

The Erosion of the Rule of Law in Europe

**Consultation submission to the
European Commission**

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Fairness, equality, justice

Fair Trials is an international NGO that campaigns for fair and equal criminal justice systems. Our team of independent experts expose threats to justice through original research and identify practical changes to fix them. We campaign to change laws, support strategic litigation, reform policy and develop international standards and best practice. We do this by supporting local movements for reform and building partnerships with lawyers, activists, academics and other NGOs. We are the only international NGO that campaigns exclusively on the right to a fair trial, giving us a comparative perspective on how to tackle failings within criminal justice systems globally.

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The Erosion of the Rule of Law in Europe: Consultation Submission to the European Commission

Introduction

Adherence to the rule of law is the cornerstone of every democratic society and a prerequisite for any justice system to be fair. While criminal offences and violations of law should be investigated, adherence to the law must also be demanded from officials who hold state power. Adherence to the rule of law is a sign of a healthy democracy and protects people from abuses of power. In criminal proceedings across the European Union (EU), fundamental rights and procedural safeguards enshrined in the Charter of Fundamental Rights of the European Union (Charter) and EU Procedural Rights Directives¹ should protect suspects and accused persons from such abuses and prevent miscarriages of justice.

However, while much attention is rightly paid to broader, more visible processes affecting the rule of law on a constitutional level, such as political interference with the independence of judges, it is equally important to shine the light on systematic breaches of the rule of law in individual cases. Routine, day-to-day violations of law, subtle pressures to cooperate with investigations or to waive rights, and decades long failures to create systems that guarantee procedural rights in smaller-scale cases go largely unnoticed and unaddressed. When fundamental rights and legal safeguards are systematically violated in individual cases, it must be addressed as a failure to respect the rule of law. As we will highlight in this paper, more than ten years after the entry into force of the Directive 2010/64/EU on the right to interpretation and translation, States still have not put in place systems that guarantee the availability of adequately qualified interpreters to and from most common EU languages.² As a result, interpretation in criminal proceedings is entrusted to tourist guides, cellmates, retired police officers, and other members of the general public who appear to be conversational in the required language.³ Similarly fundamental rights safeguards are increasingly overlooked in evidence gathering procedures, including mass surveillance and large-scale data collection, with courts routinely accepting either unlawful or unverifiable evidence.⁴ Access to justice is also increasingly limited in cases where criminal proceedings are

¹ Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, (OJ 2010 L 280, p. 1); Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings (OJ 2012 L 142, p. 1); Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, (OJ 2013 L 290, p. 1); Directive 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects and accused in criminal proceedings (OJ L 132, 21.5.2016, p.1.); Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings (OJ L 65, 11.3.2016, p. 1); Directive 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings (OJ L 297, 4.11.2016 p.1.; corrigendum OJ L91 5.4.2017, p.40).

² See .e.g., Jennifer Rankin and Angela Giuffrida, [It's a never-ending nightmare': crew of refugee rescue ship facing jail](#), the Guardian, 22 May 2022.

³ See Section 1.3.

⁴ See Section 4.

settled outside the traditional trial setting and independent courts or tribunals are less and less involved in criminal justice processes.⁵

Breaches of law such as these tend to be seen as isolated instances affecting individual cases with remedies sought, if at all, within those cases. However, systematic failures to guarantee fundamental rights and observe legal safeguards must be addressed as a systemic issue and a broader failure to respect the rule of law, which undermines the integrity and citizens' trust in justice systems across the EU.

This paper does not intend to provide a full picture of the rule of law situation in criminal justice in EU Member States, but rather highlights some of the issues that Fair Trials, its partner civil society organisations, and the members of its Legal Experts Advisory Panel have encountered in the previous year. In particular, this paper addresses:

1. [Access to justice](#)
 - [Increased use of trial waiver systems and other out-of-court proceedings](#)
 - [Lack of effective access to legal aid](#)
 - [Lack of effective access to interpretation and translation services](#)
2. [Attacks on civil society](#)
3. [Digitalisation of justice](#)
4. [Use of unlawful evidence and effective judicial protection](#)
5. [Diplomatic assurances in EAW cases](#)

1. Access to justice

1.1. Increased use of trial waiver systems and other out-of-court proceedings

In Europe, criminal punishment is increasingly imposed without a full criminal trial but instead by resorting to a trial waiver system or other alternative disposition systems that falls short of the standards of a full criminal trial.⁶ These systems rely on the consent of accused persons to waive their essential rights. However, the process is poorly supervised resulting in systemic procedural rights violations and defendants consenting to a waiver of their rights without being fully informed about the consequences of such decision.

