

Unlawful evidence in Europe's courts: principles, practice and remedies

October 2021



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Abbreviations and Terminology

EU	European Union
CJEU	Court of Justice of the European Union
ECtHR	European Court of Human Rights
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
Charter	Charter of Fundamental Rights of the European Union
TFEU	Treaty on the Functioning of the European Union
EPPO	European Public Prosecutor's Office

We have adopted the terms below throughout this report.

Defendant	Suspect, accused person or other similar status, whether officially recognised as such or de facto. This term corresponds to 'everyone charged with a criminal offence' under the ECHR.
Evidence	Information (or data) whether for or against the defendant, in the possession of the competent authorities in relation to a specific criminal case. This can be contained in any form - documents, objects, photographs, audio recordings etc.
Illegally / unlawfully obtained evidence	Evidence obtained in violation of fundamental rights of defendants and other persons or of rules and procedures applicable to the specific evidence-gathering activity under national law.
Inadmissible evidence	Evidence that cannot be used as proof in a criminal case according to national law or as a result of the decision of a court or other public official authorised to make such a decision.

EU
Procedural
Rights
Directives

Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings, (OJ 2010 L 280, p. 1);
Directive 2012/13/EU on the right to information in criminal proceedings (OJ 2012 L 142, p. 1) (**'Right to Information Directive'**);
Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings (OJ 2013 L 290, p. 1) (**'Access to a Lawyer Directive'**);
Directive 2016/800 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 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) (**'Presumption of Innocence Directive'**);
Directive 2016/1919 on legal aid for suspects and accused persons in criminal proceedings (OJ L 297, 4.11.2016 p.1.; corrigendum OJ L91 5.4.2017, p.40).

Executive Summary

Issues of evidence admissibility in criminal proceedings have become particularly important in the European Union (EU) since the creation of the area of freedom, justice, and security. The EU has increasingly invested in instruments facilitating cross-border exchange of evidence, but so far has not addressed how to verify the legality of that evidence. This issue has frequently been raised from both the perspective of ensuring evidence gathered in one Member State is admissible in another, and of ensuring effective remedies for violations of the rights under the EU law. Thus, despite a clear mandate for the EU to legislate on mutual admissibility of evidence, these questions are left largely to applicable international and regional human rights standards and to national law.

Regional practice

In the absence of clear regional standards on effective evidentiary remedies, there is an overreliance on the European Court of Human Rights (ECtHR) to fill in the existing gaps in legislation and practice. However, in practice the case-by-case overall fairness approach taken by the ECtHR can be too complex and unpredictable to provide a principled guidance for dealing with unlawful evidence.

The ECtHR leaves the exact rules of admissibility to national law, however there are some areas which require exclusion of unlawful evidence. These include cases where evidence is unreliable, obtained from torture, or results from entrapment. The approach is less clear in other cases, including those where evidence is obtained in violation of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). Even though the ECtHR recognises exclusion of evidence as key means (though not the only means) to provide an effective remedy, in practice the use of unlawful evidence, even where it plays a decisive role, is often tolerated. This is particularly true with evidence gathered in violation of the right to private life where ECtHR is most likely to accept reliance on such evidence without finding overall fairness compromised. As a matter of general principles of assessment, the ECtHR has softened its previously strong stance on exclusionary rule for evidence obtained in violation of defence rights (most notably evidence obtained without access to a lawyer). The ECtHR also finds public interest in prosecution relevant suggesting that violations of law and fundamental rights in evidence gathering could be more acceptable where there is increased public interest.

The Court of Justice of the European Union (CJEU) has not developed an extensive body of case law on evidentiary remedies. However, in its recent case law, it suggested that the exclusionary rule should apply to evidence obtained in violation of EU law where firstly, the accused has not been able to comment effectively on the evidence, and, secondly, the evidence pertains to a field of which the judges have no knowledge and are likely to have a preponderant influence on the findings of fact. The CJEU has not elaborated on what these tests entail and how they should be applied, nor has it explained why these circumstances require mandatory exclusion of evidence.

Domestic practice

The laws in EU Member States vary enormously. While most Member States have some form of legal regime governing the admissibility of illegal evidence, there are very few legal rules in Lithuania and almost none in Sweden.

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.

Legal systems give judges broad discretion to decide whether to admit unlawful evidence. In practice it is normally used to admit evidence, with 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. 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 ECtHR case law to justify a less robust approach to evidentiary remedies.

Although there are major benefits to allowing evidential challenges pre-trial, in most countries this is not possible in practice. This is partially because there is either a general lack of procedure to challenge the legality of evidence pre-trial or the defence does not have early access to the case file and specifically to information on how evidence was gathered. What little oversight exists at this stage normally rests with prosecutors. Investigative practices such as 'informal questioning' in the absence of a lawyer or information about rights are particularly problematic as they are undocumented but can be instrumental for building the prosecution's case by gathering further evidence or confronting the suspect in subsequent interviews to obtain the same incriminating information.

With a few exceptions such as Croatia and Ireland, challenges to legality and use of evidence normally take place at trial and are decided by the same judges that will decide on the guilt or innocence of the accused. This means they will examine the unlawful evidence and are most likely to be influenced by it regardless of whether they will eventually rely on it in their written decision.

Way forward

Comprehensive assessment based on four rationales

To assist judicial and prosecutorial decision-making on illegally obtained evidence, we propose a methodology that incorporates four main rationales for exclusion of illegally obtained evidence. It was developed pursuant to extensive comparative research and is built on the existing case law of regional and national courts adding structure to different rationales and interests that have already been assessed by courts in evidentiary proceedings. It incorporates different rationales for the exclusion of illegally obtained evidence and allows a comprehensive assessment of the impact of violations of law in evidence gathering on both individual fairness

as well as on broader public interest in proper administration of justice. These rationales include:

Reliability: Establishing the truth – whether and what criminal offence has been committed, who the perpetrator is and whether they bear criminal responsibility for their actions – is one of the main objectives of criminal proceedings. The truth can only be established based on reliable information. Where there are doubts that the circumstances in which evidence was obtained may have impacted its reliability and accuracy, evidence must be excluded.

Deterrence: courts should exclude illegally obtained evidence to discourage law enforcement officers from committing improprieties or illegal acts in the investigation of crime. The prosecution and investigative authorities should not benefit from breaking the law and, if judges routinely excluded illegally obtained evidence, this would send a message that there is no benefit to be gained from acting outside the law.

Prevention: if a legal system sets certain standards for criminal investigations, people have corresponding rights. If those rights are violated, the suspect or accused person should not be placed at a disadvantage because of that violation and the evidence obtained through such violation should not be used against that person. The remedial rationale is based on the right to an effective remedy, which should as far as possible, put the suspect in the position they would have been in if the rights violation of had not occurred.

Integrity: Criminal justice is based on public trust therefore justice must not simply be done but must be seen to be done. Public will lose faith in the administration of justice if judges condone wrongdoing by state authorities too easily and permit evidence obtained by deliberate, grave, or systemic abuses of power to be used in criminal proceedings. Therefore, courts must apply the exclusionary rule to preserve the legitimacy and integrity of the criminal justice system.

Based on these founding rationales we have developed a comprehensive guide to assist just judges and prosecutors in their decision making on illegally obtained evidence.

