

BRIEFING PAPER ON THE COMMUNICATION ON DIGITALISATION OF JUSTICE IN THE EUROPEAN UNION

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Fair

Trials



About Fair Trials

Fair Trials is a global criminal justice watchdog with offices in London, Brussels and Washington, D.C., focused on improving the right to a fair trial in accordance with international standards. Fair Trials' work is premised on the belief that fair trials are one of the cornerstones of a just society: they prevent lives from being ruined by miscarriages of justice and make societies safer by contributing to transparent and reliable justice systems that maintain public trust. Although universally recognised in principle, in practice the basic human right to a fair trial is being routinely abused. Its work combines: (a) helping suspects to understand and exercise their rights; (b) building an engaged and informed network of fair trial defenders (including NGOs, lawyers and academics); and (c) fighting the underlying causes of unfair trials through research, litigation, political advocacy and campaigns.



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Fair Trials is ready to share our expertise and that of our network of more than 200 defence lawyers, academics and civil society organisations. Please contact Laure Baudrihay-Gérard (laure.baudrihay@fairtrials.net) to discuss any of the issues outlined in this briefing paper.



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Impact analysis

On 2 December 2020, the European Commission published a Communication on Digitalisation of Justice in the European Union (Communication), which outlines proposals for introducing or broadening the use of digital technology in justice systems. Fair Trials welcomes the Communication and the search for ways to make criminal justice systems more accessible. However, some of the proposed measures affect the fairness of criminal proceedings and the rights of suspects and accused persons. In this briefing paper, we have outlined how these issues can be addressed.

Protecting fair trial rights

The Communication's stated objective is to make justice systems across the European Union (EU) more resilient and to promote digitalisation as a way of increasing their accessibility and efficiency. While speedy and efficient proceedings can help to guarantee the right to a trial within a reasonable time, the ultimate task of criminal justice systems is to ensure fairness in every criminal case. Respect for fair trial rights is important not only for each suspect and accused person, but also to uphold the values and *acquis* of the EU, promote mutual trust among Member States and serve as a guarantee of the rule of law. Fairness of criminal proceedings requires, among others, full and effective use of defence rights guaranteed by Article 47 and 48 of the EU Charter of Fundamental Rights and detailed in the EU Procedural Rights Directives.[1] Therefore, any measures intended to increase the speed and efficiency of criminal investigations and prosecutions must not undermine the fairness of criminal proceedings and the rights guaranteed to suspects and accused persons under EU law.

Impact and monitoring

The Communication calls for continuous monitoring, analysis and foresight programme on justice-relevant digital technology. Ongoing impact assessment of digitalisation is key to detecting, preventing or rectifying the potential risks to fundamental rights investigations and prosecutions must not undermine the fairness of criminal proceedings and the rights guaranteed to suspects and accused persons under EU law.

[1] Six [EU Procedural Rights Directives](#) protect the [right to information](#), the [right to interpretation and translation](#), [right to have a lawyer](#), [right to be presumed innocent and to be present at trial](#), the [right to legal aid](#) and [special safeguards for children suspected and accused in criminal proceedings](#).

This monitoring needs to include not only quantitative, but also independent qualitative assessments of the impact on defence rights and fairness of criminal proceedings.[2] Before introducing digital tools in criminal justice systems, clear objectives about their benefits need to be set. The perceived time and cost savings need to be properly calculated and weighed against the potential impact on the fairness of criminal proceedings and justice outcomes. Digital solutions should be open to review and removed if research and monitoring shows that they have a negative effect on the fairness of criminal proceedings or the ability for suspects or accused persons to use their rights effectively.

Risk and benefit analyses

The COVID-19 pandemic resulted in the increased use of digital solutions such as remote hearings. We need to make sure that these responses to a crisis do not become normal practice without careful assessment. Increased use of digital tools in the justice sector should not be an objective in itself but a tool to increase the fairness of criminal proceedings. However, there is a risk that perceived cost and efficiency advantages will push Member States to permanently adopt these measures without proper risk and benefit analyses. Before adopting any legislation, the EU should undertake detailed qualitative impact assessments and carry out public consultations with all stakeholders, including civil society, defence lawyers and organisations representing them.

[2] Fair Trials, [Impact assessment of remote justice on fair trial rights](#), 2020.

Impact of videoconferencing on defence rights

The Communication encourages Member States to use videoconferencing in cross-border proceedings and, wherever possible, in domestic criminal proceedings.[3]

However, the impact of videoconference on defence rights in key stages of criminal proceedings, such as legal assistance in police custody, pre-trial detention hearings and trial on merits, has not been properly assessed. The limited research[4] available shows that the use of remote technology in court hearings has a predominantly negative effect on the exercise of key rights protected by the EU Procedural Rights Directives, as outlined below.