In most European states, public prosecutors are already entrusted with the responsibility of ending cases by imposing or negotiating a penalty without requiring a judicial decision.⁷ In 2020, less than one-third of cases received by public prosecutors throughout Council of Europe Member States were processed before courts. Other cases were either discontinued or resulted in a penalty or measure imposed or negotiated by the prosecutor.⁸ In particular, guilty pleas⁴ and sentence bargaining agreements⁵ are increasingly used throughout Europe, as Fair Trials has observed for example in Italy, Cyprus, Hungary, Albania, and Slovenia.⁶

⁵ See Section 1.1.

⁶ Fair Trials, *Efficiency over justice: insights into trial waiver systems in Europe*, 2021, available at: <https://www.fairtrials.org/articles/publications/efficiency-over-justice/>

⁷ European Commission for the Efficiency of Justice (CEPEJ), *European judicial systems CEPEJ 2022 Evaluation Report (2020 data)*, p.64, Figure 3.25, available at: <https://rm.coe.int/cepej-report-2020-22-e-web/1680a86279>

⁸ CEPEJ, *European judicial systems CEPEJ 2022 Evaluation Report*, op.cit., p.147, Figure 5.17.

This trend is symptomatic of the need for States to implement cost-efficient policies to deal with overburdened justice systems, court delays, and backlogs. These are caused not only by a lack of resources but also by the constant and increasing recourse to criminal punishment to address social harm.⁷ Trial waiver systems thus are seen as a solution to deal with cases quickly and cheaply, overlooking the fact that where handled improperly they deny access to justice to suspects or accused persons. Such procedures not only limit access to courts but render procedural safeguards, including those guaranteed by the six EU Procedural Rights Directives, ineffective and inaccessible.⁹ They also allow for the expansion of police and prosecutorial powers without the control and accountability that is essential in a democratic society.²⁰

In particular, trial waiver systems limit access to justice in three ways: by limiting access to procedural rights, failing to guarantee that the accused person's consent is voluntary, and failing to guarantee effective judicial oversight.

1.1.1. Limited access to procedural rights

Our research indicates that accused persons are not systematically assisted by a lawyer when approached by prosecutors to negotiate a deal, and lawyers do not have the resources and power to provide an effective defence (e.g. requesting or conducting investigations). This is particularly true for legal aid lawyers, who are underfunded and face an ever-increasing caseload. Accused persons and their lawyers also do not have timely and full access to case files to prepare their defence: translations of essential documents are lacking, and interpretation services are unavailable. Without these procedural guarantees, they are not able to consent to a waiver of their fundamental rights in full knowledge of the case against them and the consequences of the waiver.¹¹

1.1.2. Involuntary consent

Regional standards also require that for a waiver to be valid it has to be informed and voluntary.¹² The legitimacy and legality of trial waiver systems are based on the idea that a person makes a free choice to waive their fair trial rights. However, in practice suspected or accused persons are often unduly incentivised or coerced into agreeing to a trial waiver. Direct pressure may be exerted on accused persons in the name of cost efficiency by overburdened police forces, prosecutors, and even courts. People are also affected by systemic incentives that are independent of the facts of the case, such as: the prospect of spending months or years in pre-trial detention while awaiting trial; lengthy and costly proceedings (court costs, lawyer fees); loss of job, business or even housing; and being forced to leave their family.¹³ In cases where these factors are present, voluntary consent is highly questionable.

Trial waiver systems may also enhance vulnerabilities and social exclusion, as they prove to put additional pressure on certain categories of persons. Our research showed that migrants and undocumented persons, people experiencing poverty, minorities and racialised groups, children, disabled and neurodivergent people are more likely to accept trial waiver agreements, for reasons entirely independent of their guilt or innocence.¹⁴

1.1.3. Ineffective judicial oversight

A trial before an independent court or tribunal is the forum where procedural rights violations can be brought to the attention of a judge. As highlighted by the CEPEJ and the Council of Europe's Committee on Legal Affairs and Human Rights, trial waiver systems carry the risk of removing potential human rights violations from scrutiny in an open courtroom.¹⁵ Our research indicates a very limited level of judicial scrutiny over trial waiver processes in law and practice. Courts across the EU carry out a very limited review of the veracity of admissions of guilt and of the person's consent. They are often limited to "yes" or "no" questions. Courts often have no power to modify agreements with prosecutors and may only accept or reject them, which increases the risk of overburdened courts being structurally incentivised to approve more "effective" handling of cases. The right to an effective remedy for violations of procedural rights during the pre-trial stage is thus inevitably infringed in a trial waiver context.¹⁶

1.2. Effective access to legal aid

Access to legal aid is a key component of access to justice. Access to legal advice and representation in criminal proceedings is essential to understanding and exercising the rights of suspects and accused persons.

