

# Comparative Analysis of the Waiver and/or Limitation of the Right to Appeal in Consensual Criminal Justice Instruments

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Darija Željko

Assistant at the Project for the Croatian Science Foundation at the Chair of Criminal Procedure Law, University of Zagreb Faculty of Law


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# Overview of the waiver/ right to appeal:

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**US**

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**CoE and EU**

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**International criminal law**

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**Analysis of Croatian legislative framework  
and qualitative semi-structured interviews**

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**Concludatory remarks**

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The interplay  
between the  
right to  
'negotiation'  
and (limited)  
appeal

- Constitutional and Conventional right

Contractual nature; advantage: no trial and appeal:  
**Why** to appeal?; [Innocence projects](#)

- *Fair Trials: 'The Disappearing Trial'* (2021) –  
coerciveness, open to abuse

Defendants should have the ability to appeal  
convictions resulting from trial waivers where  
**procedural violations** or **new evidence** make the  
conviction unsafe

# United States:

Anglo-Saxon plea-bargaining characterized by a lack of legal provisions regulating the practice, including appeal

a common practice for prosecutors, as a condition of entering plea deals, to **require waivers of the right to appeal**, even on the grounds of **ineffective legal assistance**

the plea agreement should expressly state that the defendant understands the meaning and effect of the agreement and that his/her **waiver of appeal is knowing and voluntary**

# Council of Europe:

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**The ECtHR: express or tacit waiver** (*Kwiatkowska v. Italy*, 2000) of a number of guarantees specific to the right to a fair trial by means of a simplified procedure is not **incompatible with Article 6 of the Convention**, as long as the procedure as a whole is **fair** (*Scoppola v. Italy*, 2000)

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penal order: *Hennings v. Germany* (1992)

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*Natsvlishvili and Togonidze v. Georgia* (2014) - safeguards specific to the trial waiver context; broader MoA appeal

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**PA CoE Resolution 2245 (2018): prohibit the waiver of appeal rights**, in order to ensure sufficient control, at the national level, of the actual practice of lower courts in the field of plea bargaining

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# International Criminal Court:



Art. 65/5 Proceedings on an admission of guilt: *'discussion ... not binding for the Court'*

*Guidelines for Agreements regarding Admission of Guilt, 2020, para. 12:*



Agreements regarding admission of guilt **may** include a **waiver of appeal**.  
In appropriate cases, such a waiver furthers the interests of finality, certainty, and efficiency.



**However**, a waiver of appeal should generally be subject to **an exception** preserving the parties' ability to **appeal sentences outside a range specified in the agreement**, and shall preserve the parties' rights to **appeal any error that manifestly undermines the fairness of the proceedings**.

# EU's silence on (appealing) plea bargain

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2009 the EU strengthened the procedural rights of suspects and defendants in criminal procedure (*'Roadmap'*)



none of the Directives on procedural rights address plea bargaining directly



a missed opportunity for EU legislator to outline the operation of the plea bargaining mechanism in Europe

# Croatian Legislative Framework and Practice:

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**Penal order:** defendant and counsel **objection/complaint**, public prosecutor **appeal**

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Municipal Public Prosecutor's Office in Zagreb approx. 24% objection

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**2021:** 17 public prosecutors never appealed; 2 did; 1 no sure; *'their colleagues did'*

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**Request for the protection of legality:** 17 no; *'never heard'*; 1 did, 2 not sure

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**Victim** – 18 satisfactory role; 2 introduction of complaint or previous consent

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**Instruction that defendant receives is not precise enough (!)**



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# Judgment based on the agreement of the parties

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- Chapter XIX. 'Indictment', not in XXIII. CPA
- limited appeal **erroneous or incomplete determination of the factual situation** – threshold: evidence of the exclusion of illegality or guilt 
- substantive violation of the criminal procedure provisions; violation of the Criminal Code 
- 26,97% waiver of the right to appeal at the County Court Zagreb

## Concludatory remarks:

undoubtedly negotiated justice instruments have gained a decisive role in the administration of criminal justice

adequately preserve right to appeal and at the same time **the efficiency and effectiveness** goals associated with these instruments

as a **minimum** appeal should be limited to **procedural issues**, especially to make sure that the **consent** given by the accused was **informed, genuine and offered freely**

# Thank you for your attention!

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Darija Željko

darija.zeljko@pravo.unizg.hr



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