECHR. This would, in effect, create a positive mandatory representation standard under the ECHR, inconsistently with the waiver case-law. This leaves a delicate situation for states to deal with in relation to the potential waiver of the right to counsel in plea-bargaining (discussed below in Part II below). Ultimately, such a waiver appears fraught with danger, which provides a strong policy basis for national systems of mandatory defence.

B. EUROPEAN / EU STANDARDS

1. European Union "Roadmap" Directives

1.1 The Roadmap Directives and their relevance

1.1.1 Background

In 2009, the EU was conferred a legislative power (Article 82(2)(b) of the Treaty on the Functioning of the European Union ("TFEU")) on the basis of which it may adopt directives establishing minimum rules in relation to the rights defence rights in criminal procedures. Directives impose result obligations upon EU Member States who must ensure that national laws comply, in substantive terms, with the standards so imposed. In default, the individual may rely directly upon the directive. In 2009 the EU Member States adopted a "Roadmap" setting out a number of priority areas for the exercise of this competence. The programme is now complete, and six directives have been adopted.

The purpose of the measures is to reinforce mutual confidence (on which intra-EU law enforcement cooperation is based), which had been undermined by the failure of EU Member States to observe ECHR standards in practice. By and large, the effect of the Roadmap Directives is to articulate the ECHR standards as positive EU law, making them more enforceable via the twin system of European Commission enforcement and direct application in the national courts using the primacy of EU law.[52]

1.1.2 Relevance to this study

The Roadmap Directives are thus clearly relevant to this study. National laws of EU Member States discussed here (except England & Wales as part of the United Kingdom[53]), specifically requested as for

[50] *Pishchalnikov v. Russia*, cited above, para. 78.
[51] *Zachar and Čierny v. Slovakia* App. No 29376/12 (Judgment of 21 July 2015).
[52] See A. Tinsley 'Protecting criminal defence rights through EU law: Opportunities and challenges', *New Journal of European Criminal Law* 2013 Vol 4, page 476. The consultant can supply the text if needed.
[53] Due to opt-out provisions which are not relevant here.

this study, are subject to the Roadmap Directives (or will be once the implementation deadlines lapse). Further, the Roadmap Directives are a useful (if only minimal) guide as to the interpretation of the ECHR standards, and they appear to have influenced the ECtHR in its own decisions.[54] They may also impose standards above the ECHR in some areas, raising relevant questions for policy-makers in non-EU states such as Georgia for whom approximation with EU standards is a consideration.

1.2 Directive 2012/13/EU on the right to information in criminal proceedings

Directive 2012/13/EU of 22 May 2012 on the right to information in criminal proceedings (the "EU Right to Information Directive")[55] establishes minimum rules relating to the information suspects and accused persons must receive in relation to the accusation and the rights they enjoy in national law (right to silence, right of access to a lawyer etc.). It also provides (in Article 7) for the "Letter of Rights", a document given to persons deprived of liberty explaining those rights in writing. The general objective of the Letter of Rights is to facilitate the exercise of procedural rights, not least the key gateway right (access to a lawyer). The implementation deadline for the Right to Information Directive was 2 June 2014 and it has been widely implemented.[56]

The consultant is not aware of reforms made, in countries which do allow plea-bargaining to take place in the absence of a lawyer, in order to ensure adequate information is received as to the specific rights available in national law in that context. Bearing in mind the complexity of the decisions involved in these procedures, the consultant suggests that such exercise will be extremely difficult and that this only underlines the importance of legal representation in this context.

1.3 Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings

Directive 2013/48/EU of 27 October 2013 on the right of access to a lawyer in criminal proceedings (the "EU Access to a Lawyer Directive"),[57] largely informed by the above *Salduz v. Turkey* case-law, establishes minimum rules on to the right to legal defence for suspected and accused persons. The Directive applies irrespective of whether the suspected or accused person is deprived of liberty (Article 2(2)) and throughout the criminal proceedings (Article 2(1)).

It establishes a substantive right of access to a lawyer governed by Article 3, such as to allow suspects and accused persons to "exercise their rights of defence practically and effectively", with further specific rights focused on pre-trial procedure and before appearance in court. Article 9, on waiver, is without prejudice to national rules on mandatory representation (Article 9(1)); it establishes a requirement for prior information, orally or in writing (which will be governed by the Right to

[54] E.g. *A.T. v. Luxembourg* App. No 30460/13 (Judgment of 9 April 2015).
[55] Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:142:0001:0010:EN:PDF
[56] See, for instance, the letters of rights produced by France (here) and Belgium (here), available in English.
[57] Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:294:0001:0012:EN:PDF

Information Directive) as to the content of the right and possible consequences of waiving it, and for the waiver to be voluntary and unequivocal. This Article is modelled on the ECtHR waiver case-law.

The implementation deadline for the Access to a Lawyer Directive was 27 November 2016; it has been implemented by some, but not all, Member States. Given its scope, the Access to a Lawyer Directive will be applicable to any of the plea-bargaining procedures discussed in Part D below. The primary area of relevance would seem to be in relation to waiver: where Member States allow the waiver of the right to counsel, this Directive establishes standards governing such waiver.

1.4 Directive 2016/800/EU on safeguards for children in criminal proceedings

Directive 2016/800/EU on safeguards for children in criminal proceedings[58] (the "EU Children Directive") establishes specific minimum rules in favour of child suspects and accused persons. It applies throughout criminal proceedings (Article 2(1)). It must be implemented by 11 June 2019.

Early drafts of the legislation proposed a mandatory representation norm, thus establishing an EU-level mandatory representation norm. The final provision (Article 6) indeed provides that Member States "shall ensure that children are assisted by a lawyer in accordance with this Article" in order to allow them to exercise the rights of defence effectively. Article 6(3) then sets out a series of specific circumstances relating to pre-trial investigative procedures and before appearance in court. Though plea-bargaining is not mentioned expressly, where such procedures fall within the trial process, there is a reasonable basis to assert that this Directive will require mandatory defence for children.

1.5 Directive 2016/1919/EU on legal aid in criminal proceedings

Directive 2016/1919/EU of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings[59] (the "EU Legal Aid Directive") establishes minimum rules relating to funding of legal representation for suspects and accused persons. Its stated purpose is to ensure the effectiveness of the Children Directive and the Access to a Lawyer Directive. It applies to suspects and accused persons who have a right of access to a lawyer under the Access to a Lawyer Directive and who are, inter alia, deprived of liberty or required to be assisted under national or EU law (Article 2(1)).

Article 4 reflects Article 6(3)(c) ECHR, providing hat those who lack sufficient resources have a right to legal aid where the interests of justice so require (Article 4(1). It provides a faculty for Member States to apply means and/or merits tests before granting legal aid (Article 4(2)). Article 4(3) governs matters to be taken into account in determining means, and Article 4(4) articulates the ECtHR's "interests of justice" factors (except for the personal situation of the accused); it also reflects the *Benham v. United Kingdom* case-law, providing that the interests of justice test shall be deemed satisfied where the person is brought before a judge in order to decide upon detention.

[58] Available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016L0800&rid=1
[59] Available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016L1919&rid=1

The Legal Aid Directive includes few provisions relating to costs. A recital (which informs the interpretation to be given to the operative provisions) in the preamble indicates that when granting legal aid, Member States should be able to require suspects and accused persons to bear part of the costs, depending on their financial resources – a reference to national practices considered in Part D.

Significantly, the Legal Aid Directive includes no provision on recovery of costs on conviction. Even the first proposals included only a provision for recovery of costs where financial means criteria turn out subsequently not to have been fulfilled. There was, at no stage, discussion of a provision regulating the recovery of costs upon conviction. On a literal reading, it would appear that the Legal Aid Directive therefore excludes any such possibility. It remains to be seen whether Member States which currently have systems involving repayment of mandatory defence or legal aid costs (see Part D) will take a different view of the Directive. The consultant, who was actively involved in the negotiations in Brussels, suspects some will. But it is clear that such systems will become liable to legal challenge following the end of the transposition period of the EU Legal Aid Directive.