Cost is one of the key hurdles affecting effective defence. Therefore, access to legal aid is central to enabling all people to access justice. In 2021, 95.4 million people in the EU were at risk of poverty or social exclusion, which is equivalent to 21.7 % of the EU population.⁹ People experiencing poverty are in particular risk of lacking access to fundamental rights, including access to a lawyer and to justice. Former UN rapporteur on extreme poverty and human rights has stated in this regard: *"[L]ack of access to justice is a major reason why people fall into and remain in extreme poverty, and therefore access to justice is not only a human right in itself but also an essential tool to tackle poverty and inequality."*¹⁰ Systems which do not provide effective access to legal advice and representation contribute to further the impoverishment and social exclusion of people living in poverty. The issue of access to legal aid needs to be assessed in the light of the fact that those who enter the criminal justice system are overwhelmingly people experiencing poverty. This is in part due to the fact that certain aspects of poverty are criminalised in Europe, either directly through laws that criminalise behaviours such as begging or fare evasion, or indirectly through laws that punish the inability to pay fines with imprisonment.

Although Directive 2016/1919 on legal aid provides that suspects and accused persons who have a right to a lawyer under the Directive 2013/48/EU on the right of access to a lawyer¹¹ are entitled to legal aid, it is still inadequately implemented. Together with the

⁹https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Living_conditions_in_Europe_-_poverty_and_social_exclusion

¹⁰ Conference Proceedings ["How access to justice can help reduce poverty"](#) 2013.

¹¹ Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, OJ L 294, 6.11.2013, 1.

lack of effective legal aid systems and access procedures,¹² it results in the right of access to a lawyer being limited in practice in some Member States.

Legal aid is also clearly underfunded in Europe. From 2018 to 2020, the average expense for legal aid decreased from 146 to 133 million euros.¹³ In particular, 20 Council of Europe Member States reduced their budget for legal aid (including EU Member States) between 2018 and 2022.¹⁴ This drop was moreover identified in countries that historically dedicate an important budget to legal aid, which enhances the overall decreasing tendency. During that period, on average, States allocated 66% of their judicial system budget to courts, around 25% to public prosecution services, and only the remaining 10% or less to legal aid.¹⁵ According to the latest CEPEJ report, only six EU Member States¹⁶ have legal aid budgets reaching over 10% of the total budget of the judicial system. In most countries, legal aid budgets represent from 2% to a little over 6% of the total budget of justice system.¹⁷ In six countries, the legal aid budget is below 2% of the total budget of the judicial system.¹⁸

Moreover, in countries that apply a means test, there is often a gap between the income threshold and the costs of paying a lawyer privately, whereby persons whose income is just above the applicable threshold do not qualify for legal aid but they cannot afford to pay for a lawyer either.¹⁹ When suspected or accused people are granted legal aid, there are concerns of insufficient quality in practice and ineffective assistance due to inadequate remuneration (low fees)²⁰ and uncertainty of being paid.²¹ Generally, legal aid schemes pay lawyers a flat fee per case or procedural act, regardless of the complexity of the case or the number of hearings, disincentivising lawyers from preparing their clients' defence adequately. This, coupled with a general lack of mechanisms in place to monitor the quality of legal aid services provided,²² erodes the right to legal aid.

Another issue is that according to the Directive, minor offences, despite constituting the majority of criminal cases in most, if not all, EU criminal justice jurisdictions,²³ are excluded from the application of the right to legal aid in certain circumstances.²⁴ As a result, legal aid and legal assistance may not be granted irrespective of the

¹² Justicia Network, *Inside Police Custody 2*, 2018, p.54.

¹³ CEPEJ, European judicial systems CEPEJ 2022 Evaluation Report, 5 October 2022., p.38.

¹⁴ CEPEJ, European judicial systems CEPEJ 2022 Evaluation Report, 5 October 2022, p.38, Figure 2.26.

¹⁵ CEPEJ, European judicial systems CEPEJ 2022 Evaluation Report, 5 October 2022, p.23, Figure 2.6.

¹⁶ Data concerning Poland, Portugal, Slovakia, Ireland was not available.

¹⁷ CEPEJ, European judicial systems CEPEJ 2022 Evaluation Report, 5 October 2022., p.39, figure 2.27.

¹⁸ CEPEJ, European judicial systems CEPEJ 2022 Evaluation Report, 5 October 2022., p.39, Figure 2.27.

¹⁹ Council of Europe, study on *The efficiency and the effectiveness of legal aid schemes in the areas of civil and administrative law*, 2021. "As a result, many people are in fact denied access to justice" p.23.