Right to a confidential consultation with a lawyer (Directive 2013/48/EU ('Access to a Lawyer Directive'))[5]

Speaking to a lawyer by phone or videoconference is not a replacement for in-person counsel. Lawyers' ability to fulfil key aspects of their role are limited if a lawyer is only able to communicate with the suspect or accused person remotely. Lawyers are less able to ensure that a suspect's or accused person's rights are properly respected, and to prevent coercion or ill-treatment.

To make sure video-links work properly, prison staff or court officials are often present in rooms that should be available for confidential lawyer-client communication.[6] It can also be more difficult for a lawyer to identify whether their client has vulnerabilities or requirements that need to be addressed.

[3] European Commission, Communication on Digitalisation of Justice in the European Union - A toolbox of opportunities, 2 December 2020, p.14, access [here](#).

[4] For example, Fair Trials, [Commentary: Impact assessment of remote justice on fair trial rights](#); Fair Trials, [Beyond the Emergency of the COVID-19 Pandemic: Lessons for Defence Rights in Europe](#); Transform Justice, [Defendants on video - conveyor belt justice or a revolution in access?](#); Nigel Fielding, Sabine Braun and Graham Hieke, [Video Enabled Justice Evaluation](#).

[5] Article 3 and 4 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 party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, accessible here.

[6] Transform Justice, [Defendants on video - conveyor belt justice or a revolution in access?](#), p. 12; Fair Trials, [Beyond the Emergency of the COVID-19 Pandemic: Lessons for Defence Rights in Europe](#), p. 6.

Right to effective participation in a hearing (Directive 2016/343 ('Presumption of Innocence Directive'))[7]

Research shows that there is limited to no possibility for confidential interaction between lawyers and suspects or accused persons during remote hearings.[8] This can have serious implications for both the effectiveness of legal assistance and a defendant's ability to understand and be actively involved in the hearing. It also may not be possible to identify whether a suspect or accused person is vulnerable or has special requirements, and to ensure these issues are properly addressed.[9]

Right to be present (Presumption of Innocence Directive)

Participation via videoconference is not equivalent to being physically present at a trial and therefore restricts this right. A trial where a defendant is only allowed to appear remotely is considered trial in absentia for the purposes of the European Arrest Warrant (EAW).[10] Therefore on a national level, remote hearings should not be imposed without a suspect or accused's person's consent. Where such hearings are conducted, they must be accompanied by detailed additional safeguards to ensure the effective exercise of defence rights.[11]

There are further concerns about minors and other vulnerable people. Suspects and accused persons with learning difficulties, in particular face serious barriers to effective legal assistance and to effective participation in most normal court settings.[12] Remote justice procedures could make these challenges worse.[13]

[7] Article 8(1) of 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, accessible [here](#).

[8] Fair Trials, [Beyond the Emergency of the COVID-19 Pandemic: Lessons for Defence Rights in Europe](#), June 2020.

[9] Equality and Human Rights Commission, [Inclusive justice: a system designed for all - Video hearings and their impact on effective participation](#), April 2020.

[10] Hannah Brodersen, Vincent Glerum, André Klip "[Improving Mutual Recognition of European Arrest Warrants for the Purpose of Executing Judgments Rendered Following a Trial at which the Person Concerned Did Not Appear in Person](#)", 2019, p.66.; see also European Criminal Bar Association (ECBA), [Statement of Principles on the use of Video-Conferencing in Criminal Cases in a Post-Covid-19 World](#), 6 September 2020, p. 3 and ECtHR, [Marcello Viola v. Italy](#), (No.2), App. No. 45106/04, Judgment of 5 October 2006, para.52.

[11] For detailed recommendations see: Fair Trials, [Beyond the Emergency of the COVID-19 Pandemic: Lessons for Defence Rights in Europe](#), June 2020.

[12] Ibid.

[13] Equality and Human Rights Commission, [Inclusive justice: a system designed for all - Video hearings and their impact on effective participation](#), April 2020.

The use of artificial intelligence in criminal proceedings

Discrimination

The Communication acknowledges the serious risks of biased outcomes and discrimination resulting from the use of automated decision-making, algorithmic Artificial Intelligence (AI) in criminal justice and is seeking to address these, including by examining AI training data and testing high-risk AI applications.[14] However, there are more fundamental issues that need to be addressed.