2. The European Public Prosecutors Office

On the basis of Article 86 TFEU, the EU is currently in the process of establishing a European Public Prosecutor's Office ("EPPO"), with the objective of combating fraud on the EU budget. The EPPO will, as currently envisaged,[60] be an EU body which will prosecute such offences before the relevant national court having jurisdiction. The current draft text envisages an EU-level prosecutor prosecuting largely in accordance with the national procedural law of the forum.

In the current draft regulation, Article 34 (simplified prosecution procedures) refers to simplified procedures in national law, essentially permitting the EPPO to pursue such procedures if appropriate. There is no provision made, as many observers had hoped, for specific provisions to ensure that such transactional disposals were subject to safeguards regulated at EU-level (access to a lawyer, judicial review etc.). Thus, the EPPO will not affect the operation of national plea-bargaining models.

3. Council of Europe instruments

3.1 CEPEJ study on the contractualisation of justice

The European Commission for the Efficiency of Justice (CEPEJ) has commented on the issue in its report *Study on the situation of the contractualisation and judicial process in Europe* of 2010.[61] The report drew a distinction between "Anglo-Saxon" plea-bargaining, characterised by the lack of legal provisions regulating the practice and the possibility of charge bargaining, and continental European systems characterised by much greater legal regulation and sentence-only bargaining (pages 39-40).

[60] The draft regulation, agreed by the Council of the EU in January 2017 but yet to be adopted, is available here.
[61] Available here.

This is, broadly, reflected in the countries studied in Part D, Germany being the main exception. The report contains no normative recommendations relevant to the present study.

3.2 COE resolutions / recommendations

3.2.1 Resolution (78) 8

Resolution (78) 8 on legal aid and advice[62] contains skeletal versions of the principles developed later by the ECtHR. It recognises the possibility of legal aid being subject to contributions, limited by protection against hardship (Part I, para. 2). It also identified the need for public funding where representation is mandatory in national law (para. 5(a)) and when legal assistance is deemed necessary having regard to the particular circumstances of the case (para. 5(b)), effectively an embryonic "interests of justice" principle much like that found in Article 6(3)(c) and EU law.

3.2.2 Recommendation R (87) 18

Recommendation R (87) 18 on the simplification of criminal justice[63] encouraged the simplification of pre-trial proceedings and the extension of plea-bargaining procedures. The recommendation was noted in *Natsvlishvili and Togonidze v. Georgia* (para. 54). In terms of safeguards, the recommendation focuses on the role of the court and says nothing of the role of legal defence.

3.2.3 Recommendation R (93) 1

Recommendation R (93) 1 on effective access to the law and to justice for the very poor[64] includes a general set of recommendations as to legal aid, which do not add substantially to the ECtHR case-law. The timing of the recommendation, a short time after Recommendation R (87) 18, does underline that simplification and safeguards go hand in hand.

C. UN PRINCIPLES & GUIDELINES

The United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems[65] (the "UNPGs") are, of course, very high-level standards without extensive detail. Key provisions are reviewed here but, given relatively more prescriptive nature of the ECtHR case-law so far as COE state parties are concerned, the UNPGs are not referred to extensively in this study.

The principles, like the EU and ECtHR standards, place emphasis on deprivation of liberty, providing that a person so deprived of liberty or facing a potential prison sentence be entitled to legal aid "at all stages of the criminal justice process" (Principle 3, para. 20), and otherwise refer to the interests of justice (Principle 3, para. 21). Among the guidelines, particularly relevant are Guideline 4, requiring

[62] Available here.
[63] Available here.
[64] Available here.
[65] Available here.

States to take measures to ensure legal representation at "all pre-trial proceedings and hearings", and Guideline 5, relating to court proceedings, establishing a requirement for the presence of counsel "at all critical stages of proceedings". Both the Principles and Guidelines make specific provision in relation to children, though no individual norm is sufficiently precise to assist much here.

D. COMPARATIVE PRACTICE

Each example of comparative practice has been studied with a focus on the Reference Questions. For each national system, the summary includes a brief description of the plea-bargaining system, to put the information on legal representation into context. Thereafter, the same three issues are considered for each country: whether representation is mandatory, whether representation is covered by legal aid and subject to what conditions, and whether any issues of reimbursement arise. As discussed in Part II, these examples shed considerable light on how the international standards and/or obligations are understood by the relevant countries.

1. At a glance: defence in national plea-bargaining systems

	Representation	Legal aid	Reimbursement
Belgium	Mandatory	Subject to means only	Not possible
Bulgaria	Mandatory	Unconditional (as defence mandatory)	Yes, subject to hardship protection
England & wales	Waivable	Subject to merits and (except initially) means	Yes, limited to contributions if applicable
Estonia	Mandatory	Unconditional (as defence mandatory)	Yes, subject to hardship protection
Finland	Waivable on certain conditions	Unconditional (as defence required in principle)	Yes, limited to contributions if applicable
France	Mandatory	Subject to means only	Not possible
Germany	Mandatory in some cases, waivable in others	Unconditional (as defence mandatory)	Yes, subject to hardship protection
Italy	Mandatory	Subject to means only	Not possible

2. Belgium (BE)

2.1 Plea-bargaining system

Belgian law provides a system of plea-bargaining (*procédure de reconnaissance préalable de culpabilité*) ("PRPC") largely modelled on the French system, governed by Article 216 of the Code of Criminal Procedure ("BE-CCP"). The procedure is available in respect of any offence for which the sentence does not exceed five years' imprisonment (Article 216 § 1), and certain serious offences including murder and sexual offences committed against minors (Article 216 § 1).

The procedure is available at the initiative of the Prosecutor, either of his own motion or upon the request of the defence. It is conditional upon the person recognising his criminal liability. The Prosecutor's proposal is limited to mitigated forms of sentence, as opposed to lesser charges. The proposal must be agreed in a formal document and is thereafter subject to court review no more than two months later. The court must verify that the facts accepted constitute the offence.

2.2 Representation: appointment of counsel mandatory at all stages

Counsel must be appointed for the preliminary phase, and is entitled to see the case-file. Counsel is also required to be present in the court hearing. There is, accordingly, no possibility for the procedure to take place in the absence of counsel. Counsel is either chosen or appointed, as below.

2.3 Legal aid: available subject only to means

The procedure specifically caters for funding of counsel. It is provided that the relevant provisions of the Judicial Code (Articles 508/13 to 508/14) on legal aid means testing are applicable in their entirety. These provisions establish a means test which is the object of further articulation in law. A person eligible on a means basis may be ordered to make contributions, based on a nominal fee per intervention of the lawyer, from €10 to €50; this system, recently adopted, has been criticised.

2.4 Reimbursement

With the exception of the above system of contributions, there is no possibility of reimbursement in Belgian law. Thus, if the PRPC happens, the person without means incurs only contribution costs.

3. Bulgaria (BG)

3.1 Plea-bargaining system

Bulgarian law provides for a system meeting the working definition of plea-bargaining (*решаване на делото със споразумение*) (disposal of the case by agreement) ("RDS"), governed by Article 381 of the Code of Criminal Procedure ("BG-CCP").[66] The procedure is available upon completion of the pre-trial investigation, or even during trial (Articles 381(1) and 384 BG-CCP). The agreement covers both the legal qualification of the offence and the nature and extent of the sanction (thus, is both a charge and sentence bargaining system). Serious offences are excluded. Where the RDS is followed, the court may sentence below the legally prescribed minimum, or substitute probation for deprivation of liberty, even in the absence of the usual criteria for such a disposal (exceptionality of circumstances).