²⁰ Fair Trials, Where's my lawyer – making legal assistance in pre-trial detention effective, *ibid*, p.18. United Nations Human Rights Committee, Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, *Report of 2013 on legal aid*, 23rd session of the HRC, A/HRC/23/43, §73. Fair Trials, *Practitioners' tool on EU Law, Legal aid Directive*, *ibid*, p.44.

²¹ Justicia Network, *Inside Police Custody 2*, *ibid*, p.55.

²² See *Practice Standards for Legal Aid Providers* developed in the framework of the project "Enhancing the Quality of Legal Aid: General Standards for Different Countries", 2018, implemented by partners from Lithuania, Germany and The Netherlands, seeking to strengthen the quality of legal aid services in criminal proceedings by developing practice standards, including specialization and continuous training, peer review and evaluation by legal aid users, judges and prosecutors.

²³ CEPEJ, *European judicial systems – Efficiency and quality of justice* – 2018 Edition, *ibid*.

²⁴ Article 4(2) of the Directive on legal aid.

consequences that the sentences imposed may have on the lives of individuals prosecuted. This undermines the purpose of the Directive in practice.

1.3. Effective access to interpretation and translation services

The right to interpretation in cross-border proceedings was already envisaged at the adoption of the Council Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States (FD EAW). Almost a decade later, Directive 2010/64/EU on the right to interpretation and translation became the first Roadmap directive to be adopted and enter into force.

However, in practice, there are still many obstacles to accessing interpretation and translation services, both in national and cross-border proceedings. Currently, a major obstacle in accessing interpretation services is the lack of qualified interpreters. People who speak a certain language but are not qualified interpreters often serve as interpreters in EAW proceedings, which involve explaining highly complex legal terms and rights that cover two Member States. There is also a general lack of training for interpreters that are qualified but not specialised in criminal proceedings or EAW proceedings specifically. This results in poor quality interpretation services which, if not properly detected and rectified, can have a detrimental effect on the effective exercise of requested persons' rights.

In 2022, members of Fair Trials' Legal Experts Advisory Panel continued to face challenges due to the inaccessibility of adequate interpretation and translation services in national criminal proceedings as well as cross border proceedings.²⁵ For example, in Italy a high-profile case prosecuting the crew of the rescue ship *Luventa* and members of several NGOs including Sea Watch, Save the Children and Médecins sans Frontières for providing humanitarian assistance at sea, was halted three times due to the State's inability to provide adequate translation services to foreign defendants.²⁶ Persons provided by Italian authorities to deliver interpretation services into German language in criminal proceedings included a tourist guide, a retired police officer, and other unqualified persons with the ability to speak German.²⁷ Similarly in Greece, after years of criminal proceedings against Seán Binder, Sarah Mardini and over 20 other humanitarians, the charge of espionage was dropped in early 2023 in part due to an inability to provide adequate interpretation and translation services to defendants throughout the proceedings.²⁸

2. Attacks on civil society

In 2022, our partner organisations continued to face retributions related to their work as human rights defenders. On 25 November, Panayote Dimitras appeared before an

²⁵ See also Fair Trials video on the right to interpretation and translation in cross-border proceedings, 2022: https://www.youtube.com/watch?v=ddI7hVSPRkY&list=PLFOit5MKd80WV_AqtpNHCnrrWudJbN7yC&index=3.

²⁶ Giulia Carbonaro, [Italy's biggest trial against migrant rescue NGOs halted for third time amid lack of interpreters](#), Euronews, 5 December 2022.

²⁷ Giulia Carbonaro, [Italy's biggest trial against migrant rescue NGOs halted for third time amid lack of interpreters](#), Euronews, 5 December 2022.

²⁸ [Annulment of charges against humanitarians in Greece: procedural rights victory, long way to justice](#), Fair Trials, 17 January 2023.

investigating judge in relation to actions carried out as a human rights defender. This was the latest chapter in a decade-long judicial harassment campaign against the Greek Helsinki Monitor and Dimitras, its spokesperson.²⁹ Dimitras had been summoned before the judge for forming and joining a criminal organisation, facilitating entry to the Greek territory for a citizen of a third country for profit and by profession, and facilitation of illegal residence of a citizen of a third country for profit. Through these charges, the state continues to use its criminal justice powers to reframe legitimate actions to help save lives and protect human rights as human trafficking.³⁰

As mentioned above, criminal charges, among them the charge of espionage, have also been brought and partially dropped after years of proceedings for Seán Binder, Sarah Mardini and over 20 other humanitarians who faced trial in Greece for providing lifesaving assistance to asylum seekers and migrants in Lesbos.³¹ The charge of espionage was subsequently dropped after years of proceedings due to its vagueness and violations of the right to translation.

