# Trial Waiver Systems in Europe

# Report on the Italian system of alternatives to the trial


## Associazione Antigone

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Funded by
the Justice Programme
of the European Union



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# I. Introduction

## 1. Project overview

Despite the apparently increasing popularity of trial waiver systems, since the publication of the report, international and domestic bodies have expressed concern about the potential impact of the increased use of trial waivers on the fair operation of criminal justice systems. The Parliamentary Assembly of the Council of Europe's ("PACE") Committee on Legal Affairs and Human Rights in September 2018 published a report entitled "Deal-making in criminal proceedings: the need for minimum standards for trial waiver systems" which identifies the need for a comprehensive study on the use of trial waiver systems with an eye to developing a set of recommendations designed to ensure that the threat to human rights, in particular the right to a fair trial, is minimised.

This Project aims to gather comprehensive and comparative information and on the basis of that to develop country-specific guidance on use of trial waiver systems without compromising defence rights. This information will also serve as a basis for wider discussion on reform on the EU level.

In the EU context the objective of the project is to provide comparable data and analysis on the implementation of safeguards provided for in the EU Directives. This data would allow us to identify potential common threats trial waiver systems pose to the right to a fair trial across the Member States and candidate countries and make recommendations to address them. This information will also be used to engage EU policy makers in the need for reform.

At the national level, the project seeks to identify risks and best practices specific to each jurisdiction. Each country covered in this project has a unique set of legal, social, economic and other circumstances in which trial waiver systems operate. The objective of the project is to develop practical, country-specific understanding of the impact of trial waiver systems on the right to a fair trial and develop guidance on best practices adapted to each country. This will be used as an essential tool for empowering domestic actors to bring about sustainable change.

## 2. Terminology / Scope of research

For the purpose of this research, a trial waiver is defined as: "a process not prohibited by law under which criminal defendants agree to accept guilt and/or cooperate with the investigative authority in exchange for some benefit from the state, most commonly in the form of reduced charges and/or lower sentences."

In the Italian criminal system there are several alternatives to a full criminal trial.

The trial waiver systems provided for in the national code of criminal procedure (c.p.p.) are:

- the **abbreviated judgement** (*giudizio abbreviato*) ex artt 438-443 c.p.p. and
- the **plea bargain** (*applicazione della pena su richiesta delle parti* also called "*patteggiamento*") ex artt. 444 - 448 c.p.p..

Other special procedures aimed at shortening criminal procedures are the fast-track trial (*giudizio direttissimo*) ex artt. 449-452 c.p.p., the immediate judgement (*giudizio immediato*) ex artt. 453-458 c.p.p. and the proceeding by decree (*procedimento per decreto*) ex artt. 459-464 c.p.p..

The **fast-track judgement** can be applied in cases when the defendant has been arrested in *flagrante delicto,* i.e. when he/she is found in the act of committing an offence. In these cases, the Public Prosecutor has the possibility to skip the preliminary hearing and bring the defendant directly before the judge of the trial for the judgment. In this case, the judgement shall take place in the ordinary forms, without prejudice to the right to request a plea bargain. The Public Prosecutor, after validation of the arrest, may request that the arrested person be made available to him/her for further investigation.

In cases when the overwhelming evidence of the crime points at the defendant, the **immediate judgment** allows him/her or the Public Prosecutor to ask the Judge for Preliminary Investigations to skip the phase of the preliminary hearing and thus move directly to the trial phase, thus speeding the entire procedure.

The **proceedings by decree** (also called *decreto penale di condanna*) foresees an anticipation of the conviction. In fact, if the case concerns crimes that can be prosecuted *ex officio* or following a formal complaint and the only penalty provided against them is a fine, the Public Prosecutor (PM) can ask the Judge for the Preliminary Investigations (GIP) the conviction to be immediately carried out. Thus avoiding a series of long and problematic bureaucratic practices, which would only engulf the work of the magistrates. The defendant may oppose the proceeding within fifteen days, in which case the trial shall take place in the ordinary form or by abbreviated judgement or plea bargain, according to the request of the opponent.

Article 599 bis of the Code of Criminal Procedure, inserted by Law No. 103 of 23 June 2017, regulates the so-called "**agreement in appeal**" (*Concordato anche con rinuncia dei motivi di appello*). The provision introduces a form of waiver of appeal, a sort of plea bargain at the appeal stage, through which the trial parties avoid much of the lengthy process, if they agree on the acceptance of some (or all) of the grounds for appeal. If the parties agree to allow all or part of the grounds for appeal, but waive any other grounds (on which they disagree), the court of appeal decides in chambers. The judge must carry out a review of the request and, if he does not accept it, orders a summons to appear at the full hearing, which will continue in the ordinary way. A further assessment is required from the public prosecutor, the defendant and the person civilly liable for the pecuniary penalty, when the grounds for granting the request involve a new determination of the penalty: all the parties must agree on the new penalty. This institution is not applicable for certain serious offences listed in paragraph 3 of Article 599 bis of the Code of Criminal Procedure.

## 3. Methodology

**Desk research**

The desk research was carried out using commentaries and case law materials available online and in the National Library in Rome and the Biblioteca Centrale Giuridica of Rome.

The main manuals and publications consulted are:

AA. VV., *Manuale di diritto processuale penale*, Giappichelli, Torino, 2018
AA. VV., *Procedura penale*, Giappichelli, Torino, 2020

F. Antolisei, *Manuale di diritto penale. Parte generale*, Giuffrè, Milano, 2003
M. Bargis, *Compendio di procedura penale*, CEDAM, Milano, 2020
A. Bassi - C. Parodi, *I procedimenti speciali*, Giuffrè, Milano, 2013
G. Cecanese, *Le «aporie» del patteggiamento*, Editoriale Scientifica, Roma, 2017
M. De Giorgio – L. Degl'Innocenti, *Il giudizio abbreviato. Aggiornato alla l. 4 luglio 2017, n.103 (riforma Orlando)*, Giuffrè, Milano, 2018
G. Fiandaca – E. Musco, *Diritto penale. Parte generale*, Zanichelli, Bologna, 2019
R. Garofoli, *Manuale Superiore di Diritto Penale. Parte Generale*, Nel Diritto, Roma, 2021
L. Grilli, *I procedimenti speciali. I riti alternativi nel giudizio penale*, CEDAM, Milano, 2011
F. Mantovani, *Diritto Penale. Parte generale*, CEDAM, Milano, 2020
G. Marinucci – E. Dolcini – G. L. Gatta, *Manuale di diritto penale. Parte generale*, Giuffrè, Milano, 2020
A. Sanna, *Il patteggiamento tra prassi e novelle legislative*, CEDAM, Milano, 2018
G. Spangher, *La pratica del processo penale. Vol I: I procedimenti speciali - Le impugnazioni - Il processo penale minorile - Accertamento della responsabilità degli enti*, CEDAM, Milano, 2012
P. Tonini, *Diritto processuale penale. Manuale breve*, Giuffrè, Milano, 2020
P. Tonini, *Manuale di procedura penale*, Giuffrè, Milano, 2020

The main legal journals consulted are:

Archivio Penale
Diritto Penale Contemporaneo (DPC)
Discrimen
Giurisprudenza Penale
Penale Diritto e Procedura
Rivista Italiana di Diritto e Procedura Penale
Sistema Penale (SP)

**Interviews**

10 interviews were carried out in the framework of this project. Interviewees belonged to 4 different groups of stakeholders, in particular:

- 6 lawyers,
- 2 former defendants,
- 1 judge,
- 1 prosecutor.

The 6 lawyers were selected also on the basis of their place of practice: 3 of them practice in the area of Rome (central Italy), 1 in the area of Turin (north), 1 in the area of Bologna (noth-center) and 1 in the area of Brindisi (south).

The 2 former defendants were two Italian males: 1 was interviewed for the plea bargain and 1 for the abbreviated judgement. The former was convicted for crimes against the property and the latter for homicide.

The judge interviewed was an experienced Judge of the Preliminary Investigations (GIP) that works in Naples.

The prosecutor interviewed was an experienced prosecutor who works in the antimafia but that has also worked in "regular" cases.

**Data analysis**

The Italian National Agency for Statistics (ISTAT) collects data from the Ministry of Justice also on the status of criminal trials and data is made available to the public through the ISTAT website. For this reason, we did not need to file a FOI request. Unfortunately, data on criminal trials are not automatized and are still collected by each tribunal individually; for this reason, data on alternatives to the trial are not very extensive and almost no breakdown is available.

Data that were openly available on the website included the total number of criminal cases and a breakdown labeled "riti alternativi" that seemed to include all alternatives to the trial; therefore, we asked for the breakdown of that category via the personalized requests to ISTAT. The breakdown of the data that we received included the plea bargain and the immediate judgement (that it was decided not to analyze in this research, since it does not fulfill the requirements of a trial waiver) instead of the abbreviated judgement. After speaking with the ISTAT employee responsible for the extraction of the data, we received the confirmation that data on other trial waivers was not available. Therefore, unfortunately the available data only covers the plea bargain.

Data on plea bargains is broken down to regions and crimes. The two datasets are separated. They both cover the years 2011-2017.

**Casefile review**

The casefile review was carried out analysing 10 casefiles: 3 regarded the plea bargain and 7 the abbreviated judgement. Since it was not possible to gather more casefiles, it was decided to carry out a focus group (see below). The issues that emerged from the casefile review were included in a dedicated section for each alternative to the trial.

**Focus groups**

In order to gather more information on the actual issues arising from the use of alternatives to the judgement, we also held a focus group involving 12 lawyers, 2 law professors and 1 regional guarantor of the rights of detainees. The discussion was very rich and aimed at exploring in depth some of the issues that were already highlighted during the interviews. The main conclusions of the focus group were included in the conclusions of this report.

A second meeting involving 3 lawyers, 3 law professors and 1 former General Prosecutor at the Court of Cassation, 1 regional guarantor of the rights of detainees and 1 Surveillance Judge (and president of a magistrates' association) was aimed at getting more information and different perspectives on the topic and on the recommendations to make to the various authorities. The discussion also included an overview on the upcoming reform of the criminal trial.

# II. Overview of criminal justice system

## 1. The Italian criminal justice system

Until the late 1980s, the Italian criminal justice system had predominantly an inquisitorial nature with only some elements typical of the adversarial system. The **new Code of Criminal Procedure** (c.p.p.), adopted by Presidential Decree no. 447 of 22 September 1988, changed the balance in the opposite way establishing an adversarial system with a few elements of the inquisitorial one. Therefore, due to the presence of some elements of both systems even if in different percentages, the Italian criminal justice system has always been defined as a "mixed" one.
In line with its predominant adversarial nature, criminal proceedings in Italy are based on three main principles:

**Separation of functions:** According to the first principle, the function of ruling on the matter must be alien to the investigating bodies. The Public Prosecutor and the Judge are both magistrates, belonging to the Judicial Order, but differ from each other for the functions exercised.
The Judge directs the collection of evidence and decides on the matter without any power of conducting investigations. On the other hand, the Public Prosecutor, with the assistance of the judicial police, is in charge of the investigative function but has no power in taking the elements gathered as evidence. As a matter of fact, only the Judge can decide whether the investigation's findings may become real evidence usable in criminal proceedings.

**Separation of phases:** The second principle establishes that the phase of seeking supporting elements to the parties (investigation) must be separated from the moment when elements are taken as actual evidence (trial). Ordinary criminal proceedings are thus divided in different phases: preliminary investigations, preliminary hearing and trial.

- Preliminary investigations are attributed to the Public Prosecutor, who decides whether the investigation must be pursued on the basis of the elements collected and eventually prepare the prosecution. With the adoption of the new Code of Criminal Proceedings, a new figure was introduced to monitor this phase i.e. the Judge for Preliminary Investigation (*Giudice per le indagini preliminari* - GIP). The GIP exercises a function of control on the activities of the Public Prosecutor and a guarantee function on the rights of the suspect. It does not normally exercise decision-making power since its judgement is only on procedural issues.
- Where the Public Prosecutor decides to initiate criminal proceedings, on the basis of the elements collected during the investigations, a preliminary hearing will take place. This is the moment when the suspect becomes the defendant. According to art. 112 of the Italian Constitution "The Public Prosecutor has the obligation to carry out the criminal action", when becoming aware of a crime. The strict compulsoriness of the prosecution is a safeguard of the principle of equality of all citizens before the law since, if the prosecution were not compulsory, the Prosecutor would have to assume the responsibility of discretion in the choice.

  The Judge for Preliminary Hearing (*Giudice per l'udienza preliminare* - GUP), as the GIP introduced by the new Code, is the figure responsible for deciding on the request of the Public Prosecutor to send the defendant to trial. If there are no elements to support the accusation,

the GUP pronounces a judgment of non-prosecution. If the accusation is supported by suitable elements, the Judge issues the decree ordering the trial. In this case the Judge forms the file for the trial containing those acts made during the preliminary investigation that can be used in the next phase.

- At the opening of the trial, the matter is entirely re-examined before the Judge who decides, in the presence of the Public Prosecutor and the defendant's lawyer, whether the elements collected during the investigation can be taken as real evidence. This ensures a greater dialectic and a tendential balance between prosecution and defense, under the control of the Judge who finds him/herself in a position of impartiality.

**Simplified procedures:** Not every criminal proceeding follows this precise process. As a matter of fact, according to the third principle on which the criminal system is based, the Code establishes some special procedures which allow to speed up the process. By skipping one or more phases of the ordinary proceedings, such institutions were designed to reduce the length of criminal justice providing the defendant with some benefits in exchange for its "right to trial".

## 2. Legality principle and mandatory minimums

The principle of legality is established, in the Italian legal system, by art. 25 of the Constitution ("No one can be punished if not by virtue of a law that has come into force before the fact committed") and it is reiterated and better explained by Article 1 of the Criminal Code ("No one can be punished for a fact that is not expressly provided for by law as a crime, nor with penalties that are not established by it").