1. Introduction

Evidence has always been at the heart of criminal justice, forming the building blocks of a criminal case. In a criminal trial it is the primary task of the prosecution to gather sufficient evidence to establish whether a criminal offence has been committed, to identify who they believe is the responsible perpetrator and to prove the guilt of the person that is accused beyond reasonable doubt. This report addresses the complex question of what should happen when that evidence has been obtained unlawfully, perhaps because unlawful surveillance techniques were used or the accused person's human rights were violated. How this question is answered is crucial. It can result in a person being convicted (or cleared) of a criminal offence; can undermine or strengthen trust in the integrity of criminal justice systems; and can create a legal environment in which human rights are either respected or derided by the state.

Fair Trials chose to examine this issue because we know that, in practice, if you are accused of a crime (even if you are lucky enough to have an excellent defence lawyer) it is exceedingly hard to stop the courts convicting you on the basis of unlawfully obtained evidence. Our aims are twofold: first, to try to understand how regional and domestic law currently deal with the question of illegal evidence in law and practice; and, secondly, to develop a principled guidance for approaching the question of what to do about unlawful evidence.

1.1. Context and aims

Issues of evidence admissibility in criminal proceedings are of global relevance but they have become particularly important in the European Union (EU) since the creation of the area of freedom, justice and security. In this context, the EU increasingly invested in facilitating the exchange of evidence between Member States and started to create minimum standards to protect the rights of those suspected of a crime. Questions surrounding illegal evidence have been raised frequently, both from the perspective of ensuring evidence gathered in one Member State is admissible in another, and from the perspective of ensuring effective remedies for violations of the rights under the EU law.

Notwithstanding this, and despite a clear mandate to legislate on "mutual admissibility of evidence"¹, the EU has not set regional standards on evidence-gathering and admissibility. This means that, for now, these questions are left largely to applicable international and regional human rights standards and to national law.

¹ Article 82(2) Treaty on the Functioning of the European Union ('TFEU'), OJ C 326, 26.10.2012, p. 47–390.

EU policy-making and evidence admissibility

The 2009 Green Paper and the European Investigation Order: In 2009 the Commission adopted a Green Paper² which envisaged comprehensive EU legislation to facilitate the cross-border exchange of evidence by regulating evidence gathering procedures (to ensure respect for fundamental rights) so that evidence gathered in one Member State would be admissible in the national courts of another. The Green Paper resulted in the adoption of the Directive on the European Investigation Order³ which details the procedures for requesting and exchanging evidence between EU Member States but created no rules on evidence gathering and admissibility.

The European Public Prosecutor's Office (EPPO): The newly created EPPO will have the power to gather and present evidence before national courts.⁴ However, the relevant legal framework does not set standards for gathering evidence to ensure their legality and compatibility with fundamental rights and, crucially, their admissibility. The initial proposal did envisage a section addressing the basic rules on admissibility of evidence gathered by the EPPO⁵, however, this was not included in the final text, leaving the procedures for detecting and remedying any violations of law or fundamental rights in evidence gathering process down to the national laws of Member States.

The E-Evidence Package: In response to the increasing demand for cross-border electronic information, in April 2018 the European Commission proposed an "E-evidence package" to create a tool for law enforcement agencies to obtain electronic data from other countries⁶. The texts of the proposed regulation⁷ and directive⁸ do not address common standards on gathering or admissibility of evidence.

² Green Paper on obtaining evidence in criminal matters from one Member State to another and securing its admissibility, COM (2009) 624 final, 11 November 2009.

³ Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, OJ L 130, 1.5.2014, p. 1–36.

⁴ Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'), OJ L 283, 31.10.2017, Articles 5(4) and 13(1).

⁵ Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office. Article 30 of the proposed Draft Regulation read: "Admissibility of evidence 1.Evidence presented by the European Public Prosecutor's Office to the trial court, where the court considers that its admission would not adversely affect the fairness of the procedure or the rights of defence as enshrined in Articles 47 and 48 of the Charter of Fundamental Rights of the European Union, shall be admitted in the trial without any validation or similar legal process even if the national law of the Member State where the court is located provides for different rules on the collection or presentation of such evidence. 2. Once the evidence is admitted, the competence of national courts to assess freely the evidence presented by the European Public Prosecutor's Office at trial shall not be affected."

⁶ E-evidence - cross-border access to electronic evidence, available at: https://ec.europa.eu/info/policies/justice-and-fundamental-rights/criminal-justice/e-evidence-cross-border-access-electronic-evidence_en.

⁷ Proposal for a Regulation of the European Parliament and of the Council on European Production and Preservation Orders for electronic evidence in criminal matters.

⁸ Proposal for a Directive of the European Parliament and of the Council laying down harmonised rules on the appointment of legal representatives for the purpose of gathering evidence in criminal proceedings.

Procedural Rights Directives: The EU has now adopted six Directives setting common minimum standards in respect of the rights of suspects and accused persons in criminal proceedings. The question of evidence exclusion as a remedy for violation of these rights was a key issue during negotiations but none of the Directives provides clear provisions on this. For example, the Access to a Lawyer Directive provides: "Without prejudice to national rules and systems on the admissibility of evidence, Member States shall ensure that, in criminal proceedings, in the assessment of statements made by suspects or accused persons or of evidence obtained in breach of their right to a lawyer ... the rights of the defence and the fairness of the proceedings are respected."⁹

In the absence of a regional legislative framework, there is a broad expectation that the case law of regional courts will fill in the normative gaps as to what an effective evidentiary remedy should be. However, the guidance of regional courts lacks coherence and clarity resulting in somewhat casuistic approach. The European Court of Human Rights (ECtHR) and recently the Court of Justice of the European Union (CJEU) consistently confirm their limited role in setting the standards on admissibility of evidence, leaving it almost entirely up to the Member States. The ECtHR, for example, relies upon the principle of subsidiarity as a justification for refusing to set clear red lines when it comes to the admission and use of illegally obtained evidence: "While Article 6 guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence as such, which is primarily a matter for the regulation under national law. It is not for the Court to determine particular types of evidence – for example, evidence obtained unlawfully in terms of domestic law – may be admissible."¹⁰

Implications of the regional gap in relation to evidence gathering and admissibility will become increasingly clear to law enforcement as the newly created EPPO starts to fulfil its role and as cross-border cooperation to fight crime continues to grow, for example in the exchange of electronic evidence. The implications are already clear to us and our partners in the context of our work to advance protection of the right to a fair trial in Europe, both in terms of ensuring effective implementation of existing rights and encouraging the EU to include effective safeguards in legislation on cross-border gathering and exchange of evidence. For example, research shows that EU procedural rights (such as right to access to a lawyer,¹¹ right to information,¹² right to interpretation and translation¹³ and

⁹ Article 3(6).

¹⁰ ECtHR, *Bykov v. Russia*, App No. 4378/02, 10 March 2009, para. 88.

¹¹ See e.g., Fair Trials, *Where's my lawyer? Making legal assistance in pre-trial detention effective*, 2019; European Union Agency for Fundamental Rights, *Rights in practice: access to a lawyer and procedural rights in criminal and European arrest warrant proceedings*, 2019, p. 37 et seq.

¹² See e.g., European Union Agency for Fundamental Rights, *Rights in practice: access to a lawyer and procedural rights in criminal and European arrest warrant proceedings*, 2019, p. 23 et seq.