In the same vein, lawyers from Fair Trials' Legal Experts Advisory Panel continued to challenge procedural rights violations in a case of criminalisation of solidarity in Italy. In that case, the crew of the rescue ship *Iuventa* is charged with colluding with people smugglers to ferry people into Europe.³² On top of fighting criminal charges in relation to their work of protecting human lives at sea, the defendants continue to face challenges caused by inadequate interpretation in criminal proceedings.³³

Civil society faces ongoing reprisals also in Cyprus. In December 2020, the Cypriot Minister of Interior abruptly removed KISA, and many other civil society organisations, from the Register of Associations. He did so using his new, self-attributed powers³⁴ to start a dissolution process for NGOs if certain regulatory requirements were not met within a two-month notice period. In KISA's case, they informed the authorities of a delay in organising their general assembly due to the COVID-19 pandemic. Despite KISA indicating that all formal requirements would be met within a short time period and appealing against the Minister's decision, they were nonetheless deleted from the Register of Associations. This was just the latest move in a long campaign to discredit and silence independent voices in Cyprus, particularly KISA, and ultimately attack the foundations of democratic pluralism.

Independent domestic civil society organisations continue to be vigorously attacked by the Hungarian government and the governing parties. According to the Hungarian Helsinki Committee, attempts to stifle civil society organisations include extensive smear campaigns and rhetorical attempts of intimidation, launching ill-founded legal procedures against civil society, and otherwise hindering their work. The series of attacks culminated in legislative steps, such as the

²⁹ [Panayote Dimitras: Fair Trials denounces criminalisation of human rights defenders](#), Fair Trials, 24 November 2022.

³⁰ [Panayote Dimitras: Fair Trials denounces criminalisation of human rights defenders](#), Fair Trials, 24 November 2022.

³¹ Annulment of charges against humanitarians in Greece: procedural rights victory, long way to justice, Fair Trials, 17 January 2023.

³² Jennifer Rankin and Angela Giuffrida, [It's a never-ending nightmare': crew of refugee rescue ship facing jail](#), the Guardian, 22 May 2022.

³³ [Trial of civil sea rescuers in Italy facing 20 years imprisonment riddled with errors: questioning of defendant aborted due to disastrous interpretation](#), iuventa-crew.org, 31 October 2022.

³⁴ [Amendment 118 \(I\)/2020](#) of the 2017 Law on Associations and Foundations and Other Related Issues.

law stigmatising certain civil society organisations as “foreign-funded organisations”, which the Court of Justice of the European Union (CJEU) found in violation of EU law in June 2020.³⁵ Even though the law in question was repealed, other laws violating the rights of and exerting a chilling effect on civil society organisations are still in force. The Hungarian Helsinki Committee reports that most authorities refuse to cooperate with stigmatised civil society organisations and reject invitations to workshops and participation in research. For example, in 2019, a judicial official sent a circular to judges warning them not to attend a training by the Hungarian Helsinki Committee.³⁶

3. Digitalisation of justice

Over the past years, the COVID-19 pandemic has proven that digitalisation has a great potential to ensure more efficient and equal access to justice. When adopted and used with proper safeguards, digital tools have the potential to enhance equality and access to justice in criminal proceedings. However, digital tools are introduced in criminal justice in a somewhat selective manner focusing on aspects of digitalisation that benefit law-enforcement authorities or courts, or increase the perceived speed and thus efficiency of criminal proceedings, but leave defence rights and needs either fully or partially unaddressed.

In cross border proceedings, the EU continued work on the digitalisation of cross-border judicial cooperation focusing on digital communication between competent authorities and introducing the possibility to conduct hearings via videoconference.³⁷ While the possibility of conducting video-hearings was accompanied by a number of essential safeguards, including an informed consent of the accused or convicted person and an assessment of necessity and ability to guarantee essential rights such as the right to confidential communication with a lawyer, other essential aspects of cross-border proceedings were markedly left out of the digitalisation initiative.

One such essential aspect is the use of digital tools to exchange case files and ensure remote access to case files for lawyers in the issuing and executing state. Electronic access to the case file should be ensured to the defence to enable timely and adequate preparation for procedural activities, in particular for judicial review proceedings under the EAW or suspect interviews under the European Investigation Order (EIO). Lack of access to the case file prevents the defence from effectively challenging the legality and proportionality of the EAW before surrender and thus obtaining an effective remedy.³⁸ Access to case files is also of crucial importance where the suspect or accused person is interviewed under the EIO and enjoys the right to access case materials in the pre-trial stage in accordance with Article 7(2) of the Directive 2012/13/EU. Some Member States have already made electronic access to case files available and provide good examples of such efforts. In France and the Netherlands, digital platforms have been developed

³⁵ CJEU, Case C-78/18, [Commission v Hungary](#), 18 June 2020.