3.2 Representation: mandatory

It is provided as part of the procedure that, if the person has not appointed defence counsel, upon request of the prosecutor the judge shall appoint counsel with whom the prosecutor shall negotiate (this appears to be a *lex specialis* vis-à-vis the general provision on mandatory defence (Article 94 BG-CCP), which sets out the situations requiring mandatory defence and does not itself mention RDS). Thus, representation is mandatory in this context. A person who would not have a right to legal representation in the ordinary course will have representation if this procedure is initiated.

3.3 Legal aid: mandatory defence costs paid by the state

As a rule, the relevant law (*Закон за правната помощ*) (Legal Aid Act, effective since 1 January 2006) ("BG-LAA")[67] provides that the legal aid system it establishes shall cover cases in which representation by defence counsel is mandatory (Article 23). This therefore applies to the RDS. This is a distinct rule from the general rule on legal aid, based on means and merits; there is thus no means condition at the point of grant where defence is mandatory, which applies for plea-bargaining.

3.4 Reimbursement: yes, subject to hardship provisions

By virtue of Article 27a Legal Aid Law (inserted 2013), in certain cases prescribed by law, persons to whom legal aid has been granted shall reimburse the expenses to the Legal Aid Bureau. Under Article 27b, such costs are deemed private debts which fall to be collected by the National Revenue Agency. As referenced earlier, enforcement of such debts is subject to hardship protections regulated by civil / tax procedure (see *Ognyan Asenov v. Bulgaria*, cited above, paras. 25-28 for the provisions).

[66] English translation (Bulgarian Supreme Court) available at http://www.vks.bg/english/vksen_p04_03.htm.
[67] An English version of the original act is available at: http://www.legalaidreform.org/national-legal-aid-systems/national-legal-aid-systems-by-country/item/50-legal-aid-system-in-bulgaria. The current version, including Article 27a as inserted in 2013, is available here: http://www.lex.bg/laws/ldoc/2135511185.

4. Estonia (EE)

4.1 Plea-bargaining system

Estonian law provides for a system of "settlement" (*Kokkuleppemenetlus*) in Division 2 of Chapter 9 (§ 239 - § 250) of the Code of Criminal Procedure ("EE-CCP").[68] The procedure is available subject to a range of excluded offences (e.g. crimes against humanity, people trafficking, extortion etc.). In 2014, 64% of cases were resolved by way of settlements. It is also excluded where multiple offenders are involved and not all consent to the settlement procedure; where the victim does not so consent; or where the accused or prosecutor does not consent (§ 239).

The procedure is available at the initiative of the prosecutor (§ 240) or the accused (§ 242). The terms of the settlement may, in law, cover the legal assessment of the offence and the nature and extent of damage caused by the offence, and the type and category or term of punishment (§ 245 (8)-(9)). In practice, however, the courts have been reluctant formally to recognise settlements extinguishing prosecution in respect of offences outright. The settlement, once concluded, is presented to the court which may proceed to judgment, convicting and sentencing in accordance with the agreement (§ 248 (5)). There is thus no "guilty plea" in Estonian law, as a finding of guilt still follows. In practice, the Supreme Court (in a decision of 2009) has insisted that prosecutors should not consent to punishment significantly below that which would be sought after trial, calling into question incentive in settlement; however, Ministry of Justice research indicates that the sentences in settlement proceedings are generally lower than those upon conviction in a full trial.

4.2 Representation: appointment of counsel mandatory in negotiations

In law, the person has a right to appoint counsel as from the point when they acquire the status of "suspect" (§ 45 (1)), which may in practice be long before settlement. There are further cases in which defence is mandatory ab initio, e.g. where the suspect is a minor (§ 45 (2)). However, defence becomes mandatory in any event as of the presentation of the criminal file for examination upon completion of the investigation (§ 45 (3)). It is at this stage, when the case is with the prosecutor, that the settlement procedure is available. As such, representation by counsel is mandatory in the negotiations. At the court stage, representation by counsel is mandatory except where it is validly waived in a limited range of scenarios, including the court stage of settlement proceedings in the case of second-degree offences (those carrying up to five years' imprisonment) provided the person is able to represent their own interests ((§ 45 (4)(1) EE-CCP / § 4 of the Penal Code of Estonia).

[68] Official English version, as at 20 February 2017: https://www.riigiteataja.ee/en/eli/530102013093/consolide

4.3 Legal aid: not subject to means, but contributions possible

Where, by virtue of the provisions of § 45 EE-CCP, participation of defence counsel is required, the person is entitled to publicly-funded representation irrespective of their financial means (see the State Legal Aid Act,[69] ("EE-LAA") § 6(2) and § 7(2)). The appointment will be made by the Bar Association (§ 18(1)). A system of partial contribution (§ 8) exists but does not apply to criminal cases; instead, compensation (re-imbursement) of legal aid fees are governed by the EE-CCP (§ 15(3), § 25(4) and § 27 EE-LAA). Formally, the funds emanate from the state budget but are held in escrow by the Bar Association which will organise payments to lawyers. Re-imbursement is paid to the state.

4.4 Reimbursement: yes, subject to means

Chapter 7 EE-CCP governs the issue of "procedure expenses", which include the remuneration of court-appointed counsel (§ 175 (4)). The in-principle rule is that such procedure expenses shall be compensated for by the convicted offender (§ 180 (1)).[70] A court called upon to determine procedure expenses must take into account the financial situation and chances of re-socialisation of a convicted offender; if the convicted offender is obviously unable to reimburse procedure expenses, part of the expenses are borne by the state; payment in instalments may be envisaged (§ 180 (3)).

5. England & Wales (E&W)

5.1 Plea-bargaining system

The system of plea-bargaining is essentially informal and rests upon the willingness of the person to plead guilty, and the prosecution's willingness to either accept a favourable factual basis for the plea, or to a charge a lesser offence to which it is agreed a guilty plea will be entered. The "bargaining" aspect arises from the (not procedurally regulated) discussions between prosecutor and counsel.

The law establishes a system of "credit" for a guilty plea, governed by guidelines issued by the Sentencing Council under statutory authority.[71] Credit is a discount from the sentence which would follow from conviction at trial. Case-law interprets it as rewarding (a) savings to the public purse; and (b) witnesses not needing to give evidence. The usual rule is that where a person pleads guilty at the "first reasonable opportunity", they will receive a one-third discount on any custodial, punitive or financial sentence. Thereafter, the available credit diminishes, up to one tenth (10%) if a guilty plea is entered on the day of trial. The credit guideline is, for the most common offences, accompanied by

[69] Official English version, as at 20 February 2017: https://www.riigiteataja.ee/en/eli/527012015015/consolide

[70] A case currently before the *Leuska v. Estonia* App. No 64734/11 (communicated on 4 February 2014) provides a practical example of such reimbursement being ordered following a settlement. The case is not otherwise relevant for the purposes of the present study.

[71] See: https://www.sentencingcouncil.org.uk/wp-content/uploads/Reduction_in_Sentence_for_a_Guilty_Plea_-Revised_20071.pdf. The statutory basis is the Criminal Justice Act 2003, s 170(4).

other guidelines on substantive sentencing, indicating a starting point and sentencing range for each offence.[72] The defence lawyer may thus rely on a reasonable degree of predictability to establish what sentence may follow (on conviction or on a guilty plea), in order to assist with the decision.

In summary proceedings (dealt with in the Magistrates Court, usually less serious cases involving at most six months' imprisonment), the case usually proceeds in two stages: a "first appearance", either immediately after arrest by police or, if police have released the person, some weeks later, at which a plea is taken and the trial prepared; then the trial itself some weeks later. In practice, a plea will often be entered at the first appearance, to attract the full credit on sentence. A plea may, then, be entered at trial (or before if the defence request a hearing), typically after service of further evidence. In practice, the possibilities for bargaining may be limited unless the prosecutor is senior. The decision to plead guilty is therefore mostly informed by the regulated credit incentive.