The legislator, in regulating the various hypotheses of crimes and contraventions, determines the relative penalties by setting only minimum and maximum limits. And it is precisely within these limits, and taking account of any extenuating or aggravating circumstances, that the judge can discretionally assess the punishment to be imposed. In fact, in the application of the penalty, the judge must abide by three fundamental rules: keeping within the limits set by the law, applying the penalty in a discretionary manner and stating the reasons that led him to impose the penalty. As regards the first aspect, the expression "within the limits set by law" provides that a penalty higher/lower than the maximum/minimum may not be imposed. Modifications of these limits may be done only when the law itself provides for them, in accordance with the second paragraph of Article 132 of the Criminal Code. In particular, both the increase and the decrease in the penalty may exceed the limits set for each type of penalty only in certain cases expressly determined by law, which are indicated in the Criminal Code itself in Articles 64, 66, 73, 78, 133a, 133b, 136.

In the Italian system there are no particular constraints for the application of the penalty by the Judge in case of conviction. The Judge, in fact, has a wide discretion in determining the penalty to be applied to those who are found guilty of a crime. This principle is laid down in Article 132 of the Penal Code, where it is stated that "Within the limits set by law, the judge applies the penalty at his discretion". However, we speak of "bounded discretion" since the judge, in his evaluation, must respect two limits: the reasons justifying the use of discretionary power in increasing or decreasing the penalty must always be indicated; the judge may not exceed the limits established for each type of penalty, except in special cases expressly determined by law.

## 3. The Italian judiciary

The function of a Judge, as well as that of a Public Prosecutor, is exercised by members of the Judiciary. There is no separation of careers between judicial and prosecutorial offices.
The members of the Judiciary – both Judges and Public Prosecutors – are completely independent and autonomous as prescribed by Article 104 of the Italian Constitution.
Their autonomy refers first and foremost to its organisation: it is autonomous *vis-à-vis* the executive, in that the independence of the Judiciary would be undermined if the measures pertaining to the career advancement of the members of the Judiciary, and in more general terms, their status, were assigned to the executive power. The Judiciary is also autonomous *vis-à-vis* the Legislative power, in that judges are subject only to the law (Article 101 Const.).
When judges win the open competitive exam, they are assigned to a Court; when magistrates win the open competitive exam, they are assigned to a Public Prosecutor office. To ensure organizational autonomy, the competence on matters like transferrals and disciplinary measures regarding members of the Judiciary are conferred to a self-governing body (Article 105 Const.), the Superior Council of Magistracy (*Consiglio Superiore della Magistratura* hereafter - CSM), which guarantees the independence of the members of the Judiciary. A special role is played by the National Association of Magistrates (*Associazione Nazionale Magistrat*i - ANM), a powerful association which represents more than 90% of the about 9,000 Italian Judges and Prosecutors.

## 4. Length of proceedings

According to an investigative report, in the penal justice system, the average number of days needed to reach the first judgement is 392, an appeal can last 840 days while proceedings at the Court of Cassation can on average last 170 day.
The most recent data on the numbers of penal proceedings that are at risk of breaching the principle of reasonable duration date back to 2017. The reasons behind such an outdated data collection can be found in the fact that, differently from the civil sector, it hasn't been possible yet to develop a modern data collection technology.
According to those data, in 2017, 19% of the cases awaiting a first judgement were beyond the three-year threshold, the situation of the Appeal Courts was of 39.4% of cases beyond the two-year threshold, while the Court of Cassation had only 1.3% of cases beyond the one-year threshold. The Tribunal for Minors also had a three-year threshold and 14.9% of the cases were lasting longer.
The law 24 March 2001, n. 89 - so called *"legge Pinto"* - introduced the possibility to receive compensation for the excessive length of judicial proceedings. However, according to the latest report published by the Ministry of Justice, the offices that elaborate the payments are also falling behind due to the high number of sentences in favor of the applicant, the limited budget allocated to these payments and chronic understaffing. This further delay of payments caused in 2019 an increase of the number of litigation cases against the administration.

## 5. Covid-19 related issues

Since the first wave of the of Covid-19 pandemic, in Italy many have highlighted the risk of a possible uncontrolled spread of the infection among prisoners, which could also be favored by the chronic overcrowding of our prisons. In order to address this problem, a number of regulations were adopted that aimed at decreasing the number of the inmate population through the introduction of measures to facilitate access to alternative measures to detention (Decree-Laws nos. 18/2020 and 137/2020).
In addition, the Attorney General of the Court of Cassation has issued some notes (01/04/2020, 27/04/2020 and 29/10/2020) containing indications for the Public Prosecutors for the reduction of prison presence during the coronavirus emergency. Specifically, it was encouraged the granting of alternative measures suitable to release inmates that did not need to stay in prison, curbing the request and application of pre-trial measures and delaying the execution of measures already issued by the G.I.P.

# III. Types of Trial Waiver Systems

The introduction of trial waiver systems in the Italian criminal justice system responds to two different sets of needs. On the one hand, those related to the administration of justice, which for decades has been forced to face the endemic problems of the enormous amount of trials and their length, which often result in a backlog of court cases and high costs, also economic, for the community. On the other hand, there are the needs of the trial parties (especially the accused and the person offended by the crime or plaintiff) who have an interest in seeing their positions quickly defined and, in the specific case of the accused, to obtain a significant reduction in punishment against the waiver of certain guarantees of the criminal trial.

The trial waiver systems provided for in the national legislation (Code of criminal procedure – c.p.p.) are:

1. the **abbreviated judgement** (*giudizio abbreviato*) ex artt. 438-443 c.p.p. and
2. the **plea bargain** (*applicazione della pena su richiesta delle parti*, also called "*patteggiamento*") ex artt. 444 - 448 c.p.p..

## 1. Abbreviated judgement (*Giudizio abbreviato*)

### a) Legislative history

The **abbreviated judgment** was introduced with the new Code of Criminal Procedure, which came into force with Presidential Decree no. 447 of 22 September 1988.
In the 1990s, the Italian Constitutional Court intervened several times on the original form of the abbreviated judgement (Judgements of the Constitutional Court: 15.2.1991, n. 81; 31.1.1992, n. 23; 9.3.1992, n. 92; 1.4.1993, n. 129; 16.2.1993, n. 56; 23.12.1994, n. 442). After several interventions, the long-awaited legislative reform came in 1999 with Law No. 479 of 16 December 1999.

A new reform took place recently with the adoption of Law no. 33 of 12 April 2019, the legislator modified again the abbreviated judgement, excluding its application for crimes punishable by life imprisonment. The reason for the reform is to eliminate the possibility in such cases to benefit from the reward function of the abbreviated judgement (see below) and ensure a particularly severe penalty for crimes of particular social danger.

### b) Definition, conditions, process, institutions/officials involved

The **abbreviated judgement** definitely shortens the resolution of the trial. In the framework of the abbreviated judgement, the defendant may request that the trial be defined at the preliminary hearing on the basis of the evidence available at that time. This means that the judge will be called to establish a verdict or conviction or acquittal on the basis of the evidence that is presented at the preliminary hearing. If the defendant thinks that additional evidence will benefit the case, s/he can

include in the request of abbreviated judgement the request to the judge to acquire additional evidence that will be listed in the request. Additionally, if the judge believes that s/he cannot decide on the basis of the evidence before him/her, it can acquire, even *ex officio*, further elements necessary for the decision. At the end of the discussion taking place at the preliminary hearing, the judge issues the sentence which may be of acquittal or conviction (in fact, it is not necessary for the defendant to confess the crime in order to benefit from this alternative to a full trial), in which case the penalty, determined taking into account all the circumstances, is reduced by one third in case of a crime and by half in case of a misdemeanor (*contravvenzione*).

Following the reform approved on 2 April 2019 and in force since 20 April 2019 (Law no. 33/2019), the abbreviated judgement can't be applied anymore to crimes punishable by life imprisonment, such as, for example, the crime of aggravated murder or aggravated kidnapping. Before the reform, if the sentence was life imprisonment, it was replaced by imprisonment for 30 years.

The **decisions of the judge** on the length of the sentence are not discretional, but are regulated by the procedural code. In the case of a regular abbreviated judgement (so-called *rito abbreviato semplice*) the judge has no discretion in the decision on the length of the sentence, that is fixed. If the defendant, along with the request of an abbreviated judgement, also makes a request for the collection of additional evidence, the judge grants the abbreviated judgement if he considers the requested additional evidence to be necessary for the purposes of the sentence and compatible with the shortened procedure.

It is possible to point out that **this proceeding is always voluntary**. It can be implemented, under certain conditions, only at the request of the defendant and can never be imposed by the judge or other authority. The request of the abbreviated judgement may only be made by the defendant, either personally or through the lawyer (provided that the lawyer has received by the defendant a special authorization called "*procura speciale*"), orally or in writing. This alternative trial may be requested until the conclusions of the preliminary hearing are formulated (Art. 438 para. 2 c.p.p.). The hearing, just like the preliminary hearing, takes place without the presence of the public (*in camera di consiglio*); at the request of all defendants involved in the trial, the hearing can take place publicly.

There are some **limitations to the appeal** of the decision of the judge: according to art 443 c.p.p. the accused and the public prosecutor cannot appeal against sentences of acquittal and the public prosecutor cannot appeal against sentences of conviction, unless the judge sentenced the accused for a charge different from the one originally requested by the public prosecutor.

The abbreviated judgement can be used in the case of a criminal trial involving a **minor**. In the case of minors, the age of criminal responsibility is 14 as for art. 97 c.p.p.. Between 14 and 18 years of age, it is possible to indict a child only if the judge has ascertained that at the time of the act he had the capacity to understand and discern (art. 98 c.p.p.). This means that the penal responsibility is subordinated to the concrete ascertainment of said capacity. The court judging a minor is the Tribunal for Minors: it is a specialized body composed of four judges: two professional judges (so-called *togati*) - including the president - and two honorary judges, one man and one woman, chosen because of their merits in the fields of social welfare, biology, psychiatry, criminal anthropology, pedagogy and psychology. In the juvenile trial the presence of the defender is always guaranteed by the law with no exceptions and free legal aid following the same requirements of the trial for adults applies. To further strengthen the right to a lawyer, the legislator has introduced some peculiarities in order to strengthen

the right to a lawyer for the child. Art. 11 D.P.R. 448/1988 and Art. 15 of the Official Rules of Procedure regulate the right to an ex officio lawyer, which can be only professionals registered in the appropriate lists, prepared, updated and communicated to the Tribunal for Minors by the bar associations. To be included in the lists a lawyer must have worked before the juvenile judicial authorities or attended advanced courses relating to juvenile law. Obviously, it is always possible to choose a lawyer of trust. In the case of the abbreviated judgement, the request must be formulated personally by the child (even if under the age of eighteen) or by means of a lawyer with "*procura speciale*".

### c) How it is used in practice

As previously mentioned, statistical data on the abbreviated judgment is not available, so the analysis of the practice comes from interviews and case files analysis.

#### Lawyers

Of the six lawyers we interviewed, 3 work only as a trusted lawyer and 3 as both trusted lawyers and ex officio lawyers. All of them also work within the free legal aid framework.

The request for the proceedings to take place in the form of an abbreviated judgement can be filed up until the end of the preliminary hearing (or in the case of a fast-track trial, the request can be made orally directly during the hearing). The judge analyses the request in light of the circumstances of the case (e.g. taking in considerations the cases of non punishability) and considering (if s/he has not enough elements to make a decision or if the defendant requested so) the acquisition of further evidence and its compatibility with the shortened procedure (e.g. if the defendant requests the acquisition of too many pieces of evidence, the judge may decide to reject the request to proceed with the abbreviated trial and proceed with the full proceeding). As a matter of fact, the abbreviated trial completely skips the phase of the debate and the sentence is issued at the end of the preliminary hearing. The judge makes the decision solely on the basis of the evidence presented at the preliminary hearing.

Lawyers indicated that they advise their clients to make use of this proceeding for fundamentally two reasons:

1. If the evidence presented by the public prosecutor is enough for the judge to find their client guilty and further evidence would not be beneficial for their client. In this case, the abbreviated procedure would at least shorten the sentence by one-third;
2. If the evidence presented by the public prosecutor is enough to start the proceeding but insufficient for the judge to find their client guilty. In this case, the result of the abbreviated procedure could be the acquittal of their client.

Connected to these two reasons, 1 lawyer adds that he advises his clients to use alternatives to the trial to avoid the accumulation of penalties or to avoid the prosecution of the investigation (that could reveal the commission of other crimes). Another factor that was indicated by 2 lawyers regarded the fact that the shortened procedure is certainly less expensive than the full trial, so the economic condition certainly plays a role in this choice. 3 lawyers on the other hand indicated that this is not a consideration made at the time of the choice of the type of proceeding, but rather on the documents

that are at disposal of the prosecution and the defendant, whether defensive investigations were carried out and whether the defence was able to present memories and other documents, so if it appears that a conviction is inevitable, it is possible at least to have a shortened sentence.

Another advantage of these procedures that was indicated by 1 lawyer is the quick resolution of the proceedings (that would normally take even years to be resolved). Another lawyer indicated that the need to conclude the trial phase is also connected to the request of a possible mitigation of the pre-trial measures. In fact, the application of pre-trial measures, is subordinate to the existence of certain conditions: gravity of the contested crime; the punishability in concrete terms of the crime; the presence of serious indications of guilt. Furthermore, according to art 274 c.p.p., there should also be one of the following conditions: danger of tampering with the evidence, danger of escape, danger of reiteration of the crime. It is probable, but not guaranteed, that the judge will consider that these conditions will be removed once the first instance trial will be concluded. Therefore, this may explain the need, also for the defendant, to reach a judgment as soon as possible.

When asked if there are particular groups of defendants that are more likely to use the abbreviated judgement, only one lawyer indicated people with a criminal record and foreigners, while others did not identify any specific group. People with a criminal record are more likely to be convicted, as having a criminal record is generally assessed negatively by the judge. Foreigners, on the other hand, are more likely to be ineligible for benefits or alternative sentences to imprisonment, as they often lack documents, residence permits, work contracts and a suitable place of residence.

When asked how often they advise their clients to make use of alternatives to the trial, 2 of them answered 20% of their cases, 1 answered 35% of the cases, 1 answered between 30% and 40% of the cases and 1 answered 40% of the cases.

The length of a hearing for an abbreviated judgement is very variable and can span between 30 minutes and hours for complicated hearings, hearings with a high number of parties, or if along the abbreviated judgment, a request was filed to acquire further evidence. The judge is obliged to carry out the evaluation of the existence of a basis for the accused's conviction and the absence of circumstances excluding the criminal liability. Some of the interviewed lawyers indicated that generally the investigating file is more thoroughly examined in the case of the abbreviated judgement because the judgement will be based on its content.