¹³ European Union Agency for Fundamental Rights, *Rights of suspected and accused persons across the EU: translation, interpretation and information*, 2016.

presumption of innocence)¹⁴ are being routinely violated in criminal proceedings across the EU, at least in part, due to the absence of institutional incentives (in the form of effective evidentiary remedies) to respect these rights.¹⁵

1.2. Project and methodology

This report is based on research (part-funded by the European Commission) that started in late 2019, conducted by Fair Trials and our partners the Croatian Law Centre in Croatia, Irish Council for Civil Liberties, Human Rights Monitoring Institute in Lithuania, Helsinki Foundation for Human Rights in Poland and Civil Rights Defenders in Sweden and our academic partner the Catholic University of Leuven as part of the project Defence Rights in Evidentiary Procedures.

Research was conducted at both a regional and domestic level. At the regional level, the Catholic University of Leuven researched the foundational principles of and underlying rationales for exclusion of evidence.¹⁶ Fair Trials also conducted desk research on key judgments of the ECtHR (between 2009 – 2020) and recent key judgements of the CJEU dealing with admissibility of illegally obtained evidence.¹⁷

The domestic research focused on five EU Member States (Croatia, Ireland, Lithuania, Poland and Sweden) chosen to ensure diversity in geography and legal system and to cover a range of approaches to evidentiary remedies.¹⁸ Each national partner conducted desk-based research on the legal framework and academic literature in their country. The partners also reviewed approximately 10 case files or court judgments and interviewed up to 10 defence lawyers, prosecutors and judges. Partners also organised workshops to discuss their initial findings. Each partner published a domestic report.¹⁹

¹⁴ See, e.g., Fair Trials, [Innocent until proven guilty? The presentation of suspects in criminal proceedings](#), 2019.

¹⁵ See e.g., Fair Trials, [Where's my lawyer? Making legal assistance in pre-trial detention effective](#), 2019, p. 16.

¹⁶ Chapter 4.2. of this report is based on the main findings of this research. Their findings are reflected in the upcoming publication in the *International Journal of Evidence and Proof*, as well as in a report to be made available online. We refer to this research as "*Maes E., Panzavolta M.* "Exclusion of evidence in times of mass surveillance. In search of a principled approach to exclusion of illegally obtained evidence in criminal cases in the European Union" (publication pending)" (Maes E., Panzavolta M.).

¹⁷ We did not review all cases dealing with illegally obtained evidence, however, the key cases we analysed contain the courts' current methodology and approach. More detailed analysis of the ECtHR key cases on the admissibility of evidence [can be found here](#).

¹⁸ For example, Sweden, has almost no rules regulating the admissibility of evidence, while Croatia, has significantly more detailed regulation on what evidence may be admitted in a criminal case.

¹⁹ The references to the *Lithuanian domestic report* are preliminary and may change subject to their final publication. It will be updated in this report accordingly. The other domestic reports are available here: [Croatia](#), [Ireland](#), [Poland](#), [Sweden](#).

2. Evidentiary remedies in European regional law²⁰

In this chapter we examine existing European law on the admissibility of illegal evidence, both EU law and decisions of the ECtHR. It is possible to identify some general principles from this, but this body of law falls far short of providing a clear guidance on how to deal with illegally obtained evidence in the context of criminal proceedings.

One key reason for this is that the ECtHR and CJEU consider these issues when performing their own limited judicial function, which is very different to that of national criminal courts:

- The ECtHR's role is to assess whether there has been a violation of rights protected under the European Convention on Human Rights (ECHR). For example, in the context of the right to a fair trial, this is to assess whether there has been a violation of the right after the national criminal proceedings have been completed.
- The CJEU's role is to interpret and enforce EU law against Member States by, for example: adjudicating in enforcement actions initiated by the Commission (which could arise in future in the context of failures to implement the Procedural Rights Directives)²¹; and clarifying the interpretation of EU law, when questions are referred to it by national courts.

A second reason is that in the absence of clear rules on the required remedies for rights violations in the ECHR or EU legislation, both the ECtHR and CJEU provide a significant degree of latitude to national legal systems:

- Although the ECHR requires state parties to provide an effective remedy for violations of ECHR rights,²² the ECtHR's starting point when assessing effective remedy for those same violations in the context of evidence is the principle of subsidiarity. The ECtHR's task is to ensure the observance of the obligations undertaken by state parties; not to decide whether particular types of evidence, including unlawfully obtained evidence, are admissible in line with domestic law.²³
- Although EU law clearly requires EU Member States to ensure an effective remedy for infringement of rights protected by EU law,²⁴ this concept is broad and leaves Member States substantial discretion in the choice of

²⁰ This chapter is based on research done by Fair Trials on the Evidentiary standards and remedies for use of illegally or improperly obtained evidence in the case-law of the European Court of Human Rights. The research paper detailing the results of this research is published on [Fair Trials' website](#).

²¹ See for example the infringement package of September 2021, available at: https://ec.europa.eu/commission/presscorner/detail/en/inf_21_4681.

²² Article 13 ECHR.

²³ ECtHR, *Prade v. Germany*, App. No. 7215/10, 3 March 2016, para. 32 and ECtHR, *Dragoş Ioan Rusu v. Romania*, App. Nos. 21363/93, 21364/93, 21427/93, 22056/93, 23 April 1997, para. 50.

²⁴ Article 47 of the Charter.

such remedy. The CJEU has made it clear that in relation to admissibility and assessment of evidence in criminal proceedings, it is primarily for national law to establish the rules.²⁵

That said, as discussed below, the ECtHR and EU law does recognise the importance of evidentiary remedies, in particular the exclusionary rule, in guaranteeing the fairness of criminal procedures and providing an effective system of remedies. Some useful principles and guidance as to how they should be applied can also be found in regional law in Europe, even though this lacks coherence and clarity.

We consider ECtHR and EU law separately, but these two bodies of law are interrelated. For example, the Procedural Rights Directives create freestanding rights under EU law, but they draw explicitly on ECtHR case law. The Access to a Lawyer Directive is an example of this, stating in its preamble regarding statements obtained in breach of the right of access to a lawyer “regard should be had to the case law of the [ECtHR], which has established that the rights of the defence will, in principle, be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction.”²⁶

2.1. The ECtHR and evidentiary remedies

“

Everyone whose rights and freedoms as set forth in [the ECHR] are violated shall have an effective remedy before a national authority...”

Article 13, ECHR

There are many ways in which rights and freedoms protected by the ECHR can be violated in the course of gathering evidence. This could, for example, happen as a result of police torturing a person to get a confession; unlawful surveillance which violates of the right to privacy; or interviewing a person without a lawyer. Although Article 13 requires an effective remedy for violations of ECHR rights, where those violations are committed in the context of criminal proceedings, Article 13 plays a minor role in the ECtHR's assessment of the procedures for challenging the legality of evidence and effectiveness of the available remedies.

Where evidence obtained as a result of a violation of ECHR rights is relied on in criminal proceedings, the ECtHR normally considers this through the prism of the right to a fair trial rather than the right to an effective remedy. It has considered the impact of basing a criminal conviction on illegally obtained evidence in numerous cases.

²⁵ CJEU, Joined cases C-511/18 *La Quadrature du Net*, C-512/18 *French Data Network and Others* and C-520/18 *Ordre des barreaux francophones et germanophone and Others*, 6 October 2020, para. 222; Case C -746/18 *Prokuratuur*, 2 March 2021, para. 41.

²⁶ Recital 50.

2.1.1. Areas where the ECtHR requires exclusion of evidence

In some contexts, reliance on illegal evidence as the basis for a criminal conviction is an automatic violation of the right to a fair trial. The ECtHR may defer to national court's assessments of how evidence was obtained, and of its reliability, but leaves no discretion to decide on the appropriate remedy: the evidence must be excluded.