In Crown Court proceedings (more serious ones, where sentencing powers are at not limited) an initial indication of plea is taken in the Magistrates Court at the first appearance, before the case is sent to the Crown Court. A plea will then formally be entered at a "plea and trial preparation hearing" ("PTPH") at the Crown Court, when the defendant is "arraigned" (i.e. the indictment put to him). A guilty plea may be entered at the PTPH (which in practice is still mostly regarded as the first reasonable opportunity in this type of case) or thereafter the defendant can be re-arraigned and enter a plea at any stage up to trial, and during trial. Crown Court proceedings will, typically, entail greater volumes of evidence and negotiations as to pleas may continue between prosecution and defence as the case develops. Counsel will often advise against entering any plea until further evidence has been seen, e.g. the laboratory analysis of drugs, CCTV etc. The nature of offences prosecuted at the Crown Court is such that there is greater possibility for proposing alternative pleas, e.g. allowing premises to be used for drugs storage, in lieu of possession with intent to supply. This may make a considerable difference to sentencing (in the above example, several years' difference).

It is open to the defendant to plead guilty on a limited factual basis, e.g. that he was merely holding the drugs for a dealer, and was not street dealing himself.[73] The CPS may accept such a basis, or decline to accept it. Even if the CPS accept, it is open to the court to reject the basis alleged. In either case, what will follow is a "*Newton*" hearing, named after the case setting guidelines for such hearings.[74] In these cases, evidence is led to establish the facts on which the judge should sentence. Given the fact of having to hold a hearing (often on a separate date) and call witnesses, credit for the guilty plea will usually be diminished where a *Newton* hearing is held and resolved against the accused. Among the defence lawyer's skills is that of exploring the factual basis with the client in such a way as to "pitch" the basis of plea in a way which will not lead to a *Newton* hearing, such as to retain credit, whilst still being favourable in terms of the sentence. Self-representing defendants often appear to be unaware of the possibility of entering a basis, or the role of the guidelines.

[72] See, for example, the guideline on drugs offences: http://www.sentencingcouncil.org.uk/wp-content/uploads/Drug_Offences_Definitive_Guideline_final_web1.pdf.
[73] As can be seen from the drugs guideline supplied above, this will make a significant difference to sentence.
[74] *R v Newton* 77 Cr. App. R. 13 CA (the judgment can be supplied upon request if needed).

5.2 Representation: an incident of the usual rules

As there is no separate procedural institution of plea-bargaining, the assistance of lawyers in deciding whether to enter a plea follows the usual rules. In England & Wales, a person is always entitled to be represented by a lawyer, but is never obliged to be so represented. There are some limited scenarios in which the intervention of a lawyer is ordered by the court, e.g. where the defendant is not permitted to cross-examine a witness, and a lawyer is appointed to do so on his behalf. However, as a general rule, legal representation is a right not an obligation. As to whether representation, if wanted, is state-funded (in whole or in part) or privately funded, this depends on the legal aid rules.

5.3 Legal aid: available on a means and merits basis

Legal aid in England & Wales is largely governed by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO") and delegate legislation. It is subject to a means and merits test. However, a distinction needs to be drawn between "duty" representation at the first appearance, and legal aid representation thereafter.

Duty assistance at the first appearance: basic merits test only

A duty solicitor, acting on the basis of a contract with the court, will be available to provide advice, assistance and advocacy assistance on some conditions (s 15 LASPO[75]). At this stage, there is no means test: all persons can see the duty if they wish and their case qualifies. However, there is a basic merits test: the solicitor may provide such assistance to a person in custody (detention) or charged with an offence carrying imprisonment, where, in the duty solicitor's opinion, the client requires such assistance. A "sufficient benefit" test applies, which essentially involves assessing whether the duty solicitor's assistance will provide a real benefit to the client. As a result of these provisions, "duty" representation is unavailable for common offences (e.g. careless driving), and, in practice, many guilty pleas are entered without representation. Injustices do occur as a result.

Representation in the proceedings thereafter: merits and means tests

In terms of merits, LASPO establishes a case-specific test, having regard to certain factors: whether it is likely that the person could lose their liberty or livelihood or suffer serious damage to his reputation; whether the matter may involve consideration of a substantial matter of law; whether the individual will be able to understand the proceedings or state his own case; cross-examination requirements; the interests of another person. In proceedings before the Crown Court, the interests of justice will be deemed to be satisfied (Criminal Legal Aid (General) Regulations 2013, regs. 24(1) and 19(2)). In other cases, it falls to the Legal Aid Agency to decide on legal aid case-by-case. The mere fact of an offence carrying, theoretically, a prison sentence is not insufficient: the issue is whether such a sentence might

[75] This is the primary legal basis for subordinate legislation (the Criminal Legal Aid (General) Regulations 2013 (SI 2013/9), last amended in 2015). These regulations in turn refer (regs. 8 and 11) to the contractual terms on which duty solicitors provide this service, which includes the substantive criteria mentioned in this paragraph (see, so far as relevant here, section 10 of the contractual terms).

be imposed (*Highgate Justices, ex parte Lewis* [1977] Crim LR 611). There is ample further case-law on the topic but it suffices to say that, in broad terms, the test may be said to correspond to (or be intended to avoid infringing) the ECtHR's "interest of justice" test.

In terms of means, detailed provision is made under LASPO for the assessment of a person's means (Criminal Legal Aid (Financial Resources) Regulations 2013, as amended). Some persons will automatically qualify: those under 18 and those receiving social security benefits. In the Magistrates Court, legal aid is either granted or refused, the means threshold is lower. In the Crown Court, the means threshold is higher (reflecting the higher cost of advocacy services in this context), and legal aid may be granted with a requirement for a contribution (as in *Morris v. United Kingdom*), without such contribution or refused. Contributions begin as from the grant of legal aid.

5.4 Reimbursement: yes, both ways

If a person is convicted, their contribution to legal aid may be enforced against their assets (Criminal Legal Aid (Contribution Orders) Regulations 2013, as amended). However, there is no provision for pursuit of the full legal aid cost, only the assessed contribution (so, in the Magistrates Court, no reimbursement will be ordered). If the person is acquitted, contributions are returned with interest.

6. Finland (SU)

6.1 Plea-bargaining system

A system of plea-bargaining (*syyteneuvottelu*) was instituted in Finland by the Criminal Investigations Act (805/2011), Chapter 3, Section 10a, with effect from 1 January 2015. The procedure is available for offences carrying up to six years' imprisonment (Criminal Procedure Act ("SU-CCP"),[76] Chapter 1, Section 10(1)-(1)), though specific offences (sexual offences, homicide and offences involving bodily injuries) are excluded. The initiative lies with the Prosecutor who may, at his own motion or on the initiative of the injured party (not, formally speaking, the defence), issue a "proposal for judgment" (Section 10(1)), in light of the potential costs and length of court proceedings in the case.

The formal conditions in order to proceed with a plea bargain are that (1) the suspect / defendant admits having committed the offence and consents to hearing the case in such a way; (2) the prosecutor and suspect / defendant are agreed on the imputable offence; and (3) the injured party states that he has no claims in the case, or agrees to the case being heard in such a way (Section 10(2)). In the proposal, the prosecutor commits to requesting punishment on a mitigated basis, and may commit to waiving prosecution for one or more suspected offences (Section 10(3)). A stage of negotiation is formally provided, in which the suspect should usually be represented (see below) (Section 10a(1)), after which the prosecutor submits the proposal to the court (Section 10a(4)).

[76] Official English translation available at http://www.finlex.fi/fi/laki/kaannokset/1997/en19970689.pdf.

6.2 Representation: appointment of counsel for negotiations, unless waived

Under Section 10a(2), "the suspect or the defendant shall be appointed counsel for the negotiations, unless he or she specifically wants to attend to his or her own defence. Counsel shall be appointed also in such a case if the suspect or the defendant is not able to defend himself or herself or if he or she is under the age of 18 years". This provision operates notwithstanding the usual rule, governed by Chapter 2 of the SU-CCP, whereby a public defender is to be appointed for the suspect if he is charged with an offence punishable by at least four months' imprisonment or is deprived of liberty pending trial (criteria which appear in general terms to relate to the ECHR "interests of justice" test).