³⁶ See e.g. Német Tamás, “[Vezetői levélben tiltottak le bírókat a Helsinki képzéséről](#)”, Index, 24.05.2019.

³⁷ Proposal for a Regulation on the digitalisation of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters, and amending certain acts in the judicial cooperation, 1 December 2022.

³⁸ Reinforcing procedural safeguards and fundamental rights in European Arrest Warrant (‘EAW’) proceedings, April 2021, p. 21.

that allow lawyers to access case files digitally and download them to their computers.³⁹ Such access significantly reduces the time necessary to access and copy the materials in police stations or courthouses and allows for quicker and more effective preparation for investigative activities or judicial proceedings.

Access to a lawyer in the issuing state also remains only a theoretical right which is not effective in practice. Article 10(5) of the Directive 2013/48/EU requires Member States to cooperate to facilitate the appointment of a lawyer in the issuing state. Specifically, Article 10(4) prescribes that the competent authority of the executing state is required, without undue delay, to inform an individual arrested under an EAW of their right to appoint a lawyer in both the issuing and executing state. Recital 46 of the Directive specifies that the competent authority of the executing Member State should provide the requested person with information to facilitate the appointment of a lawyer in the issuing Member State. In EAW proceedings, digitalisation efforts could, but fail to address a long-standing implementation gap⁴⁰ in dual legal representation.

In particular, digital tools are not used to exchange information such as lists of available on-duty lawyers and how to apply for legal aid. This is particularly relevant in the EAW proceedings which envisage dual legal representation as an important legal safeguard. Facilitating the exchange of information that allows for the effective appointment of a lawyer (e.g., lists of lawyers specialised in cross-border cases or the names of available on-duty lawyers in the issuing State) would ensure respect for the right to dual legal representation as set out in Article 10(4) of Directive 2013/48/EU on the Access to a Lawyer.⁴¹

A good example in this regard is provided by Belgium's Salduzweb platform: an online platform aimed at streamlining the search for a lawyer in police custody.⁴² The application is used by the police and investigative judges to find lawyers (both private and legal aid)⁴³ for suspected people who are deprived of liberty. Lawyers who wish to appear on the application must register on the website and choose the moment they will be on duty by selecting one or more four-hour time slots, preferred subjects, as well as the police zones

³⁹ Le Conseil National des Barreaux, PLEX : une plateforme pour faciliter les échanges d'information, 14 May 2020, available in French at : <https://www.cnb.avocat.fr/fr/actualites/plex-une-plateforme-pour-faciliter-les-echanges-dinformations> (accessed on 2 February 2022); Orde van Advocaten – Midden-Nederland, Gerechtshof A-L : Strafdossiers hoger beroep digitaal verstrekken, available in Dutch at: <https://www.advocatenorde-middennederland.nl/68715/nieuws/gerechtshof-a-l-straf-dossiers-hoger-beroep-digitaal-verstrekken> (accessed on 17 February 2022).

⁴⁰ Report from the Commission to the European Parliament and the Council on the implementation of Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third person informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, Section 3.10.2.

⁴¹ Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty (OJ L 294, 6.11.2013, p. 1–12).

⁴² Belgian Ministry of Justice, *Salduz+ law evaluation report*, 2017–2018, p.40, available in French at: http://www.dsb-spc.be/doc/pdf/Rapport-Salduz-qualitatif_FR.pdf

⁴³ Legal aid lawyers however must go through a specific training before they can assist persons in police custody.

they want to be assigned to.⁴⁴ If the person asks to be assisted by a lawyer and does not know one, the police file a request via the web application. Instantly, a text is sent to a random duty lawyer with the assistance request and the location of the police station. The system is randomised, and the police have no power in deciding which lawyer will be called.

If the lawyer accepts the task, they become unavailable in the system and they have two hours to arrive at the police station and conduct the confidential consultation. However, if the first contacted lawyer is not available, the system automatically notifies the next lawyer in line. If no lawyer can be found through the application, an emergency number at the legal aid office can be called.⁴⁵

4. Use of unlawful evidence and effective judicial protection

Evidence is at the heart of criminal justice, forming the building blocks of a criminal case. For criminal proceedings to be fair the prosecution must prove the accused person's guilt beyond reasonable doubt with evidence that is collected legally, respecting the accused person's rights and proper procedures established by law. Violation of those procedures and the suspect's or accused person's rights in evidence gathering processes violates the rule of law. Furthermore, courts' admission of such evidence and its use for conviction gives a stamp of approval for violations of law and renders the rights and safeguards of Charter and EU Procedural Rights directives ineffective.