Torture and inhuman or degrading treatment²⁷

The ECtHR has found that incriminating evidence, both in the form of statements and real evidence (physical evidence), obtained through means of torture should never be relied upon when deciding on a person's innocence or guilt, regardless of the probative value of the evidence.²⁸ This applies not only to evidence obtained from the person suspected of the crime but also to evidence obtained from others as a result of torture, including where the torture was inflicted by private parties²⁹. Reliance on such evidence will automatically render the criminal proceedings as a whole unfair. Statements obtained through torture are considered "intrinsically unreliable"³⁰ and reliance on this evidence would legitimise "the sort of morally reprehensible conduct which the authors of Article 3 of the Convention sought to proscribe".³¹

The situation is less clear in respect of evidence obtained through other forms of ill-treatment prohibited by the ECHR that do not constitute torture. Statements obtained through inhuman and degrading treatment must be excluded³². However, the ECtHR does not always require real evidence to be excluded where it was indirectly derived from evidence obtained through such treatment ('fruit of poisonous tree'). This was addressed in the controversial *Gäfgen* case which involved a conviction based on a body, autopsy result and tire tracks discovered after the location of the body was disclosed by *Gäfgen* when police threatened him with physical pain. The ECHR held that the derivative evidence did not need to be excluded as it was only used in a secondary capacity, breaking the causal link between the threat of ill-treatment and the evidence.³³ It should be noted that this approach was strongly criticised by a number of the ECtHR judges in the case who considered that, for a criminal trial to be fair, the adverse effects that flow from a breach of the right not to be subjected to inhuman or degrading treatment must be eradicated from the proceedings entirely.

In *Gäfgen v. Germany* physical evidence was collected as a consequence of inhuman and degrading treatment. The evidence was collected as a direct

²⁷ For more information, see Fair Trials and Redress, *Tainted by Torture*, 2018.

²⁸ ECtHR, *Gäfgen v. Germany*, App. No. 22978/05, 1 June 2010, para. 167.

²⁹ ECtHR, *Ćwik v. Poland*, App. No. 31454/10, 5 November 2020 and *El Haski v. Belgium*, App. No. 649/08, 25 September 2012, para. 90.

³⁰ ECtHR, *Söylemez v. Turkey*, App. No. 46661/99, 21 September 2006, para. 122.

³¹ ECtHR, *Jalloh v. Germany*, App. No. 54810/00, 11 July 2006, para. 105.

³² ECtHR, *Gäfgen v. Germany*, App. No. 22978/05, 1 June 2010, para. 147.

³³ ECtHR, *Gäfgen v. Germany*, App. No. 22978/05, 1 June 2010, para. 147.

consequence of a confession made under threat of considerable physical pain if the applicant did not reveal the location of the victim, a child who was still believed to be alive at the time of the interrogation. As a result, the defendant made a confession and directed the police to the location of the body, where the body and additional evidence, such as tire tracks, were collected. While the original confession was excluded from the criminal trial, the physical evidence obtained as a direct result of that confession, and therefore through inhuman treatment, was relied on. The ECtHR stated in principle that “the effective protection of individuals from the use of investigation methods that breach Article 3 may require, as a rule, the exclusion from the use at trial of real evidence which has been obtained as the result of any violation of Article 3, even though that evidence is more remote from the breach of Article 3 than the evidence extracted immediately as a consequence of that violation.” At the same time, it found that the fairness of the criminal trial and the effective protection of the absolute rights under Article 3 only come into question if that breach has a bearing on defendant’s conviction or sentence. Thus, real evidence obtained from a violation of inhuman treatment could be admitted and stay in the case file and even be used providing it does not have “bearing on finding of guilt and sentencing.”³⁴

Unreliable evidence

Where the manner in which evidence was gathered casts doubt on its reliability, the ECtHR requires the evidence to be excluded.³⁵ In one case, for example, where there was suspicion of law-enforcement planting evidence, the ECtHR found that the right to a fair trial had been violated where that evidence was relied on by the national court. The ECtHR considered that the possibility of evidence having been planted by the police could not be eliminated, because the searches had been conducted without a warrant and in the absence of the applicant, his lawyer, or any other witnesses³⁶. Mere doubts that the circumstances in which evidence was obtained, particularly the violation of legal rules, have impacted their reliability and accuracy should lead to the exclusion of such evidence.³⁷

Evidence obtained through entrapment

The long-standing view of the ECtHR is that the public interest in combatting even organised crime, cannot justify the use of evidence obtained by means of entrapment.³⁸ Entrapment as an ‘investigative method’ oversteps the limits of acceptable use of state power: undercover agents may act, but they cannot incite the commission of crime or increase the scale of criminal offences.³⁹ In one

³⁴ ECtHR *Gäfgen v. Germany*, App. no. 22978/05, 1 June 2010, para.178.

³⁵ ECtHR, *Bykov v. Russia*, App. No. 4378/02, 10 March 2009, para. 90.

³⁶ ECtHR, *Lisica v. Croatia*, App. No. 20100/06, 25 February 2010, para. 56 and 57. See also *Kobiashevili v. Georgia*, App. No. 36416/06, 14 March 2019, paras. 65 and 72.

³⁷ ECtHR, *Bykov v. Russia*, App. No. 4378/02, 10 March 2009, para. 90.

³⁸ ECtHR, *Vanyan v. Russia*, App. No. 53203/99, 15 December 2005, paras. 46 and 47; *Bannikova v. Russia*, App. No. 18757/06, 4 November 2010, para. 34; *Taraneks v. Latvia*, App. No. 3082/06, 2 December 2014, para. 60.

³⁹ ECtHR, *Grba v. Croatia*, App. No. 47047/12, 23 November 2011, paras. 101-102.

case, for example, the ECtHR found that reliance on evidence violated the right to a fair trial where the national courts had insufficiently examined the allegation of entrapment plea.⁴⁰

2.1.2. The “overall fairness” test

Except in the situations outlined above, it is difficult to draw precise conclusions from ECtHR case law on the impact of relying on illegal evidence to convict a person of a crime. It considers this case-by-case and gives significant latitude to national courts. The ECtHR applies a non-exhaustive range of factors to assess whether reliance on unlawfully obtained evidence has rendered unfair the criminal proceedings as a whole (the “overall fairness” test). These factors include:⁴¹

(b) the legal framework governing the pre-trial proceedings and the admissibility of evidence at trial, and whether it was complied with – where an exclusionary rule applied, it is particularly unlikely that the proceedings as a whole would be considered unfair;

(c) whether the applicant had the opportunity to challenge the authenticity of the evidence and oppose its use;

(d) the quality of the evidence and whether the circumstances in which it was obtained cast doubt on its reliability or accuracy, taking into account the degree and nature of any compulsion;

(e) where evidence was obtained unlawfully, the unlawfulness in question and, where it stems from a violation of another Convention Article, the nature of the violation found;

(f) in the case of a statement, the nature of the statement and whether it was promptly retracted or modified;

(g) the use to which the evidence was put, and in particular whether the evidence formed an integral or significant part of the probative evidence upon which the conviction was based, and the strength of the other evidence in the case;

(i) the weight of the public interest in the investigation and punishment of the particular offence in issue.