2 lawyers have also represented children under 18 involved in criminal trials. It was pointed out that often in juvenile justice, authorities try to use much more alternatives to the trial such as probation to avoid involving the child to a full criminal trial. There are specialised units of police forces that work in the juvenile justice system, but they are usually present only in bigger cities. They did not find the training of officials that work with children sufficient.

### Defendants

For the purpose of this project, two defendants were interviewed. One of them was interviewed on the abbreviated judgement. The defendant was a 37-year-old male at the time of the proceeding and the crime that was accused of committing was homicide. He had a trusted lawyer that he recalls to have met two or three days after the arrest. He does not recall if anyone read him his rights because the events took place a long time ago. He and the lawyer discussed his case with the case file while he

was in pre-trial detention and opted for an abbreviated judgement because the evidence against him was overwhelming. He admitted his guilt but it was not one of the conditions to obtain the abbreviated judgement. The hearing lasted approximately two hours. He was generally satisfied with the lawyer's assistance even if he would have liked to present more evidence to his benefit that in his opinion would have helped to better frame the events that took place.

### Judges

Within the framework of the project one judge was interviewed to assess judges' view of the two alternatives to the trial. The judge who was interviewed is an experienced Judge for the Preliminary Investigation (GIP). Being a GIP, the variety of the cases that are brought in front of her is very wide. In the abbreviated judgement, the judge is involved at the time of the preliminary hearing at the moment of the exercise of the criminal prosecution or, when there is no preliminary hearing (e.g. immediate judgement), after the notification of the immediate judgement.

Regarding the defendants that benefit from the abbreviated judgement the tendency that she perceived from her daily practice is that generally, defendants that are more likely to ask for an abbreviated judgement are those who are in pre-trial detention or subjected to another pre-trial measure (not necessarily a detention pre-trial measure). Usually in these cases, there is overwhelming evidence against the pre-trial detainee and the abbreviated judgement gives the benefit of a considerable reduction of the penalty. The graver the crime, the higher the reduction of the penalty in terms of years. She also noticed that while up until some years ago, the abbreviated trial was mainly used by defendants with a pre-trial detention measure, in the last few years there are more and more defendants without a pre-trial detention measure and crimes with a long statute of limitation (e.g. economic-related crimes) resorting to the abbreviated judgement even if the evidence is not overwhelmingly against them because they want to avoid the burden of long and expensive trials.

The role of the judge in the abbreviated judgement is different than in the case of the plea bargain because in the former the judge has to ascertain in the merits whether a person is responsible. It is a full review of the case with a conviction made beyond reasonable doubt. The judgment is made "allo stato degli atti" - at the state of the acts (only based on paper evidence presented at the preliminary hearing that sometimes consists of thousands of pages). The judge also makes an evaluation of the usability and unusability of all acts of a probative nature, i.e. whether they can be used or have to be nullified. Speed is essential in the courtroom, but the judge has the possibility to create moments for an oral debate if he has any doubts or wishes to clarify a specific point. Also, if the case material is not enough, the judge has investigative powers and can, ex officio, order an integration and create an adversarial debate. The judge makes a study only on the basis of papers, but the evaluation that has to be made is the same as that of the trial judge. For this reason, the abbreviated judgment is more burdensome for the judge while the orality of the debate of the full trial helps to better understand the case.

### Prosecutors

For the purposes of this project, one prosecutor was interviewed. He works in the antimafia prosecution office where he has been for several years. He pointed out that in the past, in the

antimafia there were almost no cases of alternatives to the trial, but now alternatives are used in more and more cases. The plea bargain is not possible for mafia cases, but the abbreviated is possible.

He explained that the abbreviated judgement is a kind of voluntary renunciation of the phase of the debate in which the defendant is content to be judged on the basis of the evidence already present. And as a result of this renunciation s/he has a discount in the sentence. The prosecutor cannot offer the abbreviated judgement because it is a choice of the defendant. Indeed, generally, if a defendant knows that s/he will be acquitted, s/he chooses the abbreviated judgement to be acquitted in a short timeframe. There are two possible phases when the defendant can request the use of an alternative judgement: when the notice of the conclusion of the preliminary investigation is given to the defendant and defence counsel (the prosecutor files all the acts and notifies them of the decision to take the defendant to trial). This is a phase when they have access to the acts. The second phase takes place when the Public Prosecutor requests the indictment at the preliminary hearing.

The time that takes him to prepare for an abbreviated judgment varies depending on the case: if it is a mafia-related crime it can even take one month, if it regards other crimes such as homicide or an extortion, even only half an hour. In general, the quality of the investigation is the same that should be carried out for a full trial. The prosecutor directs the investigation and if there is a need to gather more evidence or conduct additional investigations, the prosecutor orders the police to carry out specific acts.

The abbreviated judgment can last several hours if it is a complicated case. At the hearing the lawyer is the one obliged to participate while the participation of the defendant is not compulsory. If the defendant doesn't have a lawyer an ex officio lawyer is called. The hearing is not open to the public because hearings are close. The judge checks for the existence of circumstances excluding the criminal liability and in the abbreviated judgment the court can also question the defendant if the defendant requests it or the judge has the need to ask him/her questions. The judge also checks that the evidence is compatible with brevity. The defendant can also present documents to defend their case but this has to be done before asking to use an alternative judgement.

### Casefile analysis

Casefiles that regarded the abbreviated judgement were 7 (3 were a "conditioned" abbreviated trial). In 2 cases, the hearing was only 1; in 4 cases, the hearings were 2; in 1 case, this information was not provided.

Regarding the personal data of the defendants: 6 were male and 1 was a female, 3 were foreign nationals and 4 Italians, 3 were in their 30s, 2 in their 50s and 2 in their 60s. 1 was subjected to home arrest for about 7 months and 6 were not subjected to pre-trial detention (but 1 was given the obligation to present himself to the police with a prescribed frequency).

In 1 case, the casefile contained the minutes of the arrest and confiscation.

In 1 case, the casefile contained the minutes of the arrest and declaration of the police.

In 1 case, the casefile contained the minutes of the confiscation and blood analysis results.

In 1 case, the casefile contained a report from the police, the minutes of the hearings, the acceptance of the request to use the abbreviated judgement, the discussion and the sentence.

In 1 case, the casefile contained: presentation of the accused at the hearing for validation of the arrest and fast-track trial; European criminal record certificate; certificate of pending charges; minutes of the arrest; letter of surrender of arrested persons; notification of offence by the Police Headquarters; search and seizure report; technical assessment of seized narcotics; minutes of the validation hearing; order validating the arrest and applying pre-trial detention.

In 1 case, the content of the casefile was similar to the previous one and contained: presentation of the defendant at the hearing for validation of the arrest and fast-track trial; certificate of criminal record; certificate of pending charges; arrest minutes; search and seizure minutes; technical assessment of seized drugs.

In 1 case, the casefile contained: European criminal record certificate; certificate of pending charges; search and seizure report; technical assessment of seized goods; minutes of the hearing; sentence.

The transcription of the minutes of the hearings were delivered in 6 cases.

In 7 cases, the lawyer was a trusted lawyer and in 0 cases the lawyer denounced a violation of the procedural rights of the defendant.

In 1 case, the case regarded production, selling and detention of narcotics (art.73, par 1 of the law on drugs that prescribes 6 to 20 years of prison and a fine between 26,000 and 260,000 Euros) and the defendant was found not guilty.

In 2 cases, the case regarded production, selling and detention of narcotics (art.73, par 4 of the law on drugs that prescribes a reduction by one third or half of the penalty in some cases) and the defendant obtained 1 year and 6 months in 1 case and 2 years in the other.

In 1 case, the case also regarded art. 73, but a different paragraph (par. 5, that entails the same crime but for a small amount of drugs, hence the penalty is between 6 months and 4 years and a fine between 1,032 and 10,329 Euros) and the defendant obtained 1 year and 6 months of prison.

In 1 case, the case regarded driving under the effect of narcotics (art. 187 of the road traffic code that prescribes between 6 months and 1 year of prison and a fine 1,500 and 6,000 Euros) in which the defendant obtained 4 months of prison.

In 1 case, the crime committed was escape from prison (the penalty is 1 to 3 years of prison) and the sentence received was 1 year because of some aggravating circumstances.

In 1 case, the crime committed was introduction into the State and trade of goods with fals lables (art. 474 of the penal code that prescribes between 1 and 4 years of prison and a fine between 3,500 and 35,000 Euros) and the defendant was found not guilty.

In 7 cases, the defendant did not confess.

In 7 cases, the defendant was not sentenced to pay the legal fees in favour of the civil parts.

In 4 cases the defendant did not obtain any other benefit while in 3 cases they did.

In 1 case in which the defendant did not obtain any benefit. from the analysis of the casefile it is possible to state that with the ordinary trial the defendant *may* have been better able to demonstrate that he would have been worthy of the benefit of the suspended sentence or his crime could have been downgraded to paragraph 5 (that entails the same crime but for a small amount of drugs, hence the penalty is between 6 months and 4 years and a fine between 1,032 and 10,329 Euros); however, he would have risked a more severe sentence.

**Procedural rights:**

Out of the 3 foreign national defendants, 0 of them made use of translation and interpretation services.

Information on the rights:

In 7 cases, the defendant was informed of his rights to: a lawyer, interpreter, remain silent and against self-incrimination, the consequences of the choice of an alternative to the judgement (in 4 cases, it was pointed out that the lawyer was the one who explained the consequences of the choice and in 1 case it was pointed out that the defendant was not informed of the consequences of the choice of the abbreviated judgement). This information was extracted from the casefile.

In 7 cases, the Judge checked for the existence of: evidence against the defendant, eventual circumstances excluding the penal responsibility of the defendant (not in 1 case), aggravating or mitigating circumstances, and whether there was any violation of the defendants' procedural rights.

## 2. Plea bargain (Applicazione della pena su richiesta delle parti also called "patteggiamento")

### a) Legislative history

Inspired by the Anglo-Saxon institution, the plea bargain has been introduced in the Italian penal system by the **new Code of Criminal Procedure** in 1988 at articles 444-448.
The institution was aimed at reducing the number of pending trials in order to streamline and speed up the judicial system by celebrating a lower number of debates. Conceived as a reward procedure, the plea bargain allows the defendant, whether requesting for or consenting to an agreement with the Public Prosecutor, to obtain a series of benefits avoiding to go to a lengthy criminal trial.
At the time of its entry into force, the agreement was an exclusive competence of the parties, not providing for any control of the Judge on the adequacy of the penalty or the chance of rejecting it in the event of unfavorable assessment. Shortly after, such a procedure was declared as constitutionally illegitimate. In judgment **no. 313 of 1990**, the Italian Constitutional Court ruled that Article 444 was against paragraph 3 of article 27 Const. which requires the Judge to evaluate the observance of the principle of proportionality between the amount of the punishment and the seriousness of the offence, and thus the concrete re-educational value of the punishment.

The judgment of unconstitutionality stressed the intervention of the legislator which, with **Law no. 479 of 16 December 1999**, modified the institution of the plea bargain. In line with the opinion of the Court, the law stated that the Judge must verify the admissibility of the request, ascertaining whether the offence falls within the limits of the procedure, whether the legal qualification is correct and whether the penalty indicated is congruous.
Despite the modifications, in the first ten years from the entry into force of the new Code of Criminal Procedure, the deflationary effects that justified the introduction of the plea bargain did not reach the desired results. In the attempt to boost its use, the legislator intervened with the adoption of **Law no. 134 of 2003** extending the area of applicability of the institution. The scope of the plea bargain has been significantly extended by splitting it into the two figures of the "extended plea bargain" and "restricted plea bargain" depending on the length of the sentence resulting from the agreement.
With the entry into force of **Law no. 103 of 2017** (*"Riforma Orlando"*), other significant novelties were introduced to the plea bargain procedure. First of all, a new disposition was added to Article 488 c.p.p. (para. 2-bis) so as to provide for the circumstances in which the Public Prosecutor and the defendant may lodge an appeal against the sentence before the Supreme Court of Cassation. Moreover, it was restored the agreement of the parties also before the appeal hearing ("*concordato in appello*"). Commonly referred to as "plea bargain on appeal", the institution was already present, albeit with some differences, in the Code of 1988; after a pronouncement of unconstitutionality in 1990 (Constitutional Court, no. 435 of 1990) and a new edition in 1999, it was definitely repealed in 2008. The new legislation introduced into the Code of Criminal Procedure Article 599-bis which states that the defendant and the Public Prosecutor may agree in advance on whether to accept, in whole or in part, on the grounds of appeal.
Finally, some modifications have been made by **Law no. 3 of 2019** with regard to crimes against the public administration and the additional sanctions provided for these crimes by the Italian Penal Code (Art. 317 bis c.p.). Specifically, paragraph 3-bis was added to Article 444 c.p.p. establishing that for some crimes against the public administration the agreement of the parties can be subordinated to the exemption from the additional sanctions or to the extension of the effects of the conditional suspension also to such additional sanctions. If the Judge is against these conditions as included in the plea bargain request, the entire agreement will be rejected. Furthermore, a new provision has been introduced by paragraph 1-ter of Article 445 c.p.p. whereby, along with the sentence of application of the penalty, the Judge can apply additional sanctions.
These are both significant innovations because they extend the agreement also on additional sanctions, providing for a wide margin of discretion of the Judge.

### b) Definition, conditions, process, institutions/officials involved

The plea bargain, as laid down by the Italian law, is a special procedure aimed at closing the criminal case without trial. The institution entails, on the one hand, benefits for the defendant especially in terms of length of the sentence and, on the other hand, benefits for the criminal system in terms of procedural economy.
In the plea bargain, the defendant, its lawyer by proxy or the Public Prosecutor can suggest an **agreement to the other party** proposing a certain sentence for the crime on which the investigations have been conducted. A unilateral request coming from only one of the parties obliges the Judge to

set a time limit for the other party to express a possible consent. In the case of a unilateral request, the non-requesting party may give its consent or express its dissent; where the Public Prosecutor does not consent to the plea bargaining, he must justify the reasons (Art. 446, para. c.c.p.). If the judge considers them unjustified, it may in any case grant the reduction of the sentence.