In 2021, Fair Trials issued a report detailing the use of unlawful evidence in criminal proceedings across EU Member States. It concluded that over the past decade, legal changes in several Member States have increased the level of discretion judges have to admit evidence obtained in violation of fundamental rights. These include either legal provisions that prevent courts from treating evidence as inadmissible on the grounds that it was obtained in violation of procedural rules or legal provisions that set lower evidentiary standards where the accused are charged with serious offences.⁴⁶

Legal systems give judges broad discretion to decide whether to admit unlawful evidence. In practice it is normally used to admit evidence, with the exclusion of unlawful evidence being an exception rather than norm. Even where there are seemingly clear obligations to exclude evidence, in practice the law is often interpreted to include conditions such as 'substantive violations' or 'fundamental breaches' to allow courts to rely on evidence.⁴⁷ There is evidence of judges relying on regional and international human rights standards to justify the exclusion of illegal evidence but there are also cases of judges relying on European Court of Human Rights (ECtHR) case law to justify a less robust approach to evidentiary remedies.⁴⁸

⁴⁴ O. Nederlandt, D. Vandermeersch, Deux ans après la loi 'Salduz': inventaire critique de la jurisprudence et des pratiques; In: Les droits de la défense, Larcier; Bruxelles, 2014, p.28, available at: <http://hdl.handle.net/2078.3/139891>.

⁴⁵ Belgian Ministry of Justice, *Salduz law evaluation report*, 2013, p.9.

⁴⁶ Fair Trials, "Unlawful evidence in Europe's courts: principles, practice and remedies", 2021, p.32.

⁴⁷ Fair Trials, "Unlawful evidence in Europe's courts: principles, practice and remedies", 2021, pp. 38.-39.

⁴⁸ Fair Trials, "Unlawful evidence in Europe's courts: principles, practice and remedies", 2021, p. 39.

The lack of adequate oversight over the observance of law in evidence gathering procedures has spilled over into the cross-border exchange of evidence. For example, in 2022 a series of national and regional cases were filed in relation to the *EncroChat* hack and evidence obtained. Thousands of people across Europe were arrested, detained, and prosecuted based on evidence obtained during the hack of *EncroChat* – a communications network and service provider which sold specially designed encrypted messaging mobile devices with maximum privacy settings and functions enabled. The data obtained by the French police authorities was sent to Europol, which transferred the data to law enforcement agencies in other EU countries. However, details about how the network was infiltrated and what underlying data was retrieved have been suppressed by the French authorities on the grounds of ‘defence secrecy’. Inability to question and review the legality and accuracy of evidence has been continuously raised before national courts.⁴⁹ In at least two cases this has led to national courts questioning the compatibility of the current situation with fundamental rights. As of submission of this paper, there are at least two cases pending before the CJEU⁵⁰ and the ECtHR⁵¹ requesting these courts to bring some clarity regarding the procedure for challenging and verifying the legality of *EncroChat* evidence and an effective remedy in case of a violation of law (and fundamental rights) in the evidence gathering process.

5. Diplomatic assurances in EAW cases

The European Arrest Warrant is based on mutual trust between Member States. Even in cases where there is a serious risk that surrender under the EAW may result in a breach of prohibition of inhuman and degrading treatment, Member States are encouraged to first seek assurances from the issuing state that the rights of the requested person will be guaranteed. In a case currently pending before the CJEU where the requested person suffers from a serious chronic and potentially irreversible disease which may expose them to the risk of suffering serious harm to his or her health in case of surrender under the EAW the Advocate General’s opinion encourages seeking assurances as a guarantee of compliance.⁵² However practice shows that without any control over the implementation of the assurances in practice, they cannot serve as a guarantee that the rights of the requested person, especially inviolable rights such as the prohibition of inhuman and degrading treatment, will not be breached.

Compliance with assurances given by Member States in relation to potential breaches of inviolable rights are currently not subject to any systematic or even *ad hoc* control. This puts in question the protections afforded by the Charter and the EU law. Exchanges with defence lawyers of Fair Trials’ Legal Experts Advisory Panel highlight that Member States’ courts generally trust the assurances provided by the issuing Member State and as a result there is virtually no follow-up on their implementation or accountability in case of a breach.

⁴⁹ [EncroChat hack: Fair Trials denounces lack of transparency and oversight](#), Fair Trials, 2022; [EncroChat hack: Fair Trials denounces decision of French Court](#), Fair Trials, 8 April 2022; see also [Open Letter of Concern](#) to the European Commission, 18 February 2022.