It is very common for the ECtHR to find a violation of a right protected by the ECHR but after considering the ‘overall fairness’ to find that a conviction which relied on evidence obtained as a result of that violation is not unfair.⁴² For example, a failure to obtain a search warrant will be recognised as a violation of the right

⁴⁰ ECtHR, *Taraneks v. Latvia*, App. No. 3082/06, 2 December 2014, para. 69. See also ECtHR, *Vanyan v. Russia*, App. No. 53203/99, 15 December 2005, paras. 46 and 47; *Khudobin v. Russia*, App. No. 5969/00, 26 October 2006, para. 136 and 137.

⁴¹ ECtHR, *Beuze v. Belgium*, App. No. 71409/10, 8 November 2018, para. 150.

⁴² ECtHR, *Bykov v. Russia*, App. No. 4378/02, 10 March 2009, paras. 83 and 105; *Dragojević v. Croatia*, App. No. 68955/11, 15 January 2015, paras. 102 and 123; *Bašić v. Croatia*, App. No. 22251/13, 25 October 2016, paras. 36 and 50; *Hambardzumyan v. Armenia*, App. No. 43478/11, 5 December 2019, paras. 68 and 81.

to privacy, but using the evidence obtained as the basis for a conviction will not necessarily violate the right to a fair trial.⁴³

This has been criticised by dissenting judges on multiple occasions for creating a double standard of protection of fundamental rights. For example, two dissenting judges in one case considered that no court can, without detriment to the proper administration of justice, rely on evidence which has been obtained not only by unfair means, but above all, unlawfully. They considered that “fairness” in the context of the ECHR “implies observance of the rule of law and for that matter it presupposes respect of the human rights set out in the Convention.”⁴⁴

In addition to the failure to provide effective remedies, where ECHR rights have been violated, the “overall fairness” test also includes inappropriate considerations. One example is the consideration of the “weight of the public interest in the investigation and punishment of the particular offence in issue”, which suggests that violations of ECHR rights could be more acceptable when investigating and prosecuting serious offences and other cases that have attracted more public attention. Although it is easy to understand the political reticence of the ECtHR to find convictions to be unfair in such cases, this limb of the test is difficult to reconcile with the presumption of innocence and the special diligence that should be exercised where there are more severe human rights implications in case of conviction for the person concerned.

Nonetheless, some relevant considerations can be gleaned from the confusing and at times inconsistent case law of the ECtHR when it applies the “overall fairness” test.

The ECtHR's approach to “overall fairness” and unlawful evidence

In cases where evidence obtained in breach of the right to privacy is used in a criminal trial, having applied the “overall fairness” test, the ECtHR generally finds that there has been no violation of the right to a fair trial.⁴⁵ This has been applied mostly in cases concerning secret surveillance⁴⁶ and evidence obtained through illegal searches.⁴⁷ The ECtHR will, however, consider whether this has an impact on the reliability of the evidence, although it is rare in such cases for evidence to be rendered unreliable. It will also assess the gravity of the alleged offence and whether the defence has had an ‘opportunity’ to challenge the use

⁴³ ECtHR *Dragoş Ioan Rusu v. Romania*, App. no. 22767/08, 31 October 2017, para. 51.

⁴⁴ Joint partly concurring opinion of judges Pinto de Albuquerque and Bošnjak in *Dragoş Ioan Rusu v. Romania*, App. no. 22767/08, 31 October 2017, para. 3.

⁴⁵ See e.g., ECtHR *Lee Davies v. Belgium*, App. No. 18704/05, 28 July 2009, para. 54; *Dragojević v. Croatia*, App. No. 68955/11, 15 January 2015, paras. 131–135; *Prade v. Germany*, App. No. 7215/10, 3 March 2016, paras. 35 and 41; *Kalneniene v. Belgium*, App. No. 40233/07, 31 January 2017, paras. 40 and 54.

⁴⁶ ECtHR, *Dragojević v. Croatia*, App. No. 68955/11, 15 January 2015, paras. 131 – 135; *Hambardzumyan v. Armenia*, App. No. 43478/11, 5 December 2019, paras. 78 – 81.

⁴⁷ ECtHR, *Lee Davies v. Belgium*, App. No. 18704/05, 28 September 2009; *Prade v. Germany*, App. No. 7215/10, 3 March 2016; *Kalneniene v. Belgium*, App. No. 40233/07, 31 January 2017.

of the evidence. Even in cases where the evidence⁴⁸ in question is decisive for a conviction, it does not automatically render the resulting conviction unfair.⁴⁹

As observed by judges Pinto de Albuquerque and Bošnjak in their joint partly concurring opinion in *Dragoş Ioan Rusu v. Romania*, some criteria in the overall fairness assessment seem to be more decisive than others. These include the opportunity to challenge the authenticity of the evidence and its use during the trial,⁵⁰ the reliability and accuracy of the evidence and whether there is unchallenged supporting evidence.⁵¹ If the evidence is strong and there is no risk of it being unreliable, the need for supporting evidence is correspondingly weaker.⁵² This rationale is particularly problematic in cases where evidence is obtained in violation of Article 8, because the reliability of such evidence – recordings, intercepted correspondence or other evidence obtained without a warrant – is rarely in doubt.

Dragoş Ioan Rusu v. Romania concerned an unauthorised interception of the applicant's correspondence for a drug investigation. The procedure for authorisation was found by the ECtHR not to afford sufficient safeguards. The ECtHR noted that the applicant did challenge the lawfulness of surveillance in the main criminal proceedings but concluded that the length of proceedings – more than five years – in itself cast doubt on the effectiveness of this remedy. Nevertheless, the ECtHR did not find a violation of the right to a fair trial on account of the fact that the conviction had relied on the letters that had been intercepted. It observed that the applicant had had an opportunity to question the validity of the evidence and that the reliability of the evidence was not in question. Furthermore, although the intercepted letters were decisive for the conviction, they were not the sole evidence on which conviction was based, therefore there was no violation of the right to a fair trial.⁵³

The ECtHR also applies the “overall fairness” test when deciding whether the right to a fair trial has been breached by relying on evidence obtained in violation of the defendant's procedural rights. This could, for example, happen if a person suspected of a crime gives an incriminating statement to the police when they were not informed of their right to silence or were denied access to interpretation or to a lawyer. However, the ECtHR treats most defence rights under Article

⁴⁸ Joint partly concurring opinion of judges Pinto de Albuquerque and Bošnjak in *Dragoş Ioan Rusu v. Romania*, App. No. 22767/08, 31 October 2017, para. 7; see also *El Haski v. Belgium*, App. No. 649/08, 25 September 2012, para. 84.

⁴⁹ ECtHR *Dragoş Ioan Rusu v. Romania*, App. No. 22767/08, 31 October 2017, paras. 51-57.

⁵⁰ It is worth noting that the Court does not always carry out detailed analysis of the quality of arguments given by the national courts in favour of admitting illegally obtained evidence, see, e.g., *Prade v. Germany*, App. No. 7215/10, 3 March 2016, para. 38.

⁵¹ Joint partly concurring opinion of judges Pinto de Albuquerque and Bošnjak in *Dragoş Ioan Rusu v. Romania*, App. No. 22767/08, 31 October 2017, para. 7; see also *El Haski v. Belgium*, App. No. 649/08, 25 September 2012, para. 84.

⁵² ECtHR, *Dragoş Ioan Rusu v. Romania*, App. No. 22767/08, 31 October 2017, para. 54; *Bykov v. Russia*, App. No. 4378/02, 10 March 2009, para. 90.