6.3 Legal aid: counsel, unless waived, will be remunerated from state funds

Section 10a(2) makes applicable the general provisions of Chapter 2, SU-CCP in respect of assistance in plea bargaining. Pursuant to Chapter 2, Section 10(1), SU-CCP, fees for public defenders are paid from state funds according to terms fixed in law. Thus, in this context, all defendants have the right to a public defender remunerated from state funds. This is then subject to compensation.

6.4 Reimbursement: yes, with provision made for financial means

Chapter 2, Section 11, SU-CCP establishes the general rule that if the court finds the suspect guilty of the offence for the criminal investigation and trial in which a public defender has been appointed, the suspect shall be ordered to reimburse the State for expenses paid from state funds. If the suspect meets the financial criteria for legal aid under the Legal Aid Act ("SU-LAA"),[77] the reimbursement shall not exceed the compensation which would be payable under the SU-LAA. *A contrario*, if a person is ineligible for legal aid, they will be liable to repay the entirety of the costs incurred.

The reference to SU-LAA then brings into play the various provisions of that instrument on remuneration of lawyers' fees and expenses etc. The current amount is €110/hour. The amount payable by the person under the SU-LAA is referred to as a "deductible", which is percentage proportion of the costs ranging from 0% (for a single person with means up to €600) to 75% (for a single person with means up to €1,300).[78] This will be the amount payable as compensation.

[77] Official English translation available at http://www.finlex.fi/fi/laki/kaannokset/2002/en20020257.pdf.
[78] See: https://oikeus.fi/oikeusapu/en/index/hakeminen/mitaoikeusapumaksaa.html

7. France (FR)

7.1 Plea-bargaining system

The system of plea bargaining in France (*comparution sur reconnaissance préalable de culpabilité* ("CRPC")) was established in 2004 by the insertion of Articles 495-7 to 195-16 of the Code of Criminal Procedure ("FR-CCP"). Modifications were made in 2009 and 2011, and a further proposal was made in 2013 but has never been final adopted. By 2013, the procedure accounted for 13% of disposals in criminal cases (65,090 cases), which was presumed likely to rise further subsequently.

The CRPC is available in respect of *délits*, the middle band of criminal offence provided for in French law prosecuted before the *tribunal correctionnel* (ordinary criminal court). Are excluded from its scope the most minor offences (*contraventions*), prosecuted before a police court, and the most serious (*crimes*), which are prosecuted before the assize court. The CRPC is also not available for certain offences against the person and sexual offences punishable by five years or more.

The Prosecutor may initiate the CRPC on condition that a person "accepts the conduct alleged against him" (consultant's translation). The Prosecutor proposes to the suspect that he execute one or more sentences, determined in accordance with the general principles (proportionality etc.). In the case of a prison sentence, the proposed sentence may not exceed one year's imprisonment or half the statutory maximum. The CRPC thus involves only sentence bargaining.

In practice, the CRPC is used only in respect of fairly minor offences (it is widely used in respect of road traffic cases). It rarely results in custodial sentences: even if one is imposed, suspension or alternative execution (e.g. home curfew) may be agreed in the CRPC. The CRPC is, usually, proposed following police interrogation, in which the person is deprived of liberty, which is governed by the usual rules (including non-mandatory access to a lawyer). At the end of the police custody phase the person is brought before a Prosecutor, who decides how to proceed. At present, it is possible to proceed directly to a CRPC at this stage; however, in practice the Prosecutor will usually issue a CRPC summons and that meeting will take place some time later. Reforms tabled in 2013[79] proposed to exclude the possibility of passing immediately to the CRPC, to ensure a "cooling off" period. At present, it remains possible for the Prosecutor to issue both a court summons and a CRPC summons, so that the usual procedure will carry on according to its usual timeframes if the CRPC does not close the case. Again, the 2013 reforms sought to exclude this. They have, however, never been adopted.

7.2 Representation: appointment of counsel mandatory

The CRPC is initiated by the Prosecutor of his own motion, or at the request of the person or their lawyer. Thus, appointment of a lawyer is not a precondition to the procedure being *suggested*. In order for the CRPC to proceed, however, appointment of defence counsel is mandatory. Article 495-8 provides that the person's statements by which they admit the facts held against them are recorded,

[79] Available (French only) here: https://www.senat.fr/leg/ppl13-013.html.

and the Prosecutor's proposal made, in the presence of the accused person's lawyer. It further specifies that the person "may not renounce their right to be assisted by a lawyer". Thus, assistance is mandatory in all cases. The lawyer must also able to consult the case file. The provisions on the hearing that follows before a court make it clear that the person must be represented in court too.

The availability of legal aid on a means basis (see below) raises the question what happens where a person is not entitled to legal aid, but is unwilling to appoint a lawyer. As above, the CRPC provisions do not allow the right of access to a lawyer to be waived. Accordingly, if the person is unwilling to be assisted by a lawyer, they cannot be dealt with by CRPC and the case must proceed to judgment in the ordinary way. Accordingly, all cases dealt with by CRPC will necessarily involve legal assistance.

7.3 Legal aid: available subject to means only

Legal aid in France is governed by Law 91-647 of 10 July 1991 relating to legal aid ("FR-LA1991").[80] The central provision is that natural persons with insufficient resources may benefit from legal aid (Article 2). The applicant must demonstrate that their resources are inferior to €1007 per month (for complete legal aid, whereby 100% of the fees will be covered by the state) ranging to €1510 (for partial legal aid, covering between 55% and 25% of the fees).[81] The right applies specifically to the CRPC (Article 10). Accordingly, legal aid is available for persons facing the CRPC, subject to means.

In practice, the accused will usually be at liberty and will have time to organise legal aid representation if they are due to attend a CRPC. However, there are also "duty" representation systems for the CRPC, organised by the regional Bar Associations. However, this covers only the method of appointment; who remunerates the lawyer depends on the financial means criteria. If legal aid is granted, the fees will be paid by the state, as the case may be with some contribution by the individual; if it is declined, the lawyer's fees will become payable by the person himself.

7.4 Reimbursement: no reimbursement possible

Provisions of the FR-LA1991 enable the competent judge to order that a person benefiting from legal aid be required to pay some of the costs of the State (Article 42). However, these provisions do not apply to criminal proceedings, including specifically the CRPC (Article 47). Accordingly, reimbursement of the cost of legal aid assigned in respect of the CRPC is not a possibility. Of course, as noted above, in cases of partial legal aid there is some contribution required at the point of grant.

[80] Available (French only) at https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000537611.
[81] The specific figures are updated on a year-by-year basis.

8. Germany (DE)

8.1 Plea-bargaining system

The Law on Regulation of Agreements in criminal proceedings of 29 July 2009 amended the Code of Criminal Procedure (DE-CCP) to incorporate new provisions on "negotiated agreements", which correspond to the working definition of plea bargaining. These provisions codify earlier case-law of the Federal Supreme Court developed in response to the growth of informal plea bargaining, which was characterised by unease around the departure from the search for truth and the need for a relationship of proportionality between the criminal fault of the offender and the punishment.[82]

The law envisages discussion of the status of the proceedings between accused and prosecution, between the court and parties prior to the opening of proceedings, or during the main hearing with a view to the expedition of proceedings (Sections 160b, 202b and 257b respectively). Such discussions are to be taken note of in the main hearing (Section 243). Section 257c then provides a legal basis for such agreement and its content: the agreement may pertain only to the consequences of the judgment, and a confession must be a central part of the agreement; however, the agreement cannot, in law, trespass upon the function of the court in establishing guilt (see Section 257a(2)). The court thus retains, in law, the sovereign power to find guilt and sentence based on the evidence. The law now confirms that appeal rights cannot be waived as a result of an agreement (see Section 302) (the issue had been the subject of controversy, as appears from the ECtHR case *Litwin v. Germany*).