The criminal justice data used in AI systems does not represent an accurate record of criminality, it just represents a record of the crimes, locations and groups that are policed and prosecuted within society, rather than the actual true occurrence of crime. Racially biased criminal justice practices are prevalent throughout Europe, and therefore structurally discriminatory policing, prosecutions and sentencing is represented in the criminal justice data used in AI systems.[15] Any analysis of such data by AI is extremely likely to result in decisions which perpetuate these disproportionate and discriminatory criminal justice approaches. It will also lead to a re-enforcement and re-entrenchment of those biases via ‘feedback loops’ which reinforce patterns of inequality.[16] As a result, proposed efforts or solutions to ‘de-bias’ datasets, such as removing all potentially ‘biased’ variables, will merely result in the AI system losing much of its functional utility and becoming unusable. Even where data about ethnicity or other protected characteristics is not included or is specifically excluded, other seemingly legitimate data can act as a ‘proxy’ for other factors.[17] For example, area codes or home addresses can often be a proxy for race or ethnicity, due to pronounced ethnic residential segregation in many European countries.[18]

[14] European Commission, Communication on Digitalisation of Justice in the European Union - A toolbox of opportunities, 2 December 2020, accessible [here](#).

[15] Fundamental Rights Agency, ‘EU-MIDIS II Second European Union Minorities and Discrimination Survey’, 2018.

[16] For a more detailed discussion of these points, please see Fair Trials’ response to the EU consultation on AI, ‘[Regulating AI for use in Criminal Justice Systems](#)’, June 2020.

[17] Ibid.

[18] E.g. Sweden. See Malberg, Bo ‘[Residential Segregation of European and Non-European Migrants in Sweden](#)’ (2018) Eur J Popul 34(2): 169-193; FRA, ‘Summary Report - The State of Roma and Traveller Housing in the European Union - Steps towards Equality’ (2010)

Independent testing

It should be a legal requirement for AI systems to be tested by an independent body before and post-deployment within criminal justice systems. If an AI system fails a test to prove that it does not result in discriminatory outcomes or exacerbate social inequalities, it should be barred from operational use. Given the evidence and issues described above, it is likely that many systems will not pass such a test.

Predictive justice and the presumption of innocence

The right to be presumed innocent in criminal proceedings is a basic human right, safeguarded by EU law under the Presumption of Innocence Directive[19] and the EU Charter of Fundamental Rights, as well as the European Convention on Human Rights.

However, predictive and risk-assessment AI tools target individuals and profile them as criminals before they have carried out the crime for which they are being profiled. These predictions and risk assessments have resulted in police surveillance, harassment and arrests, and they influence decisions about prosecution, bail sentencing and probation.[20] As a result, law enforcement has moved beyond the formalistic ideas and definitions of ‘reasonable suspicion’, ‘suspect’ and ‘charge’, as AI systems are used to generate reasonable suspicion and potential suspects.

From a moral and ethical viewpoint, using systems to profile, predict an individual’s future actions or create a suspicion of criminality without objective evidence, leading to criminal justice action, infringes the presumption of innocence. However, it is unclear whether these decisions and the outcomes they influence violate the legal presumption of innocence under current EU and international human rights law. Sufficient safeguards are needed to properly protect people’s rights and freedoms against these new law enforcement and criminal justice strategies and systems, including preventing their use in certain circumstances.

AI systems must uphold the presumption of innocence. AI systems which seek to profile, predict, assess risk or otherwise pre-designate an individual as a criminal before trial must not be allowed in criminal justice. AI systems that influence or assist law enforcement or criminal justice authorities to take unjustified or disproportionate measures against individuals based on statistical prediction, rather than reasonable suspicion or objective evidence should similarly not be allowed.

[19] [Presumption of Innocence Directive](#).

[20] Fair Trials’ response to the EU consultation on [‘Regulating AI for use in Criminal Justice Systems’](#), June 2020.

Transparency and accountability

Decision-making processes within criminal justice systems should be transparent so that they can be understood and scrutinised by the people using them, suspects and accused persons, and the general public. The Communication states that criminal justice bodies should give explanations for their decisions, that opacity is unacceptable, and that human accountability is paramount, but obligations and requirements in relation to AI must go further.[21]

Criminal procedure should enable the full disclosure of all aspects of AI systems that are necessary for suspects and accused persons to contest their findings. Any AI-influenced decisions in criminal justice must also be intelligible, and explanations for AI-influenced decisions should be understandable by a layperson and should not require technical expertise. Commercial or proprietary interests, or technical concerns, should never be a barrier to this level of transparency and explanation.

AI systems' decisions, or decisions they have influenced, must also be contestable by criminal defendants. This is so that they can not only challenge the outcomes of the AI systems' calculations and analyses, but also scrutinise the legality of their use. Individuals must be notified that they have been subject to an automated decision by an AI system, so they can challenge that decision.[22]

[21] European Commission, Communication on Digitalisation of Justice in the European Union - A toolbox of opportunities, 2 December 2020, accessible [here](#).