⁵⁰ [German courts refer the legality of EncroChat evidence to the CJEU](#), Fair Trials, 8 November 2022.

⁵¹ ECtHR, *AL. v. France and E.J. v. France*, Nos. 44715/20 and 47930/21, 3 January 2022.

⁵² CJEU, Case C-699/21, E.D.L., Opinion of Advocate-General Campos Sánchez-Bordona.

In the absence of any data about the implementation of assurances in practice, there is anecdotal evidence to show that they are not complied with and need to be monitored to ensure compliance and guarantee rights. An example involving repeated breaches of assurances was highlighted in a recent report on EAW proceedings in Germany. It highlights a decision of German courts questioning the reliability of assurances given by Hungarian authorities that the requested person, ML, will be kept imprisoned in accordance with the minimum European standards on prison conditions. In that case, ML had previously already been surrendered to Hungary, following a CJEU judgement, and based on an assurance provided by the Hungarian authorities that the detention facilities he was to be imprisoned in would provide adequate conditions. The German court determined that the previous assurance given by the Hungarian authorities had been violated and contrary to what was assured by the Hungarian authorities the requested person had been kept in a different, sub-standard detention facility. The Hungarian authorities, though asked by the German authorities, failed to explain why that assurance was violated. Therefore, the German court held that the basis for mutual recognition – mutual trust – was broken by the Hungarian authorities, in particular in relation to ML, who was requested by the Hungarian authorities by means of a new EAW. Therefore, the court held that a new assurance by the Hungarian authorities that ML will be kept in acceptable prison conditions cannot be relied upon. Furthermore, referring to the CJEU jurisprudence, it held that a real risk of inhumane prison conditions continues to exist in relation to ML and concluded that the EAW cannot be executed in this situation.⁵³ There is also evidence of national courts refusing to execute the EAW on account of failure to check the reliability of assurances of the issuing Member State.⁵⁴

Defence lawyers from Fair Trials' Legal Experts Advisory Panel also point out that the formal content of the assurance requests focus on basic conditions such as cell space and overlook other aspects of detention. For example, a lawyer found that after being surrendered on the basis of assurances given by Bulgaria, their client was held in poor detention conditions that lead to them suffering from bedbug bites.

Assurances should not be used as a replacement for the existence and systematic implementation of adequate standards of detention conditions. The practice of routinely relying on assurances as a compromise for courts faced with the dilemma of whether to refuse an EAW or allow surrender to potentially rights-infringing conditions has been viewed with concern by many experts and practitioners as a tacit admission that human rights violations are indeed endemic but that protection from them should only be provided as an exceptional, case-by-case measure. A further consideration in relation to the reliance on assurances to protect the fundamental rights of requested persons is the risk that they, often foreign nationals in the country of prosecution, will enjoy a higher degree of rights protection in a kind of positive discrimination *vis-à-vis* nationals detained purely according to domestic procedures in which no particularised assurances are given.⁵⁵

⁵³ Dominik Borodowski, First Periodic Country Report: Germany, STREAM Project 2022, p.8.

⁵⁴ Higher Regional Court of Appeals Bremen (Hanseatisches Oberlandesgericht in Bremen), Order of 16 March 2020, 1 Ausl A 78/19, ECLI:DE:OLGHB:2020:0316.1AUSLA78.19.00; Higher Regional Court of Appeals Hamburg (Hanseatisches Oberlandesgericht Hamburg), Order of 26 January 2022, (1) Ausl 99/20, ECLI:DE:OLGHH:2022:0126.AUSL99.20.0A.

⁵⁵ Fair Trials, Measure of Last Resort?, 2016, p.36.

Fair Trials is not aware of any national court or body which systematically monitors compliance with assurances (for example, to ensure that suspects are not moved to facilities with worse conditions than those promised in the assurance). The lack of systematic monitoring of assurances makes it impossible to know how often these are used, what the content of the assurances is, and whether they are complied with.⁵⁶ The ECtHR has provided guidance on safeguards in the use of assurances, providing eleven aspects to assess the quality of assurances, including whether compliance with the assurances can be objectively verified through diplomatic or other monitoring mechanisms, including providing unfettered access to the applicant's lawyers.⁵⁷ However, without sufficient monitoring, it is difficult to see how these are being respected in practice in the context of EAW cases and whether the rule of law is respected in relation to upholding adequate standards of detention.

⁵⁶ Fair Trials, *Measure of Last Resort?*, 2016, p.36

⁵⁷ ECtHR, *Othman (Abu Qatada) v The United Kingdom*, App. 8139/09, 9.05.2012, para. 189.