Excluded from the **applicability of the plea bargain** are the proceedings for crimes of child prostitution, juvenile pornography and gang rape. Among the exclusions, there are also all those people who have been declared habitual and professional criminals, criminals who are declared to have a particular inclination towards committing crimes, and recidivist criminals, when their prison sentence is more than two years (by itself or combined with a monetary penalty).
In proceedings for other crimes, such as those of embezzlement or extortion, the request for a plea bargain is admissible only if the price or profit from the crime has been fully reimbursed.

According to Article 444 c.p.p., the sentence proposed can be an alternative to detention[1] or a pecuniary penalty, reduced by up to one third, or a custodial sentence which, reduced by up to one third, does not exceed five years of imprisonment. This provision is the so-called **"extended plea bargain"** as introduced by the 2003 reform.
The original design of the institution, nowadays known as the **"restricted plea bargain"**, is enshrined in Article 445 which provides as the only requirement a maximum length of 2 years of prison sentence (net of the reduction of up to one third) on which the defendant and the Public Prosecutor can agree. No maximum threshold is provided in the case of a pecuniary penalty only.

The code does not require the defendant to explicitly acknowledge his responsibility at the moment in which he requests the plea bargain or subscribes to the agreement with the Public Prosecutor. However, there are different jurisprudential approaches to the meaning of the plea bargain in terms of guilt. The first approach considers that the plea bargain judgment implies an admission of guilt; the second approach considers that, according to articles 444 and 445 c. 1 bis of the Code of Criminal Procedure, the plea bargaining judgment is equivalent to a conviction, but does not have any effect in civil or administrative proceedings; the third approach adopts a strictly literal interpretation of article 444 of the Code of Criminal Procedure, excluding that the plea bargaining judgment constitutes an admission of guilt.

The plea bargain may be **requested during preliminary investigation and until the conclusions of the preliminary hearing.**

[1] Alternatives to detention are the so-called substitutive sanctions of short detention sentences, provided for by the Law, 24/11/1981, No. 689 and subsequent modifications. In this case, the judge, in pronouncing the sentence of conviction and if deciding to determine the duration of the detention within two years, can substitute such penalty with that of the semi-detention, which entails, in any case, the obligation to spend at least ten hours a day in prison. When the the judge determines the detention within the limit of one year, s/he may also replace it with supervised liberty, which entails a ban on leaving the city of residence unless authorised and the obligation to report periodically to the local police station. When he deems it necessary to determine it within the limit of six months, s/he may replace it with a proportionate fine determined according to certain pre-established criteria. Any other alternative measures to detention may be requested by the defendant or his lawyer during the execution of the sentence after the final conviction.

The natural time for the agreement to take place is at the preliminary hearing, when the defendant has already had the opportunity to acquaint himself with the entire investigation file and to weigh up his defensive strategy.
The procedure of the proposal depends on the stage of the proceeding:

- During the preliminary investigation, the suspect will be able to make a joint request for a plea bargain along with the Public Prosecutor and the Judge will set a hearing for the decision;
- After receiving the notice of the conclusion of the preliminary investigation, the defendant or its lawyer may make a plea bargain request to the Public Prosecutor who, after giving an opinion, will forward all documents to the Judge for the Preliminary Investigation who will set a date for a closed hearing (*camera di consiglio*) to make the decision on the admissibility of the agreement;
- During the preliminary hearing, the defendant may choose to settle the case by plea bargain by making an express request, either orally or in writing, until the presentation of the conclusions at the preliminary hearing;
- In the case of fast-trak proceedings (*giudizio direttissimo*) or proceedings pursuant to Article 550 c.p.p. (*per citazione diretta*) the deadline for the submission of the plea bargain request is the opening of the trial;
- In the case of the immediate judgement (*giudizio immediato*) and of the penal decree of conviction (*decreto penale di condanna*) the request for the plea bargain must be made within 15 days from the notification of decree.

At this point, it is important to point out that in the Italian penal system, unless the defendant is summoned by the judge, his/her presence is not compulsory. However, the presence of the lawyer is always compulsory. In fact, the defendant may issue a "*procura speciale*" to his/her lawyer to act independently, in his/her name and on his/her behalf. The lawyer with a "*procura speciale*" has a wide margin of negotiation with the Public Prosecutor to determine the agreed penalty, since the "*procura speciale*" with which the power to "plea bargain" is conferred is characterised by a wide margin of discretion granted to the lawyer in this matter. The "*procura speciale*" must be issued in writing and a written agreement with predefined points is not required. However, if limits or conditions are set in the mandate received, the lawyer is not allowed to deviate in any way and any overstepping of the mandate is unlawful. If the lawyer exceeds the limits set by the "*procura speciale*", the agreement and the subsequent approval by the judge are invalid. In such a case, the judge, having ascertained the illegitimate use of the mandate and therefore the existence of an agreement in conflict with the defendant's wishes, does not ratify the agreement and may order the appearance pursuant to article 446, paragraph 5 c.p.p.

The only case when the presence of the lawyer, defendant and Prosecutor is not compulsory is the case of the plea bargain during the preliminary investigations, regulated by article 447 c.p.p. If during the preliminary investigations a joint request by the Public Prosecutor and lawyer (or request by one party with written consent by the other) is submitted, the judge sets a date for the hearing. If the request is presented only by one party, the judge sets by decree a time limit for the other party to express consent or dissent. At the hearing, the Public Prosecutor and the defence counsel are interviewed if they participate. Thus, in the sole case of a plea bargain requested during the preliminary investigation, at the hearing at which the Judge of the Preliminary Investigations decides

whether or not to accept the agreed penalty, the parties (i.e. the prosecutor and the lawyer) may not even appear. This is because, since the judge only has to assess whether or not the conditions exist for ratifying the agreement already reached between the prosecution and the defence, the presence of the lawyer is not strictly necessary.

Once the agreement has been submitted, the **Judge is responsible for verifying the admissibility of the request**. Specifically, it must check whether the offence falls within the limits of the procedure, the correctness of the legal qualification and the adequacy of the penalty indicated. The decision is made on the basis of the state of the acts, i.e. on the basis of the investigation file and, if necessary, the defender's file. The simplification consists in eliminating the taking of evidence and in using directly the elements collected in the investigation phase for the purposes of the decision. If the Judge considers the content of the agreement to be correct in all its parts, it orders the application of the penalty. If not, it rejects the request and orders that the case be proceeded with in the ordinary trial. Finally, on the basis of the acts, it may consider that the defendant must be acquitted.
The Judge can thus choose whether to accept or reject the proposal for a penalty submitted by the parties by mutual agreement, but he can never modify the agreement itself.

The proceeding is always voluntary and can never be imposed by any public authority. If appropriate, the Judge can order a personal appearance of the defendant at the hearing in order to verify its actual will (the defendant's participation is not compulsory but the participation of his lawyer is at all times) and the voluntariness of its request or consent (Art. 446 para. 5 c.p.p.).
In plea bargaining, the defendant knows in advance the amount of punishment that will be applied if the Judge accepts the agreement. The "the right to trial" is sacrificed by the fact that the defendant, by agreeing with the Public Prosecutor, directly affects the quality and quantity of the sentence, so that he/she can concretely evaluate whether it is convenient to abandon the guarantees that the trial offers.

In case of dissent, the Public Prosecutor may appeal; in other cases, **the judgment is unappealable** (Art. 448 para. 2 c.p.p.). The Prosecutor and the defendant may submit the case to the Supreme Court of Cassation "only for reasons related to the expression of the suspect's will, to the lack of correlation between the request and the sentence, to the incorrect legal classification of the fact and the illegality of the sentence or of the security measure" (Art. 448 para. 2-bis c.p.p.).

Payment of court costs, accessory penalties and security measures (with the exception of confiscation), will not be applied. The sentence resulting from the plea bargaining is not entered in the criminal record certificate at the request of the person concerned.
The plea bargain is not applicable to **minors** as the legislator deemed minors unable to evaluate the circumstances of their case and the repercussions of their choices in this regard.

## c) How it is used in practice

As previously mentioned, it was possible to collect and analyse statistical data on the plea bargain, so the analysis of the practice comes from interviews, statistical data and case files analysis.

### Lawyers

The lawyers interviewed explained that the negotiation phase of a plea bargain usually takes place in court even before or during a recess of the hearing. In practice, either the lawyer or the prosecutor ask for a suspension of the hearing to discuss the possibility of an agreement. The suspension of the hearing lasts a few minutes and finally one of the two parties reports to the judge the agreement that was made. Usually it is the lawyer that proposes the plea bargain to the prosecutor, they discuss the charge and the amount of penalty taking in consideration all aggravating and mitigating factors and then they present it to the judge for approval. A plea bargain is not conditioned to an admission of guilt and is not per se an admission of guilt (see above regarding the different jurisprudential approaches to this issue). The judge, after verifying that there are basis for the accused's conviction and examining the casefile, can either approve the deal or reject it but cannot modify it. Once the plea bargain is rejected by the judge, it is not possible to ask for a new one, but the lawyer can ask to proceed with an abbreviated judgement.

Because the negotiation is done between prosecutor and lawyer, 1 lawyer indicated that the most important factor in this alternative judgement is the possibility to communicate with the prosecutor before the hearing.

The choice of benefitting from an alternative judgement is of the defendant. The defendant might have various reasons to do so. 2 lawyers indicated that when the evidence against their client is strong and they think a full trial will lead to a conviction, they advise their client to use the plea bargain to ensure a lower sentence. Another reason listed by 2 lawyers is the certainty of the outcome (which is left to the discretion of the judge in the abbreviated judgement) and 1 lawyer pointed out the fact that it is much quicker. 1 lawyer indicated that the economic condition might play an important role because alternative judgements are much cheaper than the full trial. 3 lawyers on the other hand indicated that this is not a consideration made at the time of the choice of the type of proceeding, but rather on the documents that are at disposal of the prosecution and the defendant, whether defensive investigations were carried out and whether the defence was able to present memories and other documents, so if it appears that a conviction is inevitable, it is possible at least to have a shortened sentence. 1 lawyer also indicated that pre-trial detention also has an impact, as it makes the person more "tired" and ready to plea bargain in order to get out of prison, especially if it is the first detention. 1 lawyer also added that the choice of plea bargain is made when the lawyer is able to make a good deal with the prosecution.

Another advantage of these procedures that was indicated by 1 lawyer is the quick resolution of the proceedings (that would normally take even years to be resolved). Another lawyer indicated that the need to conclude the trial phase is also connected to the request of a possible mitigation of the pre-trial measures.

When asked if there are particular groups of defendants that are more likely to use an alternative trial, 1 lawyer indicated that from indirect experience, ex officio lawyers often resort to plea bargaining, even when defending non-EU foreigners, without taking into account that a final conviction will seriously affect the legitimacy of their stay. Another lawyer thought about defendants accused of so-called road crimes (e.g. driving while drunk or under the effect of a narcotic), where the plea bargain and the substitute penalty of community service result in an appropriate reduction of the penalty and, if the community service is carried out successfully, the crime is extinguished. Another lawyer indicated that the plea bargain is used only for defendants who do not run the risk of the repetition of the crime.

When asked how often they advise their clients to make use of alternatives to the trial, 2 of them answered 20% of their cases, 1 answered 35% of the cases, 1 answered between 30% and 40% of the cases and 1 answered 40% of the cases.

In general, lawyers indicated that the time of a plea bargain hearing is very variable (15-30 minutes) but that it can last even only 5 minutes.

When asked which alternative judgement is most used, 1 lawyer evaluated the plea bargain to be the most used because compared to the abbreviated judgement it waives the preliminary investigation phase but at least guarantees a low quantum of sentence. 1 lawyer, on the other hand, was of the opinion that the most used alternative to the trial was the abbreviated judgement because, unlike the plea bargain, an appeal can be lodged on the merits of the case.

1 lawyer did not think it was possible to make a ranking between the two but that it depended on the circumstances of each case.

Among the downsides of the plea bargain, 1 lawyer indicated that the lawyer might have little power on the agreement on the amount of penalty, compared to the prosecutor. In fact, if the lawyer insists on a sentence that the prosecutor considers too low, it is likely that the agreement will not be reached and, therefore, that the defendant will be forced to undergo the full trial, renouncing the benefits of the alternative trial. The latter option would obviously be less convenient for the defendant than for the prosecution.

### Defendants

For the purpose of this project, one former defendant who had benefited in the past from the plea bargain was interviewed to collect his view of this kind of proceeding. He is an Italian male, aged 42 at the time of the criminal proceeding. He was accused of several crimes against the property for which he already had several proceedings open. For this reason, the lawyer (his trusted one) advised him to proceed for some with a plea bargain and for some with an abbreviated judgement. In this way he was able to get a shorter sentence even if it was still a consistent one. He did not need to admit his guilt to benefit from the plea bargain and was not pressured by anyone to opt for this kind of proceeding. He added that the costs of the trial did not affect his decision. His lawyer explained to him what these alternatives to the full trial entailed. He said that the judge was present at the time of the negotiations of the plea bargain and that he was also present at the hearing that lasted around 5 minutes. Regarding his procedural rights, he recalled that his trusted lawyer was contacted by the police and the lawyer came to the Prosecutor's Office. A police officer handed him a paper with his

rights (Letter of rights). He was able to discuss with his lawyer the case in depth when he was taken to prison for pre-trial detention; there the meetings with his lawyer were not restricted in any way. He was satisfied with his lawyer's assistance. He reported that they also had no problems with the disclosure of the casefile and that they had enough time to review it.

### Judges

According to the judge interviewed, the plea bargain is less frequently used. It is used for crimes that are not particularly grave. The defendant is usually not in pre-trial detention and has an interest for a fast resolution of the matter. Among the benefits, there are no accessory penalties (e.g. the suspension from working in the public administration) and the proceeding is not mentioned in the criminal record.

In the framework of the plea bargain, being a judge of the preliminary investigations, she is involved at the notification of the start of the investigation, during the preliminary investigation, conclusion of preliminary investigation.