⁵³ ECtHR, *Dragoş Ioan Rusu v. Romania*, App. No. 22767/08, 31 October 2017, paras. 36-44.

6(1) to (3) as tools to ensure the fairness of the trial as a whole, rather than as independent rights protected by the ECHR. As a result, the ECtHR is reluctant to find a violation of the right to a fair trial on account of a restriction of one of the procedural rights alone, even if such restriction is not justified by any compelling reasons.

The lack of clarity as to the ECtHR's approach is demonstrated in the context of convictions based on evidence obtained in the absence of access to a lawyer during police interrogation. The ECtHR found in the case of *Salduz* that the rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction, thus apparently creating an automatic obligation to exclude evidence.⁵⁴ However, since the *Salduz* decision, this approach has been softened by applying the overall fairness test instead of immediate exclusion of evidence even where there are no compelling reasons for denying access to a lawyer.⁵⁵ Nevertheless, in practice the ECtHR still finds a violation of the right to a fair trial if access to a lawyer has been denied in pre-trial stage in most cases.⁵⁶ At the same time there are cases where extensive and systemic failures in providing access to a lawyer even combined with other procedural failures, have not lead to the conclusion that the proceedings as a whole were unfair.⁵⁷

Given the vagueness of the "overall fairness" criteria, and the ECtHR's case-by-case approach, it is difficult to identify when a fair trial requires exclusion of evidence obtained in the absence of a lawyer.

Where evidence that was obtained following violations of the right to interpretation is relied on, it appears more likely that the ECtHR would find the criminal proceedings to be unfair.⁵⁸ For instance, in one case involving an incriminating statement given to the police by a woman who had not been assisted by an interpreter, the ECtHR found that the failure to provide an interpreter meant that she was not aware of the charges against her and could not understand the consequences of her right to remain silent or to be assisted by a lawyer.⁵⁹

⁵⁴ ECtHR, *Salduz v. Turkey*, App. No. 36391/02, 27 November 2008, para. 55.

⁵⁵ ECtHR, *Ibrahim and others v. The United Kingdom*, App. Nos. 50541/08, 50571/08, 50573/08 and 40351/09, 13 September 2016; *Beuze v. Belgium*, App. No. 71409/10, 8 November 2018; *Doyle v. Ireland*, App. No. 51979/17, 23 May 2019.

⁵⁶ ECtHR, *Fefilov v. Russia*, App. No. 6587/07, 17 July 2018; *Dimitar Mitev v. Bulgaria*, App. No. 34779/09, 8 March 2018; *Akdağ v. Turkey*, App. No. 75460/10, 17 September 2019; *Canli v. Turkey*, App. No. 8211/10, 12 May 2020; *Ekinci v. Turkey*, App. No. 25148/07, 12 May 2020; *Mehmet Zeki Çelebi v. Turkey*, App. No. 27582/07, 28 January 2020, para. 72.

⁵⁷ ECtHR, *Farrugia v. Malta*, App. No. 63041/13, 4 June 2019, paras. 108-119.

⁵⁸ *Baytar v. Turkey*, App. No. 45440/04, 14 October 2014; *Vizgirda v. Slovenia*, App. No. 59868/08, 28 August 2018; *Knox v. Italy*, App. No. 76577/13, 24 January 2019.

⁵⁹ ECtHR, *Baytar v. Turkey*, App. No. 45440/04, 14 October 2014, para. 54.

The ECtHR's assessment of national exclusionary rules when assessing "overall fairness"

As discussed above, the ECtHR has made it clear that, when assessing overall fairness, "where an exclusionary rule applied, it is particularly unlikely that the proceedings as a whole would be considered unfair". In practice, of course, where an exclusionary rule has been applied, reliance on the excluded evidence will not be in question as the evidence will have been excluded. The ECtHR has, however, considered a number of cases in which exclusionary rules existed in national law, and were considered by national courts, but were not applied.

Even where there is a strict domestic rule that prohibits courts from relying on evidence obtained in violation of human rights, which has not been applied in practice, this will not necessarily make the trial unfair in the eyes of the ECtHR.⁶⁰ In one case (concerning evidence obtained through an unlawful search of a suspect's mobile phone) the national courts in Slovenia did not apply the strict exclusionary rule because they considered the evidence would have come to light anyway.⁶¹ The ECtHR found no violation because the applicant had an opportunity to challenge the evidence and this was not the only evidence in the case.⁶² It stated that it was not the ECtHR's role to assess whether the domestic courts complied with national exclusionary rules.⁶³

Formal application of exclusionary rules may not be sufficient to satisfy the overall fairness test. In one case, the ECtHR found the trial to be unfair due to the reliance on a confession made during police questioning without effective access to a lawyer and suggested that a retrial would be an appropriate remedy. However, judge Zupančič in his concurring opinion considered the situation where evidence is, in theory, excluded from the new trial but, in practice, remains in the case file. He stated that for the right to counsel to have any meaning, the contaminated evidence "should be conscientiously expunged from the dossier concerning the applicant and, moreover, the new court dealing with the case ought to have no knowledge of the contaminated evidence ... during the subsequent trial."⁶⁴ He noted, however, that in many law systems exclusion of the illegally obtained evidence does not guarantee that it will still not influence the judge's decision making:⁶⁵

"[O]nce the evidence has been presented, there is no way to exclude it from the cognitive range of the sitting judges. (...) the rule to the effect that the judge cannot rely on such evidence in his or her reasoning and motivation of his or her judgment is, to say the least, naïve to the extent that it presupposes the ability of judges to ignore the contaminated or otherwise inadmissible evidence."

⁶⁰ ECtHR, *Svetina v. Slovenia*, App. No. 38059/13, 22 May 2018, para. 47.

⁶¹ *Ibid.*, paras. 29 and 47.

⁶² *Ibid.*, para. 49.

⁶³ *Ibid.* para. 50 and 54.

⁶⁴ ECtHR, Concurring opinion of Judge Župančič in *Dvorski v. Croatia*, App. No. 25703/11, 20 October 2015, para. 6.

⁶⁵ *Ibid.*, paras.11 and 12.

The ECtHR's assessment of national procedure when assessing "overall fairness"

The ECtHR, in applying the overall fairness test, examines "whether the applicant was given the opportunity of challenging the authenticity of the evidence and of opposing its use."⁶⁶ Where the accused has been able to challenge evidence, defence rights are considered to be guaranteed and the ECtHR will limit its review to detecting a failure to respond to the defendant's arguments or manifest errors in reasoning.

When the right to privacy has been violated, the ECtHR appears to take a particularly hands-off approach to assessing the efficacy of the national procedure to challenge the evidence. For instance:

- In a case concerning evidence obtained through the unauthorised, covert interception and recording of conversations in the applicant's home, the ECtHR found a violation of the right to privacy. However, it did not find that the trial was unfair overall because the applicant had been able to challenge the legality of the covert operation and because the grounds for the challenge were "addressed by the courts and dismissed in reasoned decisions".⁶⁷
- Similarly, in a case concerning the use of evidence found coincidentally during an unlawful house search, the ECtHR found a violation of the right to privacy. It did not however find there to be a violation of the right to a fair trial as the convicted person had been given multiple opportunities to challenge the use of the evidence, and "his arguments were given a due consideration by the courts".⁶⁸

In contrast, in cases concerning the admission of evidence obtained in violation of fair trial rights, the ECtHR seems more willing to examine the reasoning of the national courts in accepting or dismissing challenges. For instance:

- The ECtHR has found that a complete lack of assessment by the national courts of challenges to the admission of statements obtained in the absence of a lawyer do not meet the right to effectively challenge their use⁶⁹. This is the case even where domestic law allows collection of evidence in the absence of a lawyer.⁷⁰
- In another case, the ECtHR explained that challenges to admission of the evidence must be properly examined by a tribunal, which includes not ignoring "specific, pertinent and important points made by the accused." The ECtHR considered that law enforcement authorities had given

⁶⁶ ECtHR, *Jalloh v. Germany*, App. No. 54810/00, 11 July 2006, para. 96; *Bykov v. Russia*, App. No. 4378/02, 10 March 2009, para. 90; *Ayetullah Ay v. Turkey*, App. No. 29084/07, 27 October 2020, para. 126.