8.2 Representation: mandatory / optional in accordance with the general rules

No separate provision is made in the rules on negotiated agreements regarding legal representation. Section 257c is framed in such a way as to function with, or without, defence counsel. The involvement of counsel depends on the general rules on mandatory defence in Section 140 DE-CCP. Under these rules, defence is mandatory where, for instance, a person is in detained pending trial (Section 140(1)(4)), or if pre-trial detention proceedings are at issue (Section 140(1)(7)). Section 140(2) establishes a conditional obligation on the judge to appoint counsel where the assistance of defence counsel appears necessary because of "the seriousness of the offence, or because of the difficult factual or legal situation, or if it is evident that the accused cannot defend himself". It is immediately noticeable that this corresponds largely to the "interests of justice" test elaborated in the ECtHR case-law. This appointment will happen in preliminary proceedings if a person is detained, and may happen at that stage if it appears that the conditions of Section 140(2) are met. In any event, appointment of counsel will intervene upon indictment (Section 141), which will precede the concretisation of any negotiated agreement. Thus, if the case is one considered by national law to warrant mandatory

[82] See Weigand & Turner, 'The Constitutionality of Negotiated Criminal Judgments in Germany', *German Law Journal* Vol 15 No. 01 (available here).

representation, there will be such representation for the full plea bargain. There is of course a general right (Section 137) to appoint counsel, if a person wishes to do so himself.

The issue – highly relevant to this study – has arisen in the German doctrinal and judicial debate as to whether the mere fact of discussions being engaged in with a view to a negotiated agreement means the Section 140(2) test is met. The majority opinion is that the facts of the case will determine its difficulty in the usual way; while a minority opinion holds that the prospect of an agreement means the person faces a "difficult factual or legal situation". At present, the majority opinion prevails.

8.3 Legal aid: mandatory representation is state-funded

There is no separate system of legal aid in Germany: where representation is mandatory, it will be state-funded. Where it is not mandatory, there is no right to appoint counsel on state funds. The legislator's approach is essentially that a case warranting the grant of legal aid (i.e. one where Article 6(3)(c) calls for representation in the interests of justice) is a case in which representation is *required* and must be imposed upon the defendant, albeit having regard to his wishes. The issue of the person's financial means intervenes only at the point of reimbursement of the expenses so incurred.

8.4 Reimbursement: yes, subject to limited hardship protection

Upon conviction, the convicted person shall bear the costs of the proceedings in so far as they were caused by the trial for an offence for which he has been convicted (Section 465 DE-CCP). Enforcement of such debts is subject to regulation at the regional (Land) level. For example, *Croissant v. Germany* offers an example of Land-level law in Baden-Würtemberg providing for deferment of the enforcement of court costs would inflict exceptional hardship upon the individual (see para. 21) (it is understood the law was amended in 1992 but remains substantially the same so far as relevant). By way of a current example, the consultant was referred to the Act on Waiving Judicial Fees,[83] in respect of Berlin (last modified in 2014) which provides for deferment of enforcement if the immediate enforcement would mean special hardship, provided this does not jeopardise the debt (Section 2, para. 1). Claims based on Section 465 DE-CCP may also be waived if this seems appropriate in the public interest; if confiscation arising from enforcement would create special hardship; or if such waiver appears "just and equitable" for any other reason (Section 2, para. 2).

9. Italy (IT)

9.1 Plea-bargaining system

Italian law provides for a system of application of sentence upon the request of the parties (*applicazione della pena su richiesta delle parti*) ("APRP"), governed by Articles 444-448 of the Code of Criminal Procedure ("IT-CCP"). It is available during the preliminary inquiries (pre-trial) phase, at the

[83] Berliner Justizgebührenbefreiungsgesetz (JGebBefrG).

preliminary hearing at the end of that phase (at which the judge would usually decide whether to refer the case to trial), or up to the opening of the first-instance merits hearing in *direttissimo* cases, i.e. those proceeding directly to trial where the evidence on arrest suffices (Article 446(1) IT-CCP).

The APRP enables the Prosecutor and person to request, from the judge, the application of an alternative sanction, a financial penalty (reduced by up to a third), or a custodial sentence which (including a reduction of up to one third), will not exceed five years (making an effective sentence ceiling of 6 years and 7 months). It applies for all offences save those excluded, e.g. offences resulting from the exercise of public duties and a range of sexual offences. In practice, most serious offences are excluded by virtue of the effective sentence threshold. The judge may, if s/he agrees the facts constitute the elements of the offence, shall by judgment dispose of the matter. By Article 444(3) IT-CCP, the party requesting the procedure may make their consent conditional upon the sentence being suspended; if the judge determines that such suspension is impermissible, the request must be refused. The sentence so ordered is treated in law as a conviction (Article 445(1bis) IT-CCP). It is not expressly provided that there must be an oral hearing (the judge may order one where there is a doubt as to the voluntary nature of the request or consent given) (Article 446(5) IT-CCP).

9.2 Representation: mandatory in all cases

All persons accused in criminal proceedings must be represented by a lawyer; must be a retained lawyer or, if the person does not appoint one, a court-appointed lawyer (Article 97 IT-CCP). Such appointment becomes mandatory in enumerated situations including preliminary inquiries and the preliminary hearing which, as above, are where the APRP may be requested. If, in such context, the person has not appointed a lawyer, the relevant institution (police, prosecutor etc.) will appoint a lawyer from the local bar association's duty list. Thus, the APRP is an incident of the usual procedure, in which defence representation is mandatory, so defence in the context of the APRP is mandatory.

9.3 Legal aid: available on a means basis

Where a person has not retained a lawyer, the court will appoint one. However, the entitlement for this lawyer to be remunerated from state funds depends upon financial means eligibility, governed by a separate Presidential Decree (D.P.R. 30 May 2002, no. 115 *Testo unico in materia di spese di giustizia* (Single standard in the matter of costs)[84] as last amended in 2016 (the "Costs Decree")). The threshold is currently set at gross income annual of €11,528.41 (Article 76 Costs Decree). There is no graduated system: the person either qualifies or does not. In practice, the system is regarded as excluding persons of very few means who will (see below) become obliged to pay the lawyer personally and will simply not be able to do so, giving rise to a gap in quality representation.

[84] Available (Italian) at: http://www.altalex.com/documents/news/2014/09/10/patrocinio-a-spese-dello-stato#parte3

9.4 Reimbursement: not possible

There is no system of reimbursement foreseen by the law. The fees are either paid for by the state, or they become payable by the person. As above, it has been commented that persons of very low income will nevertheless be excluded from legal aid and will become saddled with legal fees they cannot afford to pay. Italian lawyers face difficulty in ever obtaining remuneration for such cases.

II – ANALYSIS

A. ANSWERS TO THE REFERENCE QUESTIONS

1. Is the appointment of defence counsel mandatory in plea-bargaining?

1.1 No ECHR obligation to create a "system" of mandatory defence

As noted earlier, the ECHR does not oblige states to put in place a *system* of mandatory representation. States may adopt one, provided this interference with the right of a person to defend himself in person is justified by a legitimate need (see *Croissant v. Germany*, *Correia de Matos v. Portugal*). It is debated in Brussels whether the EU Access to a Lawyer Directive has modified this position for EU Member States, but in the consultant's view is that the instrument creates only an individual (waivable) right. As from 2019 there will, however, be obligations for EU Member States under the EU Children Directive, which requires mandatory representation for children in pre-trial investigative acts and at the court stage, which may cover plea-bargaining in many national systems.

Whether Georgia should maintain its rule of mandatory defence for all cases in plea-bargaining is thus not a question of ECHR obligation, but of policy choice. This choice depends essentially on the question (a) whether a right to publicly-funded representation will always arise in plea-bargaining, and (b) whether any possibility of waiver should be permitted. These issues are considered below.