She pointed out that the role of the judge in the plea bargain is different than the role she has in the abbreviated judgement. The plea bargain is not a judgment on the criminal responsibility of the accused; however, if the judge realises that the defendant is not guilty, s/he does not allow the use of a plea bargain. Indeed as a preliminary check the judge has to evaluate whether there are causes of acquittal. Upon reviewing the agreement that the lawyer and prosecutor present, the judge must be careful to evaluate the legality of the agreement: congruous punishment, punishment calculated in the right way keeping into account the mitigating factors and the correct legal qualification of the fact. Unlike the case of the abbreviated judgement, she does not think the plea bargain to be a burdensome procedure.

### Prosecutors

The investigations that the prosecutor has to carry out are the same that are needed for a full trial and the quality of the investigation is the same. To prepare for the plea bargain it doesn't take much, around half an hour, and the discussion with the lawyer may take place directly at the hearing. Generally to benefit from the plea bargain, the lawyer makes a written request to the prosecutor, who presents it to the judge, otherwise during the hearing prosecutor and lawyer make a written agreement. The prosecutor can offer to use a plea bargain and discusses it with the lawyer because the defendant without a lawyer cannot discuss any alternative to the full trial (indeed, the lawyer is the one obliged to participate in the hearing while the defendant hasn't this obligation). The lawyer explains the deal to the client but the prosecutor tries to make himself understood also to the defendant. At times the lawyer and the prosecutor dictate the written minutes directly to the registry clerk. The whole hearing might last even only 5 to 10 minutes. There are some guidelines or advice regarding the plea bargain but there is nothing mandatory for the respect of the principle of independence. The judge has to check that the penalty is congruous to the crime; if s/he deems the sentence too low s/he can reject it. Among the benefits of the plea bargain, the crime is not registered

in the criminal record. It is important to point out that the plea bargain has not the aim of ascertaining the criminal responsibilities of the defendant.

### Data analysis

As it was mentioned in the methodology, data on plea bargains is broken down to regions and crimes. The two datasets are separated and cover the years 2011-2017.

In the dataset of the number of cases divided per region, it is possible to find: the number of cases that reached the indictment phase (divided per region), the number of cases in which a defendant chose the plea-bargain, and the percentages of the plea bargain cases.

The collected data shows that the number of cases that reached the indictment phase and the number of cases in which the plea bargain was used decreased, especially from 2014. The total number of indictments went from 466,274 in 2011 to 402,315 in 2017 and the total number of plea bargains went from 6,084 in 2011 to 4,285 in 2017. The percentages of use of the plea bargain also decreased from 1.30% in 2011 to 1.06% in 2017. The total number of cases of indictment are higher in the south (113,206 in 2017), follow central Italy (87,661 in 2017) and North west Italy (84,837 in 2017), follow North east Italy (62,205 in 2017) and last come the islands (54,406 in 2017). In terms of percentages of use of the plea bargain, the positions of the regions are different: north east Italy (1.45% in 2017), north west Italy (1.30% in 2017), central Italy (0.90%), the south (0.87%) and the islands (0.85%).

In the dataset on the number of cases divided by crime (the most relevant ones in numerical terms were chosen), it is possible to find the number of cases that reached the indictment phase, the number of cases in which a defendant chose the plea-bargain, and the percentages. The breakdown of the number of cases per crime is not equal to the total, probably because in each casefile were included more crimes.

From the data analysed it is possible to observe that the percentages of plea bargain cases on the total number of cases is extremely low and has been quite stable through the years (between 1.06% and 1.30%). The crimes that were considered in this breakdown were the most common ones: crimes against the person, crimes against the family, crimes against the property, forgery, crimes against the public administration, crimes against the administration of justice, crimes against drug laws. With the exception of crimes against drug laws, the percentages per each crime are all very low (seldom above 1%). One interesting percentage regarded the violation of drug laws because the percentage rises and ranges between 3.35% and 5.74%. One of the reasons might lay in the fact that the majority of the crimes that fall under this category have a lower sentence than the other categories of crimes (even though for bigger crimes sentences can also be very heavy).

### Casefile analysis

Casefiles that regarded the plea bargain were 3. In 3 cases, the plea bargain took place at the hearing held with a fast-track trial (giudizio per direttissima). In 2 cases (not considering the case in which the deal was not accepted by the judge), the hearing was only 1.

In 2 cases, the deal was accepted by the judge, while in 1 case, the judge did not accept the deal. In this second case, the deal was not accepted because the judge did not think that the agreed deal was congruous to the circumstances of the case, so rejected the deal and decided to proceed with the form of the fast-track trial.

Regarding the personal data of the defendants: 3 were male, 2 were foreign nationals and 1 Italian, 2 were in their 30s and 1 in his 50s. 1 was subjected to home arrest and 2 were not subjected to pre-trial detention (but 1 was given the obligation to present himself to the police with a prescribed frequency).

In 1 case, the casefile contained the minutes of the arrest and confiscation.

In 2 cases, the casefile was heavier and contained at least: presentation of the accused at the hearing for validation of the arrest and fast-track trial; certificate of criminal record; certificate of pending charges; minutes of the arrest; letter of surrender of arrested persons; notification of offence by the Police Headquarters; search and seizure report; technical assessment of seized narcotics.

The transcriptions of the minutes of the hearings were delivered in 3 cases.

In 3 cases, the lawyer was a trusted lawyer and in 0 cases the lawyer denounced a violation of the procedural rights of the defendant.

In 1 case, the case regarded production, selling and detention of narcotics (art.73, par 1 of the law on drugs that prescribes 6 to 20 years of prison and a fine between 26,000 and 260,000 Euros) and the defendant obtained 2 years and 8 months.

In 1 case, the case also regarded art 73, but a different paragraph (par. 5, that entails the same crime but for a small amount of drugs, hence the penalty is between 6 months and 4 years and a fine between 1,032 and 10,329 Euros) and the deal was reached at 1 year and 8 months of prison and a fine of 1,600 Euros.

In the case that was not accepted by the judge, the case regarded art. 73, par 1 of the law on drugs carried out by several people as a concurrent offence (art 110 of the penal code that prescribes that each person carrying out the offence shall be be punished according to the penalty prescribed by the penal code) and the deal reached with the Prosecutor was of 11 months of prison and a fine 3,000 Euros with the benefit of the conditional suspended penalty.

In 3 cases, the defendant did not confess.

In 3 cases, the defendant was not sentenced to pay the legal fees in favour of the civil parts.

In 1 case (without considering the case where the deal was not accepted), the defendant did not obtain any other benefit while in 1 case he did.

In 1 case, the Public Prosecutor did not file the request for pre-trial detention only following the plea bargain agreement, which is why the public prosecutor opted for this procedure.

**Procedural rights:**

Out of the 2 foreign national defendants, 0 of them made use of translation and interpretation services.

Information on the rights:

In 3 cases, the defendant was informed of his rights to: a lawyer, interpreter, remain silent and against self-incrimination, the consequences of the choice of an alternative to the judgement (in 2 cases, it was pointed out that the lawyer was the one who explained the consequences of the choice). This information was extracted from the casefile.

In 3 cases, the Judge checked for the existence of: evidence against the defendant, eventual circumstances excluding the penal responsibility of the defendant, aggravating or mitigating circumstances, and whether there was any violation of the defendants' procedural rights.

# IV. Defence rights in TWS

## 1. Access to a lawyer

**The right to a lawyer is absolute and can not be waived.** There are no exceptions (even criminal lawyers have to have a lawyer if they are accused of a crime). The right to be assisted by a lawyer is constitutional: it is prescribed by Articles 3 and 4 of the Constitution and by Articles 386, 364, 96, 97 and 678 of the c.p.p.. If a suspect is not informed about his right to have a defendant, any information obtained from him/her is not valid to be used in a trial (Art. 350, para. 6 and 7 c.p.p.).

### Appointment procedures

When an **individual is arrested**, the police have to follow the procedures prescribed by Article 386 c.p.p.. First of all, the Public Prosecutor is informed of the arrest (*habeas corpus ex* Art. 13 of the Italian Constitution), secondly the suspect is informed of the right to appoint a legal counsel as provided by Article 96 c.p.p. (this information is given through the Letter of Rights, that enlists all the other relevant rights as well). If the suspect is deprived of her personal freedom, the appointment may also be made by a close relative.
If there is no necessity to proceed with the arrest, the appointment of a lawyer takes place when the individual assumes the **status of suspect**. This can happen in two cases. The first case is when during the questioning of an individual as a witness, the latter reveals elements that make him/her a suspect. In that event, the Prosecutor has to suspend the questioning and inform the individual of the right of legal assistance and immediately proceed to the appointment of a lawyer (Art. 63, c. 1 c.p.p.)[2]. The second case takes place when an investigation carried out by police enforcement leads to an individual. In this case, the individual is listed in a register (Art. 335 c.p.p. *registro delle notizie di reato*) thus assuming the status of suspect. If such a person must undergo an act guaranteed by the presence of a lawyer (e.g. interrogation, search), he/she is notified of the so-called information of guarantee (Art. 369 c.p.p. *informazione di garanzia*) that lists its rights, including the right to appoint a lawyer.
For some acts carried out in the investigation phase, the lawyer must only be notified (e.g. search and seizure); for others, its presence is mandatory for validity (e.g. interrogation, inspection, confrontation). In any case, when the law does not provide for an advice notification or when, although notified, he/she does not participate in the act, the lawyer has the right to view and to extract a copy of the minutes of the acts performed.

If the person, whether arrested or not, doesn't have a lawyer or the lawyer can't be reached, Article 97 c.p.p. provides for the ***ex officio* lawyer** to step in and provide legal assistance to the arrested. The lawyer is formally appointed by the judicial authority, from a list prepared in advance by the bar association. The Prosecutor then communicates the name of the appointed lawyer to the suspect. The

[2] It is important to note that at times there are cases in which an individual is called to be questioned as a witness even if the prosecutor already has elements to accuse him/her. This stratagem is used to induce the individual to spontaneously present himself to the place of questioning. In this case, as he/she should have been considered a suspect since the very beginning of the questioning, none of the information extracted during his/her questioning can be used *ex* art 63 c. 2.

lawyer must be informed of the appointment before any act for which the Code requires the mandatory presence of an attorney can be carried out. Its duties cease if and when the suspect instructs its own lawyer.
The lawyer appointed *ex officio* has the same powers, rights and duties as the one appointed by the suspect. However, some interviewees have pointed out that it may happen that the lawyer appointed by the Prosecutor, the police or the Judge is not, in practice, as strongly motivated as one appointed by the defendant. In general no influence is exerted by the police or by the prosecutor on the work of the lawyer appointed *ex officio.*

Article 98 c.p.p. also establishes that the suspect can ask to be admitted to benefit from **free legal aid** according to the norms that regulate it. D.P.R. n.115 of 30 May 2002, which (among other things) regulates the expenses of the State regarding legal aid, establishing that legal aid is granted to all persons (citizens, foreigners and stateless) that have an income lower than 11.500 euro. It is possible to benefit from legal aid during all phases of the proceedings.
Even if it is not possible to waive the right of legal representation, the suspect is entitled to repeal his lawyer whenever he/she wants. This is possible also in those cases when the suspect avails himself/herself of free legal aid at the State's expenses because of financial situation (Art. 107 c. 4 c.p.p.). In this case, the repeal of a lawyer and the appointment of a new one need to be authorised by the Judge, as for law 134/2001, that provides for the recourse to free legal aid.

### Communications among suspects/defendants and lawyers

Once appointed, **the suspect has an absolute right to meet its lawyer at any time.**
As the person is not deprived of liberty, the access to legal assistance as communications with the lawyer are easy since there are no obstacles to the exercise of rights as guaranteed by Articles 96 to 108 c.p.p..
The person deprived of personal liberty has the right to meet with the defense counsel at any time, even when in pre-trial detention (Art. 104 c.p.p.). Therefore, the lawyer is entitled to have immediate access to the place of custody (Art. 36 dispositions. att. c.p.p.). Moreover, following the implementation of the EU Directive on the right to interpretation and translation in criminal proceedings, defendants have the right to be assisted by an interpreter also during interviews with their own defenders (Art. 104, co. 4 bis c.p.p.).
Article 104 c.p.p. also regulates the communication between the suspect and his lawyer: the arrested person has the right to meet his/her lawyer both immediately after the arrest and as soon as the pre-trial detention has started. However, the exercise of this right may be suspended in two cases:
1) for a maximum of 5 days, in proceedings relating to particularly serious crimes and only in exceptional circumstances - e.g. there is the risk that the investigation may be jeopardized (Art. 104, para. 3, c.c.p.);
2) for a maximum of 96 hours in case of arrest *in flagrante delicto* or detention (Art. 104, para. 4,c.p.p.).
The law does not indicate the exact circumstances and limits for the suspension of this right, which represents a compression of the right of the suspect[3].

[3] The doctrine and the jurisprudence indicate as possible circumstances of applicability of this suspension the cases regarding organized crime and terrorism. It is also important to underline that, as the exact circumstances of suspension are not indicated in the law, the doctrine expresses concerns regarding the theoretical possibility of suspension in all cases. On the other hand, the jurisprudence (Cass. pen., Sez. I, n. 1806 of 1992) has

### Application of the right to legal assistance in trial waiver systems

From the point of view of the right to legal defence, the **judge** who was interviewed for this project pointed out that the Italian legal system prescribes almost from the very beginning the presence of the lawyer and this is perceived as the most important guarantee to the defendant's right to technical defence and indeed it cannot be waived. The lawyer has the role to provide guidance and knowledge as to his/her rights. She believes that in general (but there are exceptions) having a trusted defender is better than having an ex officio lawyer because the level of trust between lawyer and defendant is better guaranteed in the case of the former and the latter often has many cases to follow and less time for each individual case. She also believes that free legal aid has helped the ex officio defence, but that there are still issues that should be resolved.

According to the **lawyers** interviewed, they are usually called during the phase of the denunciation, arrest, investigation. Only in a few cases they indicated to be called at the phase of the hearing, appeal and second level appeal. Some indicated that they are not usually called too late, but 2 stated that this problem is more connected to the phase of the validation hearing and the fast track trial (because speed is essential) than in connection with the alternative trial systems. None of them has ever experienced a hamperement of access to his/her client but rather a slowdown of this phase for organisational reasons or because the police or Carabinieri let them see their clients only right before the validation hearing. They generally indicated that there are no particular problems linked to the interconnection between legal aid and alternative trials. Also, one of them pointed out that if it is necessary, the lawyer can request and often obtain a reasonable period of time to prepare the necessary documentation to be filed to access free legal aid for the assisted person. Furthermore, a lawyer pointed out that some problems for lawyers working in the legal aid framework concern, as it happens with a regular trial and not only with alternatives to the trial, the limitation in being able to benefit from useful means to carry out defensive investigations.