⁶⁷ ECtHR, *Bykov v. Russia*, App. No. 4378/02, 10 March 2009, para. 82.

⁶⁸ ECtHR, *Prade v. Germany*, App. No. 7215/10, 3 March 2016, para. 38. See also *Dragoş Ioan Rusu v. Romania*, App. No. 22767/08, 31 October 2017, para. 53.

⁶⁹ ECtHR, *Rusen Bayar v. Turkey*, App. No. 25253/08, 19 February 2019, para. 131; *Akdağ v. Turkey*, App. No. 75460/10, 17 September 2019, para. 68; *Canli v. Turkey*, App. No. 8211/10, 12 May 2020, para. 46.

⁷⁰ ECtHR, *Fefilov v. Russia*, App. No. 6587/07, 17 July 2018, para. 61.

contradicting explanations to how the evidence in question was obtained, which the domestic court had not analysed.⁷¹

- The ECtHR has also found that the national court must provide sufficient reasons for dismissing the applicant's arguments to challenge the admissibility of evidence, especially where it plays a decisive role in the decision.⁷²
- The ECtHR has found that a complete failure to examine objections to reliance on evidence constitutes "such a procedural disadvantage to the applicant's detriment that the proceedings as a whole fell short of the requirement of a fair trial."⁷³

The ECtHR's assessment of "overall fairness" and the weight of the evidence

When assessing whether the overall fairness of proceedings have been violated due to the admission of illegally obtained evidence, the ECtHR considers "the use to which the evidence was put, and in particular whether the evidence formed an integral or significant part of the probative evidence upon which the conviction was based, and the strength of the other evidence in the case".⁷⁴ For example, exclusion of unlawful evidence may not be required to ensure the overall fairness of criminal proceedings where the evidence does not constitute the decisive evidence on which guilt was based, and where other evidence is sufficiently strong.⁷⁵ The ECtHR does not, however, require the exclusion of illegal evidence even where it is decisive: "where the evidence is very strong and there is no risk of it being unreliable" there is less need for supporting evidence."⁷⁶

2.2. EU Law

The EU clearly has the legal power to legislate to establish minimum rules on the "mutual admissibility of evidence between Member States".⁷⁷ To date, it has not done so. The EU could also have provided more substantive guidance on how violations of Procedural Rights Directives should be remedied in evidentiary

⁷¹ ECtHR, *Ayetullah Ay v. Turkey*, App. No. 29084/07, 27 October 2020, paras. 172-179.

⁷² ECtHR, *Aleksandar Zaichenko v. Russia*, App. No. 39660/02, 18 February 2010, para. 58.

⁷³ ECtHR, *Horvatić v. Croatia*, App. No. 36044/09, 17 October 2013, para. 86.

⁷⁴ ECtHR, *Beuze v. Belgium*, App. No. 71409/10, 9 November 2018, para. 150(g).

⁷⁵ ECtHR, *Dragojević v. Croatia*, App. No. 68955/11, 15 January 2015, para. 133. See also, *Akhlyustin v. Russia*, App. No. 21200/05, 7 November 2017, para. 54 and *Hambardzumyan v. Armenia*, App. No. 43478/11, 5 December 2019, para. 79. See also *Megrelishvili v. Georgia*, App. No. 30364/09, 7 May 2020, para. 38.

⁷⁶ ECtHR, *Bašić v. Croatia*, App. No. 22251/13, 25 October 2016, para. 48. See also ECtHR, *Bykov v. Russia*, App. No. 4378/02, 10 March 2009, para. 90; *Prade v. Germany*, App. No. 7215/10, 3 March 2016, para. 34; *Kobiashvili v. Georgia*, App. No. 36416/06, 14 March 2019, para. 56.

⁷⁷ Article 82(2) TFEU.

proceedings. Although the language in some of the Directives suggest that the exclusion of the evidence is required, it is not clear.⁷⁸

In this section we therefore consider what principles on evidentiary remedies can be gleaned from other sources of EU law.

2.2.1 Effective remedy in EU law

“

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

”

Article 47, EU Charter

There are many contexts in which evidence-gathering in criminal proceedings could involve violations of individual rights and freedoms guaranteed by EU law. It could, for example, involve the indiscriminate wholesale retention of telecommunications data⁷⁹ or violations of the procedural rights of suspects. Where this is the case, the EU and Member States are required to respect the right to an effective remedy, which is both a general principle of EU law and a fundamental right under Article 47 of the Charter.⁸⁰

We can find indications of the right to an effective remedy in secondary EU law, including in the EU Procedural Rights Directives:

- Recital 49 of the Access to a Lawyer Directive states that “in accordance with the principle of effectiveness of EU law” the remedy should be “adequate and effective”.
- Recital 44 of the Presumption of Innocence Directive clarifies that “an effective remedy, which is available in the event of a breach of any of the rights laid down in this Directive, should, as far as possible, have the effect of placing the suspects or accused persons in the same position in which

⁷⁸ The Access to a Lawyer Directive states in Recital 49: “in accordance with the principle of effectiveness of EU law” the remedy should be “adequate and effective”. The *Presumption of Innocence Directive* goes further, in Recital 44: “the principle of effectiveness of Union law requires that Member States put in place adequate and effective remedies in the event of a breach of a right conferred upon individuals by Union law” and “an effective remedy, which is available in the event of a breach of any of the rights laid down in this Directive, should, as far as possible, have the effect of placing the suspects or accused persons in the same position in which they would have found themselves had the breach not occurred, with a view to protecting the right to a fair trial and the rights of the defence.”

⁷⁹ CJEU, Joined cases C-511/18 *La Quadrature du Net*, C-512/18 *French Data Network and Others* and C-520/18 *Ordre des barreaux francophones et germanophone and Others*, 6 October 2020, para. 222; Case C-746/18 *Prokuratuur*, 2 March 2021.

⁸⁰ CJEU, Case 222/84 *Johnston*, 15 May 1986; see also Case 222/86 *Heylens*, 15 October 1987 and Case C-97/91, *Borelli* 3 December 1992.

they would have found themselves had the breach not occurred, with a view to protecting the right to a fair trial and the rights of the defence.”⁸¹

However, EU law and CJEU case law are not clear on what the right to an effective remedy requires in terms of exclusion of evidence in criminal proceedings, but certain general principles can be identified.

Since EU law does not require a concrete remedy for violations, Member States have autonomy as to the system of remedies they provide. These remedies must, however, be equivalent to the remedies provided for a violation of equivalent national law. This means that if evidence must be excluded as a remedy where national laws protecting defence rights are violated, evidence must also be excluded where procedural rights under EU law are violated. The national system for remedies should also be effective (in deterring future violations, restoring harm and preventing future harm); proportionate to the nature of the violation; and dissuasive (capable of leading to compliance with EU law).