1.2 Necessity of counsel in the "interests of justice"

As noted above, the question whether the state needs to ensure access to legal representation depends, under the international standards, on whether this is needed in the "interests of justice". There are two possible views, one according to which the interests of justice will always require representation where plea-bargaining is at issue, the other according to which the nature of the particular case should determine whether representation is needed for plea-bargaining.

1.2.1 One view: counsel always needed in plea-bargaining

There are reasons for suggesting that plea-bargaining, by its nature, meets the interests of justice First, the sheer significance of the waiver given in plea-bargaining calls for representation as a safeguard. The cases on plea-bargaining both hinge on the role played by counsel in finding the waiver effective.

The finding in *Natsvlishvili and Togonidze v. Georgia* that the person had to understand the "*legal* consequences" of the waiver of trial rights in order for the latter to be effective is the clearest indication that legal representation is indispensable in this context.

Secondly, plea-bargaining entails legal act of self-incrimination. As noted above, the risk of coerced confession in police interrogation warrants representation by counsel (*Salduz v. Turkey*). It is difficult to see how the prospect of a formal admission of criminal liability in a plea bargain does not also warrant representation, *a fortiori* because it is also the result of discussions on law enforcement premises and will often be subject only to a limited form of judicial scrutiny is applied thereafter. If one accepts the analogy, it should follow that the interests of justice are satisfied in plea bargaining.

Thirdly, plea-bargaining entails complexity. The accused must consider, on a prospective basis, issues which on their own have sufficed to meet the interests of justice test in the ECtHR's case-law (e.g. constituent elements of an offence etc.), but also the prospects of relying upon defences at trial (e.g. self-defence) which calls for trial experience. As noted above, minority German judicial / doctrinal opinion holds that the requirements of mandatory defence in German law (which largely correspond to the ECtHR "interests of justice" test) will be satisfied where a plea agreement is envisaged.

National approaches creating special regimes derogating from their general interest of justice tests would support this approach. In this study, the Finnish system is an example: entitlement to a public defender is presumed when plea-bargaining is at issue (subject to means), whereas such defence is ordinarily subject to a case-specific interests of justice test. It may be noted that the Finnish system involves both charge and sentence bargaining, which may offer a rationale for that approach.

1.2.2 Alternative view: counsel required where the case requires it

The alternative view is, of course, that the question whether publicly-funded legal representation is required in plea-bargaining simply depends on the nature of the case, by application of the four "interests of justice" factors considered earlier. On this logic, a simple case involving bare factual issues, or where the penalties are not severe, might be considered as one not calling for legal representation. This is the currently position in German law, consistently with the majority judicial and doctrinal view on the subject (though it should be borne in mind that, in the German system, negotiations can pertain only to sentencing). English law (though it tolerates unrepresented guilty pleas at any level) likewise foresees no state-funded representation for simple cases (e.g. road traffic cases), including at the first hearing where guilty pleas are most often entered.

1.2.3 Specific cases

Irrespective of the view one takes of the general position, it does appear plain that some cases will always call for representation in application of the interests of justice test. It would be possible to fine-tune this list but two examples appear relatively uncontroversial: youths and those detained.

1.2.3.1 Youths

As noted above, the ECtHR's four factors take into account the personal situation of the accused. And the EU Children Directive imposes, at a regional level, a mandatory defence obligation in relation to children at the point of court proceedings. Though the measure does not bind Georgia, this is convincing evidence, in the consultant's view, that the "interests of justice" should be presumed satisfied where the accused is a youth. Reforms are to be expected in this sense by 2019.

1.2.3.2 Persons facing deprivation of liberty / in detention

As noted above, there is a consistent line of ECtHR case-law beginning with *Benham v. United Kingdom* and *Quaranta v. Switzerland* according to which a person facing a charge carrying a sentence of imprisonment should qualify for legal aid under the "interests of justice" test. Bearing in mind that, in the pre-trial detention legislation of Council of Europe states, the possibility of a prison sentence is a precondition for detention, an accused *in* detention will meet this test. This approach is reflected in the UNPGs, and the EU Legal Aid Directive articulates this as a positive EU standard. In the comparative study, among those countries without mandatory defence systems, England & Wales deems the interests of justice satisfied where a prison sentence is possible, and Germany ensures mandatory representation where the person is in detention. It appears relatively uncontroversial to suggest that a person facing plea-bargaining for an offence carrying a prison sentence, or who is currently in detention, should have recourse to state-funded representation.

1.3 The possibility of waiver

1.3.1 Waiver remains possible under the ECHR

Consistently with the ECtHR's position on mandatory defence, there is as yet no line of ECtHR case-law ruling out the possibility of waiver of legal representation to which a person is entitled under Article 6 ECHR. As can be seen from Part D, the English, Finnish (and to some extent the German) systems all appear to rely upon the possibility of a valid waiver of the right of access to a lawyer in plea bargaining, in so far as the national law allows this possibility (in some cases only in Germany). In the consultant's view, nothing makes that approach incompatible *per se* with the ECHR.

1.3.2 However, mandatory defence may be prudent

However, as noted earlier, the ECtHR places great emphasis on the role played by counsel in situations where the accused faces pressure and a risk of self-incrimination (*Salduz v. Turkey*); it has called for careful protection of the right to counsel in such context (*Pischalnikov v. Russia*); and it has even hinted at the need for prior legal advice before a waiver of the right to counsel can be valid (*Zachar and Cierny v. Slovakia*). Given the central role played by legal advice in ensuring the "legal consequences" of the waiver of trial rights (*Natsvlishvili and Togonidze v. Georgia*), it can be expected that any waiver of the right to counsel in plea bargaining would be very closely scrutinised by the ECtHR. And it may well be that, in practice, a plea-bargain in the absence of a lawyer will be likely to be found invalid absent

advice from a lawyer. Thus, though Article 6 cannot require mandatory defence, *de facto* that system may be regarded as the best way of avoiding violations.

Certain legislators (e.g. Belgium, Bulgaria, France, Estonia, Italy) appear to have taken this approach, either as a result of the application of a general approach to criminal proceedings (e.g. Estonia and Italy, where defence would be mandatory anyway) or specifically in relation to plea bargaining (e.g. France, Bulgaria, Belgium, where defence is mandatory in plea-bargaining where it would not be for ordinary proceedings). Given the criticisms levelled at the Georgian system, and the additional factor of the high conviction rate adding another layer of pressure to the decisions taken in plea-bargaining, it may be considered that the possibility of waiver of the right to counsel is so fraught with danger that it is safest to preserve a rule whereby representation is always required.

1.4 Sub-conclusion

The "interest of justice" test should arguably be presumed satisfied in relation to plea-bargaining (even if the same case might not be deemed to meet that test for an ordinary trial proceeding), such that legal defence is called for (state-funded if the person has not the means to pay). As a matter of ECHR standards, that right can be waived, but there are policy reasons against allowing this. That is the approach taken by a majority of the EU Member States covered (Belgium, Bulgaria, Estonia, France, Italy). Whilst one (Finland) tolerates waiver, the concerns expressed about Georgia's current plea-bargaining system would seem to imply a risk in following that approach. The English model, allowing guilty pleas to be entered without representation, is based on significant amounts of trust in (a) judicial oversight and (b) high prosecution standards, and yet unfairness arises in such cases.

2. Right to legal aid for all defendants / reimbursement

It is clear in light of both the ECtHR case-law, EU Legal Aid Directive and UNPGs that, where the interests of justice require representation, the availability of free legal assistance is still contingent on the person not having the means to pay. The question is how this is articulated. The two models that have arisen in the ECtHR case-law involve (i) means-testing at the grant stage; and (ii) exemptions from re-imbursement upon conviction, and they seem to be treated alike under Article 6(3)(c) ECHR.