Regarding the problems posed by the unlimited and unsupervised access to their clients, the time they have to prepare for a hearing and the confidentiality of their meetings, lawyers pointed out different circumstances that affect their answers. There are three different case-scenarios in case of a new criminal case: the first one entails no arrest and no pre-trial detention. The second one entails the arrest and a fast-track trial and the third one entails the arrest and no fast-track trial.

In the "no arrest and no pre-trial detention" case, the procedure usually starts with the reception by the indicted person of the notification of the start of a procedure against him/her, then the indicted person appoints a lawyer (or an ex officio lawyer if s/he doesn't have one) and since there is no deprivation of liberty, access to a lawyer is not hindered and there are no specific problems related to eventual alternative trials (both abbreviated judgement and plea bargain) that the defendant and lawyers might request. Indeed, the choice of the judgement can be discussed by lawyer and client and after making the decision, the lawyer files the request to proceed with an alternative trial.

established that the social dangerousness of the suspect is not a sufficient reason to grant the suspension of this right.

The second case is the one that poses the most problems. It usually takes place when the person is arrested *in flagrante delicto*. In this case, after the arrest, the validation hearing takes place within a very short time and the arrested person meets his/her lawyer (often a lawyer called *ex-officio* with whom there is no level of trust) only a few minutes before the validation hearing. Also, the prosecutor might be able to hand the casefile over to the lawyer only five minutes before the beginning of the validation hearing, so the lawyer has very little time to study it and only a few minutes to meet with the client; the consultation might even take place in the corridor before entering the court hearing with very little privacy and limited possibility to have interpretation services to assist in case of a non-Italian speaking person. Because the person was caught *in flagrante delicto*, the prosecutor may request the use of a fast-track trial (*giudizio per direttissima*) that takes place right after the validation hearing. The lawyer might in this circumstance ask to proceed with an alternative trial (more often with a plea bargain) that usually is carried out immediately.

The third case is the one of the arrest and no fast-track trial. In this case, the person is arrested, the validation hearing is carried out and the preliminary hearing is set. The judge might issue a pre-trial detention order, so the defendant will be held in prison until the trial. Lawyers indicated that if their client is held in prison, no particular issues can be raised regarding the access to their client, consultation conditions, access to the casefile or time to prepare for the hearing.

Interpretation services available at the hearings are often described as poor. Also, the interpretation of consultations with the lawyer are possible if the consultation takes place right before the validation hearing, where it is possible to request an interpreter. For other consultations taking place outside this scenario (therefore all other necessary consultations) the interpreter is usually a trusted one chosen and paid for by the party. Only one lawyer indicated that, when the interpretation was not provided to a client who could not understand the hearing, the lawyer filed a formal complaint and obtained the annulment of the pre-trial detention order that descended from that hearing. In another case, the result of such a complaint (in this case made on the lack of a translation of documents) has not been made known yet. A third lawyer indicated that judges are not very attentive to this issue and complaint mechanisms had no effect. Translation services are also provided for the most important documents such as the notification of the conclusion of investigations, summons to appear in court, notice of hearing, sentences and ordinances. One lawyer mentioned that there are cases in which clients are pressured to renounce their right to the translation of documents.

The **judge** who was interviewed for this project, pointed out that, regarding the right to translation and interpretation, when the trial arrives in front of the GIP, often the prosecutor already knows whether the foreign defendant knows the Italian language and the GIP relies on the prosecutor (however, if this is not the case, the need for an interpreter is evaluated at the moment). If the Public Prosecutor knows that the defendant does not understand the Italian language, an interpreter is called and the translations are already arranged by the Public Prosecutor. If the defendant is not present, it is important that the acts are translated. English and French are the most spoken (and interpreted) languages and there are very qualified interpreters also with legal knowledge. In case of less common languages often there are interpreters who are not used to translate their legal language and so it is the duty of the judge to try to simplify as much as possible the lexic used. In cases of defendants who do not speak English and speak some particular dialects, each tribunal can arrange agreements with embassies or universities to help with these interpretations.

The **prosecutor** pointed out that, regarding the rights of the defendant, every time s/he is interrogated, the presence of their lawyer is compulsory and it is also compulsory to read them their rights. It is also important to point out that a confession is not enough to bring a case to court and usually the confession comes after the evidence was presented. At times it may happen that defendants admit doing something to the police without the presence of the lawyer. However, their statement cannot be used in a trial and they have to be repeated in front of a prosecutor with the presence of the lawyer to be valid.

## 2. Access to case file and information on charges

In the Italian legal system, Article 111 para. 3 of the Constitution provides for a series of guarantees aimed at ensuring the effectiveness of the right to defence within the framework of criminal proceedings: the right to obtain the acquisition of evidence in one's own favour under the same conditions as the prosecution, the right to have sufficient time to prepare the defence and, upstream, the right to be informed about the reasons for the accusation against their own person.

**Right to information regarding ongoing investigations**

The Italian law provides for the obligation of immediate registration of the news of crime (Art. 335 c.p.p. *registro delle notizie di reato*), with the indication of the person under investigation where it has been identified. However, it is not foreseen that the suspect is informed of this registration, but he/she can learn of it upon request. Where there is such a request, the Public Prosecutor's Office is obliged to inform the suspect of the existence of investigations, with two exceptions:
1) when the proceedings concern particularly serious offences, listed in art. 407, co. 2 lett. a) c.p.p. (among which are those of mafia association and of terrorism);
2) the communication may also be postponed for a period of no more than three months, if there are specific needs of secrecy connected to the nature of the investigation.

Apart from the hypothesis of the request, the suspect learns of the investigation carried out against him/her when a precautionary measure is ordered, when he/she is notified of the so-called information of guarantee (Art. 369 c.p.p. *informazione di garanzia*) i.e. the notice served to the suspects before the performance of an act guaranteed by the presence of a lawyer (e.g. interrogation, search) or at the end of the preliminary investigations (Art. 415 bis c.p.p. *avviso di conclusione delle indagini preliminari*).

It is necessary to make explicit the distinction between suspect and defendant with regard to the benefit of the right to information with respect to the accusations made against them:

Suspect under investigation: In the Italian system, the suspect may not be aware of the investigations until the notice of conclusion of the preliminary investigations ex art. 415-bis c.p.p is notified. This communication must include "the summary statement of the fact for which the proceedings are being carried out, of the regulations that are presumed to have been violated, of the date and place of the event". Where, however, "guaranteed" acts are to be carried out (to which the lawyer has the right to attend), already during the investigation an information of guarantee must be delivered to the suspect. This information must obligatorily contain the indication of "the rules that are assumed to

have been violated, the date and the place of the fact" on which the investigation is being conducted. Only in some cases, therefore, the suspect is informed of the reasons for the investigations against him or her during their course.

Defendant in criminal proceedings: The suspect acquires the quality of defendant after the exercise of criminal prosecution by the Public Prosecutor (indictment). The act - request or decree - must contain "the statement, in clear and precise form, of the fact, of the aggravating circumstances and of those that may entail the application of security measures, with the indication of the relevant articles of law". The defendant, therefore, who has already been summarily informed through the notice of conclusion of the preliminary investigations, is informed in greater detail of the content of the accusation at the moment of the start of the criminal action, before the Judge of the Preliminary Hearing (G.U.P.) or directly before the Judge of the hearing.
The rules are in line with art. 6 (3) of the EU Directive 2012/13 on the right to information in criminal proceedings, which stipulates that the time limit for information on the accusation is the moment when the case is submitted to the judicial authority.

### Information on the reasons for arrest or detention and on the measure of pre-trial detention

The law clearly requires that suspects or accused persons who are arrested or detained are informed of the reasons why these measures have been adopted.
Article 386, para. 3 c.p.p. requires the judicial police who have carried out the arrest or detention of a suspect to indicate the reasons for it in the report, which must be drawn up, at the latest, within 24 hours of the deprivation of liberty. This provision, which has been in force since 1991, is in line with the obligation to provide information on the reasons for arrest laid down in Article 6(2) of the EU Directive 2012/13.
Information on the reasons for the application of pre-trial detention is guaranteed by art. 293 of the Code of Criminal Procedure since its first formulation in 1988. According to what is provided, at the time of execution of the measure, the judicial police must deliver to the person concerned a copy of the order that has issued it, in which the Judge must provide adequate reasons for the decision (Art. 292, para. 2, lett. b, c, c-bis c.p.p.).
The issue of the right of interpretation and translation nevertheless represents a critical point with regards to the communication of this information.

### Access to the casefile

In implementing Directive 2012/13/EU, the Legislative Decree 101/2014 did not include any provisions dedicated to the rights of access to the case's materials. The Italian legislature considered the pre-existing procedural norms as already sufficient to ensure the right and therefore maintained that. However, even if the law as it stands does regulate extensively such rights, the doctrine has often raised concerns over the lack of clarity of the discipline. In line with these considerations, probably a more organic legislative intervention could have been a wiser option.

### Whether, when and how access to case materials and documents is provided

Access to the materials of the case is granted always or at least in the majority of cases. Such materials may include documents, photographs, video and audio-recordings as well as information by police officers and prosecutors.
However, a critical element, which in some situations can represent an obstacle to files' access, is the extraction costs. The extraction of copies, in fact, remains at the expense of the interested party, with the sole exception of those who benefit from free legal aid. This may limit, in fact, the effectiveness of the right of access to the materials and documents of the case. Moreover, the prices of such extractions are not determined by law but by the registry of each judicial office and can therefore vary from one court to another, even significantly.
A second potential obstacle to the benefit of this right is represented by the timing of access to the file, which is fundamental for the preparation of the defense. In principle, this is allowed after the notification of the notice of conclusion of the investigations, which is followed by the full cognisance by the defence of the documentation contained in the Public Prosecutor's file (Art. 415-bis c.p.p.). In practice, suspects and defendants are generally granted access to the file's documents in time to exercise their rights of defense. However, the procedures for obtaining copies can be time-consuming. Obtaining the documents in due time is particularly problematic for the preparation of the validation hearing or the interrogation of the accused. It is above all in cases of summary judgement that the time available to defence lawyers for consulting the documents concerning their clients is extremely limited.
In principle, the times in which access to case materials and documents are granted are:

- during preliminary investigations;
- at the time of the first interview;
- once preliminary investigations are concluded, with the full disclosure of the relative documentation (so-called "public prosecution dossier" Art. 415 bis c.p.p.).

Another important point to consider is the extent of documents that can be accessed. The law generally provides that suspects and defendants are guaranteed access to all documents and records related to the investigation (Art. 116 c.p.p.), but does not provide further indications or restrictions as to which documents should be materially provided to them. It is not defined what is essential or, in other words, for which documents or under which circumstances access can be refused.

### Access to file in alternative judgements

Both in the **abbreviated judgement** and in the **plea bargain**, access to evidence and to the file is granted to the lawyer, as well as the right to make copies, without substantial differences from ordinary proceedings.

As it concerns the defence's right to submit evidence before the negotiations:

**Abbreviated judgement**: there is no negotiation but for the purposes of the decision the judge uses the documents contained in the casefile and the evidence presented at the hearing (Art. 442 para. 1bis c.p.p.). The defendant, while making use of the abovementioned evidence, may file the request for the abbreviated judgement along with the request of an integration of the evidence necessary for

the purposes of the decision. The judge shall order the trial to be adjourned if the requested additional evidence is necessary for the purposes of the decision and compatible with the shortened procedure, taking into account the documents already acquired and usable. In this case the Public Prosecutor may request the admission of his/her contrasting evidence (Art. 438 para. 5 c.p.p.). According to the judge interviewed, for the abbreviated judgment the judge makes a study only on the basis of papers, but the evaluation that has to be made is the same as that of the trial judge. For this reason, the abbreviated judgment is more burdensome for the judge while the orality of the debate of the full trial helps to better understand the case. Nevertheless, if the case material is not enough, the judge has investigative powers and can, ex officio, order an integration and create an adversarial debate.

**Plea bargain**: Agreement: If the parties find an agreement, the Judge will decide on the basis of the acts acquired up to that moment.

Both in the **abbreviated judgement** and in the **plea bargain** there are no substantial differences in the timing of disclosure compared to ordinary proceedings. The disclosure normally takes place: at the time of the first act that the lawyer has the right to attend and, in any case, before the interrogation (art. 369 bis c.p.p.) or, at the latest, with the notification of the conclusion of the preliminary investigations (art. 415 bis c.p.p.).

## 3. Information on rights

The right to be informed of one's rights, although not expressly provided for in the constitutional provision, represents a fundamental prerequisite for the exercise of the right of defense.
Article 24(2) of the Italian Constitution says that "defence is an inviolable right at every stage and instance of legal proceeding". This, together with article 111 (3) about the right of evidence collection and the need to have enough time to prepare one's case, forms the basis of information about rights. These articles protect the right to defence which cannot exist independently of the right to information: without access to information there is no effective right to defence and the principle of equality of arms wouldn't be respected.

### Novelties introduced in accordance to EU law

A specific regulation concerning information on the rights of which the person deprived of liberty is entitled to was introduced by Legislative Decree No. 101 of 1 July 2014 (in force on 16 August of the same year), enacted to transpose the European Directive 2012/13 on the right to information in criminal proceedings.
Article 1 of the decree, in particular, intervened on the Italian Code of Criminal Procedure, amending articles 293, 294, 369, 369-bis, 386 and 391. Art. 2, on the other hand, has modified law 69/2005 on the European arrest warrant.

### Letter of Rights

The main novelty introduced by the decree is the introduction of the obligation of the authorities to deliver a **written communication containing the indication of his/her rights** (hereinafter, "Letter of Rights"). Before the implementation of the Directive, in fact, the judicial police and the Public Prosecutor's Office only had to inform the person concerned of the right to appoint a trusted lawyer and of the right, failing that, to be assigned a public defender. The information must be delivered at the time of the arrest *in flagrante delicto* or of the execution of the order ordering pre-trial detention, or at the time of the first interrogation by the Public Prosecutor or the delegated judicial police. At the latest, in cases where the subject is not arrested, remanded in custody or interrogated, the communication of information on rights must take place with the notice of conclusion of the preliminary investigation pursuant to article 415-bis.