[22] Fair Trials' response to the EU consultation on AI, '[Regulating AI for use in Criminal Justice Systems](#)', June 2020.

Digitalisation of case files

The primary focus of the Communication is the use of digitalisation to increase the speed and efficiency of communication and exchange of information between competent authorities. However, the Communication and digital solutions envisaged therein should also address access to information for defence in cross-border proceedings. There are clear benefits of digitalising the exchange of information in cross-border proceedings and reducing reliance on paper files, which require physical access and limit time for their inspection. However, where law enforcement, prosecution and judicial authorities have full and unrestricted access to case files throughout criminal proceedings, the principle of equality of arms requires that the digitalisation of case management systems and case files also benefits defence. Timely access to case files in the pre-trial stage of criminal proceedings is protected by Article 7 of Directive 2012/13/EU ('Access to Information Directive').^[23] Remote access to case files could support effective implementation of that right.^[24]

The EU has previously called for measures to address the overuse of detention and to promote alternatives to detention.^[25] Enabling defence lawyers to prepare effective challenge to arrest warrants on a national and European level and, where necessary, to argue for the use of other, less restrictive cross-border cooperation instruments could contribute significantly to that effort. Therefore, defence lawyers must be granted access not only to the EAW form, but also to all essential documents^[26] underlying the national arrest warrant on which an EAW is based. Access to case files in the issuing state is particularly essential to enable effective dual defence in EAW proceedings as envisaged by the Access to a Lawyer Directive, which remains problematic in a majority of Member States.^[27]

[23] European Commission, Report 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., p. 17, 26 September 2019, accessible [here](#).

[24] Fair Trials, [Beyond the Emergency of the COVID-19 Pandemic: Lessons for Defence Rights in Europe](#), June 2020, p.26.

[25] Council Conclusions on mutual recognition in Criminal Matters '[Promoting mutual recognition by enhancing mutual trust](#)', 2018/C 449/02, 13 December 2018.

[26] Article 7(1) of Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, accessible [here](#).

[27] Report of the European Commission on the Implementation of Directive 2013/48/EU on Access to a Lawyer, accessible [here](#), Section 3.10.2

Cross-border cooperation

Digitalisation may benefit cross-border cooperation through more efficient and timely exchange of information. However, the increase of speed and ease of exchange of information between competent authorities should not undermine the effectiveness of available remedies, including any challenges to the relevance, accuracy or legality of evidence gathered in another Member State.

The use of the EAW has grown exponentially from 2004 to 2018 with the number of EAWs issued in a single year growing almost threefold in a little more than a decade. In 2018, more than 17,400 people's arrest and surrender was sought within the EU.[28] Overuse of EAWs is not only costly, but also contributes to the long-standing crisis of overcrowding in prisons across Member States.[29] This in turn undermines mutual trust, which is at the very heart of the successful implementation of the EAW. Our research has found that the EAW continues to be used contrary to its objectives, for example to carry out investigative activities and prosecute petty crimes.[30] Existing alternative measures continue to be underused compared to the EAW.

Alternatives to EAWs

Digitalisation should promote and facilitate the use of alternative cross-border cooperation instruments such as the European Investigation Order or European Supervision Order. Directive 2014/41/EU on the European Investigation Order already provides for the use of digital means such as video or telephone conference to promote proportionate use of the EAW.[31] Resources available for the digitalisation of justice should be used to promote the increased use of these alternative cross-border instruments.

[28] European Commission, European e-justice, Statistics on EAW use, available [here](#) and [here](#).

[29] See Joined Cases C-404/15 and C-659/15 PPU Pál Aranyosi and Robert Căldăraru, EU:C:2016:198.

[30] Fair Trials, [Beyond Surrender, Putting human rights at the heart of the European Arrest Warrant](#), June 2015, p. 8.

[31] Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, Article 24, Recital 26, accessible [here](#).

Promoting dual legal representation

In cross-border proceedings, digitalisation should also be used to promote dual legal representation. Article 10(4) of Directive 2013/48/EU on the Access to a Lawyer^[32] 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. Digitalisation should facilitate the exchange of current lists of lawyers, or the names of lawyers on duty in the issuing State, who can provide information and advice in EAW cases as envisaged by the Directive on the Access to a Lawyer.

Digitalisation should also provide a mechanism to facilitate cooperation between defence lawyers in the issuing and executing states in EAW proceedings and, specifically, the early participation of lawyers in both states at the early and crucial stages of cross-border proceedings, such as the initial EAW hearing in the executing state before surrender.

[32] [Access to a Lawyer Directive](#).