As noted above, there are comparatively few examples of violations of Article 6(3)(c) arising from the application of national means criteria, and they offer minimal guidance. In any case, the determination of appropriate factors is essentially a competence of the Contracting States. There is no reason to suppose that any of the criteria currently applied by the Georgian LAS (i.e. social vulnerability) pose any problem in this regard. The question is when to apply them.

2.1 Means test at the grant stage

Some of the national systems in which legal representation is obligatory (Belgium, France, Italy) do not guarantee that this will be state-funded, instead applying the general financial means criteria from

their legal aid legislation. In Italy, this is a general approach to criminal proceedings: the defendant must be represented and will have to bear the cost if he does not meet the criteria; the same applies for plea-bargaining. In France, a person is not obliged to be represented in ordinary court proceedings, but is for plea-bargaining. The accused person with means thus has a choice: either pay for a lawyer, in which case the CRPC will be available, or decline to pay and forego any benefits of the CRPC. This has the effect that state funds are not expended upon defence of persons who are able to pay for a lawyer, yet the CRPC retains the integrity that follows from accused persons always being represented. It appears nevertheless likely that the efficiency savings brought about by the CRPC will be retained, as persons with means will likely choose to pay for representation and obtain lighter penalties under the CRPC rather than go through a trial process (with potentially heavier penalties) in order to avoid paying for a lawyer by representing themselves.

2.2 Reimbursement subject to hardship protection

As noted above, the ECtHR considers it compatible with Article 6 ECHR for states to require reimbursement of fees expended by the state on legal representation upon conviction, including when such costs arise from unwanted mandatory defence (*Croissant v. Germany*). However, this must not prejudice the fairness of the proceedings; in particular, the risk of costs must not dissuade a person from exercising the right to appoint legal aid counsel (*Ognyan Asenov v. Bulgaria*).

Several of the countries considered (Bulgaria, Estonia, Germany) have systems requiring, in principle, the repayment of sums expended by the state on mandatory defence; while others (Finland, England & Wales) feature systems requiring payment of contributions which will be enforced on conviction (though costs of duty representation at first appearances in England & Wales are not recoverable). It is possible that such practice may be reviewed in light of the EU Legal Aid Directive (with the exception of the English system, since the United Kingdom is not bound by that measure), though equally Member States may take the view that protecting those without means from enforcement of reimbursement orders amounts, in substance, to legal aid means testing and should be treated alike.

For present purposes, one difference appears key. It seems that means testing at the grant stage (Belgium, Estonia, France) is subject to the (more finely tuned) criteria of the legal aid system. By contrast, exemption from reimbursement orders (Bulgaria, Estonia, Germany) appears to be based on provisions of civil law enforcement designed to protect against hardship. The Finnish system, whilst based on post-conviction costs, falls somewhere between the two: legal fees are paid by the state, and on conviction the quantum of reimbursement is fixed by the legal aid law according to the general means criteria. This appears less likely to create the prohibited “dissuasive” effect.

2.3 Sub-conclusion

Legal representation in plea-bargaining, even if it is called for, may be subject to means eligibility so far as international standards are concerned. At present, before implementation of the EU Legal Aid Directive, there are two common policy choices in the EU in relation to plea-bargaining: (1) making the grant of legal aid for plea-bargaining subject to means, such that legal fees become payable by the

state if the accused qualifies and payable by the accused if he does not; and (2) organising the initial remuneration of lawyers from the state budget, with the accused liable to repay costs to the state on conviction, subject to rules protecting the person against hardship. In either system, even where defence is mandatory, the person with means who wishes to avoid paying for representation in plea-bargaining is not forced to do so: he is able to decline to go through plea-bargaining at all.

CONCLUSIONS & RECOMMENDATIONS

CONCLUSIONS

Mandatory defence

- There is no general obligation to institute a system of mandatory representation, be it for plea-bargaining or other procedures.
- As from 2019, an exception will exist for most EU Member States in relation to children; this should, in most cases, cover the court phase of plea-bargaining.

Is appointment of counsel mandatory for plea-bargaining?

- At present, in the absence of a case at the ECtHR considering the absence of a lawyer in plea-bargaining, it cannot be said that such procedures necessarily call for the involvement of counsel.
- Should that case arise, it is possible that the ECtHR would consider plea-bargaining akin to police questioning or the merits trial, i.e. a moment in which representation is required in principle.
- In any event, there is support for the view that, where a plea-bargaining procedure is envisaged, the "interests of justice" should be deemed satisfied, leaving only the question of means. Consistently with this, several EU Member States assume counsel is needed for plea bargaining irrespective of the nature of the case, e.g. Belgium, Bulgaria, France, Finland, Estonia.
- The alternative view is that the "interests of justice" will require representation on the same basis as usual, meaning plea-bargaining in minor or simple cases could take place without defence counsel, unless the accused appoints one privately. This is the approach taken in German and English law (the latter with only basic restrictions at the very court initial stage).
- In terms of the ECHR, any right arising on the basis of the above considerations is subject to the general possibility of waiver consistently recognised in the ECtHR's case-law.
- Whether to allow such waiver in national law is a matter for individual states. Some, e.g. France, do not permit it. Others, e.g. England & Wales, do permit it. The reality is that such waivers give rise to a risk of violations of Article 6 and place considerable responsibility with the courts.

Legal aid representation / reimbursement

- Where the right to legal representation arises, it arises only for those without sufficient means to pay. The international standards do not provide a basis for treating plea-bargaining differently.
- It is open to the state to make legal representation in plea-bargaining mandatory, but to fund such representation only where the person has insufficient means, the lawyer's fees becoming payable by the person if they are assessed as not meeting the means criteria.

- It appears that states operating mandatory defence systems mostly offer legal representation subject to no conditions at the point of grant, and require repayment upon conviction (e.g. Bulgaria, Estonia, Germany etc.) Under the ECHR, such a system must include protection at the time enforcement of the re-imbursement is sought; the systems considered have such rules.
- However, it is likely that states will review and possibly reform these practices in the coming years light of the EU Legal Aid Directive, with effect from 2019 or thereabouts.

RECOMMENDATIONS

Further outside input

- This assignment should be built upon in a subsequent consultancy to include a unit involving study of the Georgian system and its current operation in practice, and the proposal of alternative models in consultation with Georgian stakeholders and foreign experts.
- Legal aid institutions / ministries of justice in the countries studied in this report, particularly those with lower income per capita (i.e. Belgium and Bulgaria), and others (which the consultant can suggest) should be contacted to ascertain the extent to which the application of means criteria in plea-bargaining processes have produced efficiency savings overall.
- Bar associations and regulators in the different countries should also be consulted to establish which works better in terms of ensuring quality legal services: application of means criteria at the point of grant or initial remuneration from state funds with re-imbursement subsequently.

Consideration of alternative models

- The LAS should consider drawing up alternative means-based models for court-appointed representation in plea-bargaining, consulting with both local and foreign stakeholders with a view to assessing their potential benefits and pitfalls.
- The LAS should consider, based on its available statistical information, the potential savings that would follow from making legal assistance in plea-bargaining subject to a means condition. This would appear to be an obvious way of saving money whilst retaining mandatory representation.
- The LAS should also give consideration to “duty” systems for plea-bargaining in simple cases which can be quickly resolved, akin to the CRPC duty system in France, if these are not in place already. The consultant can obtain detailed information on such systems if required.
- The LAS should be careful in before advocating the possibility of waiver. To the extent that it envisages doing so, it should give extensive thought to the nature of cases in which such a waiver might safely be permitted, and the way in which legal rights are notified to accused persons.

The European Union angle

- The LAS should seek to participate, to the extent possible, in EU expert-level meetings and events regarding the implementation of the EU Access to a Lawyer Directive, EU Children Directive and EU Legal Aid Directive, with a view to gauging any reforms in Georgia against the developing policy landscape among its neighbours.

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