With regard to the execution of orders ordering pre-trial detention, Article 293 c.p.p. introduces the obligation to deliver to the suspect/defendant a written communication containing a list of the rights the person is entitled to, **in a language he/she can understand**. If the comprehensibility of the language is undoubtedly a central aspect, the new paragraph 1-bis, however, provides for an exception for the hypothesis in which the detainee does not speak or understand Italian and the "letter" is not immediately available in a language he or she understands: in these cases, by way of exception, the information can be provided orally, although the delivery of the written translation at a later date remains mandatory. A similar provision, with the same exception as regards the mandatory translation, has been introduced in art. 386 of the c.p.p. for the hypothesis of arrest *in flagrante delicto.*

In order to make the new obligations to provide information more effective, dispositions have been included in articles 294 and 391 of the Code of Criminal Procedure which require the judge (at the time of the interlocutory hearing or at the hearing to validate the arrest) to check that the communications have actually been made in the prescribed form - or at least that they have been given orally - and to proceed personally to give or complete the omitted or deficient communication. No further remedy is provided, however, in the event that the judge fails to remedy the lack of information.

In art. 369-bis of the Code of Criminal Procedure, among the information on the right of defense that the Public Prosecutor must provide to the suspect, it has been included the right to be assisted by an interpreter and to obtain the translation of fundamental acts (Art. 369-bis, para. 2, letter d-bis). As regards the provisions concerning the appointment of a lawyer, it has been provided that the Public Prosecutor informs the suspect of the appointment of a public defender at the latest at the conclusion of the preliminary investigations (Art. 369-bis, para. 1).
Finally, art. 2 of Legislative Decree 101/2014, intervening on art. 12 of Law no. 69/2005, introduced the obligation to deliver the "Letter of Rights" also at the time of the execution of a European Arrest Warrant.

At the administrative level, the Ministry of the Interior has adopted a circular (prot. no. 559 / D / 007.15 / 022571 of August 11, 2014) that provides the State Police with operational guidelines, including models of Letters of Rights in Italian, English, French, Spanish, German and Chinese. The absence of a ministerial model of Letter of Rights in Arabic represents a critical element, since this

language is very widespread among people deprived of their liberty. If it is true that many local offices, in practice, have prepared pre-printed forms in Arabic, it is desirable the development of a uniform model issued by the ministerial level.

Another critical issue is the lack of specification in the law of the right of suspects/defendants to keep a copy of the letter. In several cases, the letter is read but not delivered to the person deprived of liberty. Moreover, there is a lack of provision for the delivery of the same in any format that may be necessary due to particular conditions of the person concerned (for example, with provision for the braille code for the blind).

The rights that are included in the Letter of Rights are: the right of access to a lawyer; the entitlement to free legal advice and the conditions of obtaining free legal advice; the right to be informed of the charge against them; the right to interpretation and translation; the right to remain silent; the right to access the documents on which the measure is based; ) the right to inform consular authorities and notify family members; the right to access emergency medical assistance; the right to be brought before the judicial authority within ninety-six hours for the validation of the arrest / no later than five days from the beginning of the execution of pre-trial detention in prison; and the right to appear before the judge to be questioned and to lodge an appeal in cassation against the order deciding on the validation of the arrest / to appeal against the order ordering the precautionary measure and to request its replacement or revocation.

### Application in trial waiver systems

According to the **lawyers** that were interviewed for the purposes of this project, regarding the right of information of their clients, they generally point out that almost all of them receive formal notice of their rights in writing, but often it is not until the first meeting with the lawyer that they are actually made aware of them, especially in the case of someone who speaks a foreign language because templates are available only in some languages. The information about their right to an interpreter is not always understood and lawyers indicated that they are often offered an interpreter when they are brought before the first judge who also has the duty to inform them of their rights; this usually takes place in the second case scenario (analysed above) that entails the arrest and a fast-track trial.

Regarding the information on the rights of the defendants (Letter of Rights), the **judge** interviewed believes that it is very much up to the will of legal practitioners, other legal professionals, the ability of a Carabiniere, policeman, or prosecutor who enter in contact with the defendants not to limit themselves to notifying the rights but making the defendants understand their rights. If the judge realises that the defendant is having difficulties understanding his/her rights, the judge should help the defendant and put him/her in a position to understand his/her rights.

## 4. Right against self-incrimination

Despite the lack of an express reference in the European Convention on Human Rights, the jurisprudence of the European Court of Strasbourg recognises the right of every accused person to remain silent and not to incriminate himself, as the core of the very notion of fair trial enshrined in

art. 6 ECHR. In the Italian constitutional framework, the right to silence finds more than one reference. It is centred, first of all, on the inviolability of the defence at every stage and level of the proceedings (Art. 24 para. 2 of the Italian Constitution), since the right to remain silent is an "inalienable manifestation of the defendant's right of defence". In addition, the right to silence can be traced, more generally, to the defendant's right to respect for his moral freedom, which implies the necessary voluntariness of his possible declaratory contribution in the proceedings (articles 2 and 13 of the Italian Constitution). Finally, the presumption of innocence (Art. 27 para. 2 of the Italian Constitution) excludes duties of cooperation on the part of the defendant, who is free to choose whether or not to carry out evidentiary activities, to counter-argue in order to refute the evidence or to limit himself to denying all charges or to remain silent.

It is also important to point out that both the **judge** and the **prosecutor** pointed out that a confession is not enough to bring a case to court and that it must always be backed by more proof. The judge also added that in general, false self-incrimination is a crime.

One way to ascertain whether a defendant has been made aware of the right against self-incrimination is to analyse the records of a criminal trial.

According to the Code of Criminal Procedure, **the ordinary way of documenting criminal procedural acts is the minutes** (*verbale*), which can be made in two different forms, i.e. complete or summarized.

Article 134(3) of the c.c.p. sets out that when the documentation is carried out using the summarized minutes, an audio recording should also be made. However, this rule is not absolute and it has to be read together with Article 140(1), according to which it is possible that no audio recording is done along with the summarized minutes, if the acts have little relevance, a simple content or if there is no audio recording instrument or technical personnel available.

Although, there is no sanction provided if, without the requirements listed in Article 140(1), the audio recording is not carried out: according to the Court of Cassation[4], this does not affect the validity of the act and the documentation can still be used for the decision.

Article 140(2) however prescribes that, when only the summarized minutes are made, the judge shall monitor by checking himself that the core of the statements is faithful to the original and contains the description of the circumstances in which these statements were made, if they may be useful to assess their credibility.

In the case of the plea bargain and the abbreviated judgement, the c.p.p. states that they should be carried out in the form of a closed hearing and subjected to the same regulations of the preliminary hearing. This is also applied in terms of the documentation of the acts. In theory, according to article 140 (2) c.p.p. the minutes of the preliminary hearing are generally redacted in a summarized form. However, the judge, upon request of one of the parties, orders the hearing to be recorded using an audio-audio visual recorder ( Art. 420 (4) c.p.p.). In practice, according to some interviews carried out in a previous research that Antigone published in 2019, the closed hearing is not only documented via the summarized minutes, but also with an audio recording. This includes alternatives to the trial, hence, the plea bargain and the abbreviated judgement. This was also confirmed by one lawyer

[4] Judgement no. 13610/2010.

interviewed. It is important to point out that the negotiation phase between lawyer and prosecutor that takes place during a suspension of the hearing is not recorded, but that their agreement is entered in the minutes once the hearing is resumed and the agreement is presented to the judge for his/her approval.

Audio recordings, audiovisual recordings and transcriptions made during the proceeding are included in the files of the proceeding (Art. 139 (6) c.c.p.), thus accessible as any other file of the case. The Procedural parties (the suspected, the defendant, the plaintiff) can examine any file and request full or partial copies, either directly or through their attorney. The legislation does not contain explicit prescription on the timely fashion of providing the recordings, such as other documents. According to Article 49 (1) disp. att. c.c.p.., tapes of audio recordings and audiovisual recordings are stored in specific containers that are numbered and sealed. No other more specific provision exists with regard to the access to audio recordings or audiovisual recordings.

## 5. Effective remedies

The Italian code of criminal procedure provides for a system of invalidity in cases where certain procedural acts are affected by serious irregularities. According to art. 179 c.p.p, the most serious procedural violations (cf. art. 178 c.p.p.) are irremediable and are detected ex officio at every stage of the proceedings, including nullities deriving from the failure to summon the defendant or from the absence of his/her lawyer in cases where his/her presence is mandatory. The declaration of nullity entails the renewal of the void act, if necessary and possible, by the same judge who declared it; otherwise, there is a regression of the proceedings to the previous phase in the case where the performance of the act to be renewed falls within the exclusive power of the judge of that phase. The lawyer and defendant can always raise concerns and point out to the judge the violation of procedural rights.

The causes for nullity are several and here below are reported only a few examples:

With regard to the access to lawyer, the questioning of an arrestee who has not had opportunity to consult with his lawyer does not lead to its annulment: only in the event that a lawyer misses it altogether, the interrogation will be unusable. In practice this never happens, because if the appointed lawyer (of trust or ex officio) does not appear, a replacement is immediately appointed in accordance with art. 97, paragraph 4 c.p.p. This applies also to the case in which the lawyer does not appear to the hearing when the negotiation of the plea bargain takes place. Since it is not possible for the defendant to negotiate on his/her own, a new ex officio lawyer is immediately appointed for the hearing. Since the lawyer would need time to familiarise himself/herself with the case, it is possible to ask for a postponement of the hearing. It is also possible to ask for a postponement of the hearing in order to review the casefile materials and usually the hearing is postponed by a couple of weeks. Among his/her duties, the lawyer has to inform the defendant of his rights. This is why the assistance of the lawyer is necessary, while its absence constitutes a violation of procedural provisions.

Another example regards the procedures for recording the acts for which the law provides for two cases of procedural invalidity. The first case is governed by Article 142 c.p.p., according to which the minutes are null if there is absolute uncertainty as to the persons who participated or if they are not signed by the public official who drafted them. The second case is provided by Article 141 bis c.p.p. which states the penalty of exclusion of the questioning (conducted outside the hearing) of a person

who is detained, when his statements are not documented fully by means of audio or audiovisual recording.

## Right to appeal

Regarding the right to appeal, there are differences between the abbreviated judgement and the plea bargain.

Abbreviated judgment: The rationale for the abbreviated judgment lies in the State's interest in a speedy trial (in exchange for sentence reductions), so there are limits to the possibility of appeal. Acquittal sentences can be appealed by the public prosecutor, but not by the defendant. The public prosecutor may not appeal against convictions, except in the case of a judgment modifying the title of the offence that s/he had requested.
Apart from these cases, the appeal follows the form laid down in Article 599 c.p.p., and is therefore conducted in closed session. All the guarantees and prerogatives granted in the ordinary procedure are also applied in these cases.
There are, however, further limitations regarding the right to take evidence. In the course of the appeal, new evidence may be taken within the limits of article 603, but they have to be in accordance with the type of abbreviated judgement adopted.
In fact, the defendant who has requested the conditional abbreviated procedure retains the right, also at the appeal stage, to retake the evidence already acquired in the abbreviated procedure, provided this appears necessary for the purposes of the decision. He may also request the use of evidence that the judge at the preliminary hearing refused to accept.
On the other hand, a defendant who has submitted a simple request for an abbreviated trial may not claim this right in the appeal proceedings.

Plea bargain: the appeal against the sentence of application of the penalty at the request of the parties is, however, subject to greater restrictions. With the introduction of paragraph 2 bis in Article 448 of the Code of Criminal Procedure, it has been established that "The Public Prosecutor and the defendant may lodge an appeal in Cassation against the sentence only for reasons relating to the expression of the defendant's will, for the lack of correlation between the request and the sentence, to the erroneous legal qualification of the fact and to the illegality of the penalty or of the security measure". Outside these exhaustively listed cases, no review of the judgment at first instance can be obtained.

Regarding the issue of the expression of the defendant’s will, for example, the Court of Cassation, with judgment no. 15557 of 6 April 2018 stated that, on the subject of the plea bargain, the appeal to the Court of Cassation on grounds relating to the expression of the defendant's will pursuant to the new Article 448 par. 2-bis c.p.p., must contain a specific indication of the acts or circumstances that led to the violation, under penalty of inadmissibility. The Court stated that the judge's verification of the defendant's will is superfluous when he is present at the hearing at which the agreement between the parties is reached.

### Role of the judge

Abbreviated judgment:

**In the abbreviated judgement the judge has to ascertain in the merits whether a person is responsible for a criminal behaviour or not**. It is a full review of the case with a conviction made beyond reasonable doubt. The judgment is made "allo stato degli atti" - at the state of the acts (only based on paper evidence presented at the preliminary hearing that sometimes consists of thousands of pages). The judge also makes an evaluation of the usability and unusability of all acts of a probative nature, i.e. whether they can be used or have to be nullified. Speed is essential in the courtroom, but the judge has the possibility to create moments for an oral debate if he has any doubts or wishes to clarify a specific point. Also, if the case material is not enough, the judge has investigative powers and can, ex officio, order an integration and create an adversarial debate. The judge makes a study only on the basis of papers, but the evaluation that has to be made is the same as that of the trial judge. By condemning or acquitting the defendant, therefore the judge does not play a merely formal role having a discretionary power on the development of proceedings.

Plea bargain: the **Judge is responsible for verifying the admissibility of the request agreed by the Public Prosecutor and the defendant**. As already mentioned, the judge must check whether the offence falls within the limits of the procedure, the correctness of the legal qualification and the adequacy of the penalty indicated. However, it can never modify the agreement itself.

If the Judge considers the content of the agreement to be correct in all its parts, it orders the application of the penalty. If not, it rejects the request and orders that the case be proceeded with in the ordinary trial. Moreover, on the basis of the acts, it may consider that the defendant must be acquitted. Therefore, in the plea bargain the judge exercises an authentic jurisdictional function by deciding on whether to accept or reject the proposal for the penalty submitted by the parties. The verification is not apparent and formal, but actual and substantial, evaluating the specific case and the adequacy of the penalty.

As in the case of the abbreviated judgment, the proceeding is always voluntary and can never be imposed by any public authority. If necessary, the Judge can order a personal appearance of the defendant at the hearing in order to verify its actual will and the voluntariness of its request or consent (Art. 446 para. 5 c.p.p.)

## 6. Impact of TWS on co-defendants fair trial rights

Both in the case of plea bargain and in the case of the abbreviated judgement, as already mentioned above, a confession or admission of responsibility by the defendant is not necessary to have access to the alternative procedures.

The procedural events of one of the co-defendants who have chosen the alternative procedure will therefore not affect those of the co-defendants who have chosen the ordinary procedure and vice versa.

If one or more co-defendants opt for a different procedure - in this case, one or more co-defendants opt for the plea bargaining and one or more co-defendants opt for the ordinary procedure - the criterion of evaluation of the two procedures will also be different, so that it is physiologically possible and legitimate that opposing outcomes may be reached. The prevailing jurisprudence, for

example, with reference to the contrast of judgments involving a plea bargain, excludes that the acquittal or conviction of the co-defendant who has opted for a different procedure constitutes a contrast of judgments. This means that there are cases in which one co-defendant chooses a plea bargain and another chooses the full trial that ends with his/her acquittal.

# V. Stakeholder's evaluation of the different alternatives to the trial

In this section are reported the evaluations of the different justice stakeholders on the plea bargain and the abbreviated judgement that emerged during the interviews.

**Lawyers** identified the goals of these procedures as a way to accelerate some burdensome processes (hence reducing the number of hearings and pending proceedings) in exchange for some benefits in terms of punishment and evaluated the current systems to be reaching those goals. One lawyer on the other hand evaluated the abbreviated judgement as not entirely reaching this goal because since the reduction of the penalty is automatic, it is as easy as starting with a higher initial penalty to have a final sentence similar to a sentence without an alternative judgement. The benefits for the criminal justice system were identified with a faster processing of case files. The benefits for their clients were identified with a shortened penalty in case of conviction, a shorter trial and a quicker resolution of their case while at the same time ascertaining the facts. For the victims only one benefit was identified by 3 lawyers, that is the possibility of reaching a decision and compensation within a shorter time frame.

Among the downsides, some lawyers mentioned that a full evaluation of the evidence is lacking and that this undermines the adversarial process and sacrifices the establishment of the judicial truth. 1 lawyer indicated that some ex-officio lawyers might suggest to their clients to use an alternative judgement because they know they will not have an "economic satisfaction" (so they use them to speed up the conclusion of the case) and this carries enormous risks for the defendant, especially if their legal stay might be affected by the outcome of the judgement.

Regarding the abbreviated judgement, 2 lawyers suggested that there should be an extension on the usability of several acts and documents, and not be subject to the profound limitations that exist today it should be made easier. 1 lawyer suggested that alternatives to the trial should be promoted in a greater way than they are today. 1 lawyer suggested that the use of the plea bargain should be extended. 1 lawyer suggested that the quality of interpretation needs to be improved and that it could be better to envisage the specialised figure of the interpreter and in any case the party interpreter should be different from the judge's. The same lawyer suggested sending the defence counsel by certified email or fax the essential documents in the hands of the public prosecutor's office when notifying him of the validation hearing. 1 lawyer suggested that the plea bargain should grant more benefits, also in terms of modality of execution of the sentence.

The **judge** considered the goal of alternatives to the trial to be the reduction of the number of trials and believed this purpose to be achieved because their use if frequent. She pointed out that defendants who choose an abbreviated procedure reach an irrevocable sentence in 2 years at the most, while if they go through the whole trial, a first degree sentence might be achieved even after 6-7 years. Therefore the deflationary effect is strong. This also has benefits in terms of the reduction of trial expenses for the defendant, less victimisation and a reduction of the sentence.

In terms of changes that the judge would make to the current system, she indicated that in her opinion the abbreviated trial poses problems of access to the acts and knowledge of the acts (telephone interceptions, transcripts) by the lawyer, and the access to these case materials should be expedited to facilitate lawyers. The difficulty in gaining access to the trial documentation is not due to any

particular formal restrictions in the law, but to practical reasons. The short time available to the lawyer to set up the defence due to the rapidity of the procedure means that s/he cannot have as much knowledge of the trial documentation as the prosecution, which has formed the same documentation, perhaps in the course of long and complex investigations. At the same time, it would be useful to introduce a system that remediates nullifications. Her overall judgment is very positive, even if it is quite a heavy workload. On the other hand, unlike the case of the abbreviated judgement, the judge does not think the plea bargain to be a burdensome procedure.

The **prosecutor** understood the goal of alternatives to the trial as to limit the use of the full trial, that is long and tiring, and replace it with a quicker decision with a lower penalty. He did not think that in Italy they are very used because it is also possible that using a full trial, the crime reaches its statute of limitation so there is directly no penalty for the defendant (but the defendant is usually wealthy). The benefits for the criminal justice system are a contraction of the phase of the debate, lower costs, magistrates have time for more cases and the judgement is carried out quicker. Benefits for the defendant are a reduction of the sentence and no publicity of their case. For the prosecutor there are also benefits: alternative judgements take less time and the result is the same. In terms of risks, the abbreviated judgement sees the judgment of the defendant as relying on the acts presented at the preliminary hearing rather than on a full trial. The abbreviated judgment anyway ascertains the responsibility of the defendant in committing the acts even if in a less efficient way because of the lack of the debate phase.

# VI. Conclusions

Before drawing the main conclusions from this work, it is possible to point out that on 23 September 2021, the Parliament approved a law (nr. 2353) delegating the Government to write a law that will make the criminal trial more efficient. The law is entitled "Delegating to the Government for the efficiency of the criminal trial and provisions for the speedy definition of judicial proceedings pending at the courts of appeal" (*Delega al Governo per l'efficienza del processo penale e disposizioni per la celere definizione dei procedimenti giudiziari pendenti presso le corti d'appello*) and was published on 27 September 2021 in the Gazzetta Ufficiale nr. 134.

In general, the provisions of the delegating law can be traced back to the need to speed up the criminal trial also through its deflation and digitization and some of the news regard alternatives to the trial.

With regard to the plea bargain, the delegating law prescribes that the Government shall provide, when the prison sentence to be applied exceeds two years, that the agreement between the defendant and the prosecutor extends to ancillary penalties and to optional confiscation, and upon request of the parties, the extra-criminal effects of the sentence shall be reduced, also providing that it shall not have the effects of a conviction in disciplinary proceedings and in other cases.

In the case of the abbreviated trial, the Government should intervene on the conditions for accepting a request of an abbreviated trial "conditioned" by the acquisition of additional evidence, providing that it be admissible only if such evidence is necessary for the decision and if the special procedure produces procedural economy in relation to the time required for the trial. Also, the Government is delegated to provide for a further reduction of the penalty by one-sixth when the defendant agrees to avoid lodging an appeal.

The considerations that may be drawn from the research and the meetings that were held on the advantages and shortcomings of alternative proceedings in Italy are several.

In general, from the research it has emerged that alternative procedures appear to make it possible to shorten the duration of trials, reduce the costs of criminal justice and shorten the defendant's wait for a sentence, thus strengthening the certainty of the law.

Moreover, it should be taken into consideration that, unlike similar models in other countries, especially those belonging to common law systems, Italian alternative procedures do not require a confession by the accused and allow - albeit with the limitations mentioned above - the possibility of appeal and a concrete contribution by the defence in determining the possible penalty. Since these alternative procedures are available only upon request of the accused and the assistance of a defence lawyer is foreseen at every stage, the procedural guarantees seem, at least according to the law, to be satisfactorily protected.

This explains the relative success of these proceedings, to which lawyers, as it emerges from the interviews, resort mainly when the evidence against their client is strong and they think a full trial will lead to a conviction, in order to obtain a reduction of the sentence.

However, there are several critical issues to be noted regarding alternative procedures. First of all, their relative success must be contextualised and can be explained by placing them in a broader discourse concerning the systemic problems of the Italian criminal justice system.

On the one hand, as mentioned above, it continues to suffer from the problem of the excessive length and slowness of criminal proceedings and the chronic problem of the backlog of cases. In the Minister's recent Report on the Administration of Justice for the year 2020, published on the occasion of the inauguration of the Judicial Year 2021, it was stated that, in order to tackle the backlog in the criminal sector, it is necessary to intervene on the abbreviated judgement and on the plea bargain, by modifying the conditions of accessibility in order to extend their use[5].

On the other hand, the last decades have witnessed, more and more, the phenomenon that the doctrine has defined "pan-penalism", i.e. the tendency to the continuous introduction of new crimes in the criminal code to cope with the perception of insecurity felt by citizens. In parallel, there has been a general and constant toughening of criminal sanctions and an increase in the use of custodial sentences. The result has been an expansion of the criminal sphere with a consequent further increase in the workload of the courts.

These factors entail, from a general and systemic point of view, two consequences.

The first is that the wide use of alternatives to the judgement can be explained by the need to make up for the inefficiencies of the system, thus enabling their resolution to be postponed in an incisive and definitive manner. Thus, while on the one hand this may lead to a reduction in the duration of trials and an increase in the number of cases closed, it must be verified whether the consequence may be a renunciation of the full application of constitutional principles, especially with regard to the right to defence, as we will discuss later.

The second consequence is that, despite this, the deflating effectiveness of alternative procedures risks to be diminished and weakened by the constant increase in penalties and the introduction of new preclusions to their access.

From the practical point of view of the impact of alternatives to the judgment on the number of the prison population, a consideration can be made on the basis of the available statistics for the last thirty years. On the basis of these data, it can be noted that the number of people in prison has gradually and steadily increased over the years. Over this period, there have only been a few moments when the prison population has suffered a significant drop, which was always intended to be temporary and was immediately followed by a gradual rise. The drop in numbers is due to two pardons in 1991[6] and 2006[7], to the temporary deflationary measures adopted in 2014 following the ruling of the European Court of Human Rights in the Torreggiani vs. Italy case, and in 2020, the year in which some measures[8] were adopted to encourage the use of alternative measures to detention in order to contain the risk of Covid-19 infection in prisons. It must be also considered, as it was mentioned earlier in the report, that there is a lack of statistics in general on the use of alternatives to the trial. Therefore, it is not possible to demonstrate any direct correlation between the variation, either increasing or decreasing, of the prison population and the use of alternatives to the judgment in criminal proceedings.

There are, moreover, further problematic profiles that may emerge from the comparison between the theory of the functioning of alternatives to judgement and their implementation in practice.

[5] https://www.giustizia.it/cmsresources/cms/documents/anno_giudiziario_2021_relazione.pdf.

[6] D.P.R. 22 dicembre 1990, n. 394

[7] Legge 1° luglio 2006, n. 241, 3

[8] D.L. 17 marzo 2020, n. 18 e D.L. 28 ottobre 2020, n. 137

Among those interviewed in the framework of the research, in fact, lawyers in particular highlighted some potential critical issues. For example, it was pointed out that there could be a violation of the constitutional principle of the publicity of the trial, since alternative procedures often envisage the holding of hearings in chambers (i.e. without the public); likewise, there is the risk of restricting the constitutionally guaranteed right to be heard, since the alternative procedures are - with the exception of the conditional abbreviated judgement - always decided at the state of the acts, on the basis of the elements gathered before the opening of the trial.

With particular regard to the abbreviated judgement, it must be added that its choice is considered to be of an abdicative nature. This implies that the evidence taken by the Prosecutor (and the police) during the course of the preliminary investigations is immune from any exception of unusability or relative nullity, deriving from any errors concerning the lawfulness of the methods of taking the evidence itself.

One important issue that was pointed out during the meetings regarded the management of the outcomes of sentences in co-defendant cases. Indeed, there might be cases in which the co-defendant who choose an alternative to the trial have to serve some kind of sentence and later on, those who choose the full trial (that lasts longer than the alternatives to the trial) are acquitted for the same charges. An example from the practice in Argentina helped the debate on this issue. Argentinian law prescribes that in co-defendant cases all co-defendants have to make a unanimous decision on the kind of judgement and if one of them does not agree to waive trial, a full trial will be used. In the Italian case, since it is possible for co-defendants to choose different kinds of judgements, a possible solution for this issue would be a mechanism that would allow the review of sentences in cases of acquittal.

Another problematic aspect concerns defendants belonging to disadvantaged groups, especially from a social and economic point of view, for whom, at times, the agreement on the sentence may not be the "consensual" result of a real negotiation but an imposition by the prosecution, since accepting a plea bargain is often the only way to avoid imprisonment.

As emerges also from some of the interviews conducted, cases are not uncommon in which the not-so-wealthy defendant, not being able to afford complex defence activities or high-level technical expertise, risks being induced to prefer the alternative judgement also at the price of renouncing certain guarantees of the full trial.

There is also the problem of awareness in the choice of access to the alternative judgement, especially for non-native speakers. In the case of foreigners, the choice of the alternative procedure and the anticipation of the ( eventual) conviction may have significant consequences on the residence permit of the person concerned, since the conviction at first instance is sufficient to revoke the residence permit. The guarantee of the right to translation and interpretation and the effective legal training of interpreters and mediators may be of great importance for an informed choice.

# VII. Recommendations

1. It is recommended that the Government and Parliament intervene on the code of criminal procedure so that, in the respect of fair trial and the full recognition of defence rights, to widen the prerequisites to access the abbreviated judgement and the plea bargain.

2. It is recommended to the Government and to the Parliament to intervene on the criminal legislation to decrease the minimum and maximum penalties or to limit their increase in order not to compromise the effectiveness of alternative procedures.

3. It is recommended that the School for the Judicial Training, both at national and district levels, ensure that Judges and Prosecutors be aware that their duty is to verify that the agreement of the parties is in fact the consensual result of a negotiation conducted following the principle of the equality of arms, so that the defendants belonging to weak socio-economic categories be not subjected to pressure or prejudice.

4. It is recommended to the Government to set up a national register of translators and interpreters in order to ensure greater professionalism in the exercise of this profession, which is essential to ensure the full participation in criminal proceedings of defendants and suspects who are not Italian native speakers, also in order to be able to give informed consent to alternative proceedings.

5. The Minister of Justice is recommended to prescribe adequate training for interpreters and translators who provide linguistic assistance in criminal proceedings, in particular on legal language and vocabulary, providing elements of criminal law and procedure.