The right to an effective remedy under EU law includes not only a substantive right to redress but also a procedural right to effective access to a fair hearing, to ensure effective judicial protection of the rights protected by EU law. This includes the right to bring a legal action,⁸² right of access to a tribunal,⁸³ the right to be heard,⁸⁴ respect for the rights of the defence⁸⁵ and respect for the principle of equality of arms.⁸⁶ In the context of criminal proceedings, legal challenges to the admissibility of evidence obtained in violation of EU rights, will often provide the forum in which courts are required to provide this effective judicial protection.

2.2.2. CJEU case law on evidentiary remedies

The question of admissibility of evidence in criminal cases has not been extensively addressed by the CJEU. The few isolated cases are insufficient to identify a general approach or clear principles. The cases in which the CJEU does address this have mainly concerned the admission of evidence obtained in violation of the respect for private and family life⁸⁷ and the protection of personal data.⁸⁸

⁸¹ 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, recital 44.

⁸² CJEU, Case C-513/10, *Földgáz Trade Zrt v Magyar Energetikai és Közmű-szabályozási Hivatal*, 19 March 2015.

⁸³ CJEU, Case C-199/11, *Europese Gemeenschap v Otis NV and Others*, 6 November 2012, para. 49.

⁸⁴ CJEU, Case C-249/13, *Khaled Boudjlida v Préfet des Pyrénées-Atlantiques*, 11 December 2014.

⁸⁵ CJEU, Case C-112/13, *A v B and Others*, 11 September 2014, para. 58.

⁸⁶ CJEU, Case C-472/11, *Banif Plus Bank Zrt v Csaba Csipai and Viktória Csipai*, 21 February 2013, para. 29.

⁸⁷ Article 7 of the Charter.

⁸⁸ Article 8 of the Charter.

The clearest guide to its approach is found in its decisions in *La Quadrature du Net* and *Prokuratuur*, although both judgments are lacking both in terms of clarity and principled reasoning.

In both cases, the CJEU assessed first whether EU law had been violated in the way evidence was gathered. In *La Quadrature du Net* the CJEU found that EU law precludes national legislation requiring a provider of electronic communications services to carry out the general and indiscriminate transmission or retention of traffic and location data for the purpose of combatting crime in general or of safeguarding national security. In *Prokuratuur* it held that EU law also precludes national legislation that allows public authorities access to traffic or location data in respect of electronic communications for the general purposes of the prevention, investigation, detection and prosecution of criminal offences.

The CJEU then went on to assess whether EU law was breached by the use in domestic criminal proceedings of information obtained as a result of the retention of and access to that traffic and location data. The Court's starting point was that issues of admissibility and exclusion of evidence are a matter of national law:⁸⁹

[A]s EU law currently stands, it is, in principle, for national law alone to determine the rules relating to the admissibility and assessment, in criminal proceedings against persons suspected of having committed ... criminal offences, of information and evidence obtained by such retention of data contrary to EU law or by access of the national authorities thereto contrary to EU law.

The CJEU did, however, draw on the principles of equivalence and effectiveness discussed above. In the context of evidentiary remedies, it described the principle of effectiveness as requiring national rules on admissibility of evidence to prevent "information and evidence obtained unlawfully from unduly prejudicing a person who is suspected of having committed criminal offences."⁹⁰ The CJEU did not explain in general terms what mechanisms might be acceptable to prevent undue prejudice. It did, however, state that the "objective may be achieved under national law not only by prohibiting the use of such information and evidence, but also by means of national rules and practices governing the assessment and weighting of such material, or by factoring in whether that material is unlawful when determining the sentence."⁹¹

The CJEU made it clear that in some circumstances, the principle of effectiveness would require the exclusion of evidence:⁹²

⁸⁹ CJEU, Joined cases C-511/18 *La Quadrature du Net*, C-512/18 *French Data Network and Others* and C-520/18 *Ordre des barreaux francophones et germanophone and Others*, 6 October 2020, para. 222.

⁹⁰ *Ibid.*, paras. 225 and 43.

⁹¹ *Ibid.*, paras. 225, 146, 166; Case C-746/18 *Prokuratuur*, 2 March 2021, para. 43.

⁹² CJEU, Joined cases C-511/18 *La Quadrature du Net*, C-512/18 *French Data Network and Others* and C-520/18 *Ordre des barreaux francophones et germanophone and Others*, 6 October 2020, para. 227.

[T]he principle of effectiveness requires national criminal courts to disregard information and evidence obtained by means of the general and indiscriminate retention of traffic and location data in breach of EU law in the context of criminal proceedings against persons suspected of having committed criminal offences, where those persons are not in a position to comment effectively on that information and that evidence and they pertain to a field of which the judges have no knowledge and are likely to have a preponderant influence on the findings of fact.

The conditions that require exclusion of evidence do not, however, make a lot of sense in the context of criminal proceedings, having been taken from other areas of EU law.⁹³ It appears that two conditions trigger the obligation to exclude evidence: i) that the suspect has the possibility to comment effectively on that information and that evidence; and ii) that evidence/information pertain to a field of which the judges have no knowledge and are likely to have a preponderant influence on findings of fact. Even though the relevance of these two tests is hard to understand, it is clear that they are designed to protect procedural fairness and, in particular, the “adversarial principle”⁹⁴. The CJEU has not elaborated on what these tests actually entail and how they should be applied, nor has it explained why these particular circumstances require mandatory exclusion of evidence.⁹⁵

The question of evidentiary remedies was also considered by the CJEU in the case of *Dzivev*, concerning the admissibility of evidence obtained through wiretapping for the purpose of combating VAT offences.⁹⁶ In that case, however, the question was whether EU law prohibited the application of national exclusionary remedies where this limits “the effectiveness of criminal prosecutions enabling national authorities, in some cases, to penalise non-compliance with EU law”. The CJEU found that EU law cannot require a national court to disapply a procedural rule that requires the exclusion of evidence obtained without the legally required authorisation. Thus, the requirement under EU law that interferences with the right to privacy be carried out in accordance with law, took precedence over the general interest of prosecuting VAT offences.⁹⁷

Regional standards - key conclusions

- Neither EU law nor the ECHR provides clear rules or guidance in respect of evidentiary remedies. The ECtHR and CJEU therefore give a high degree of latitude to national courts.
- The exclusion of evidence is recognised as a key means (though not the only means) of states providing an effective remedy where fundamental rights have been violated.

⁹³ CJEU, Case C-276/01 *Steffensen*, 10 April 2003.

⁹⁴ *Ibid.*

⁹⁵ *Maes E., Panzavolta M.*, Section 1.2.

⁹⁶ CJEU, Case C-310/16 *Dzivev and Others*, 17 January 2019.

⁹⁷ CJEU, Case C-310/16 *Dzivev and Others*, 17 January 2019, para. 36.

- There are some areas where the ECHR law requires the exclusion of evidence obtained in violation of fundamental rights, including where evidence is unreliable, obtained from torture, or results from entrapment. There are also some less clearly defined situations where EU law requires evidence to be excluded where principles of procedural fairness have been violated.
 - Aside from these situations, when assessing whether exclusion of evidence is required, a complex and unpredictable case-by-case approach is taken by the ECtHR.
 - In terms of how this assessment is made, there aren't enough relevant judgments of the CJEU to identify consistent principles, but some general principles can be identified from the numerous decisions of the ECtHR:
 - Exclusion of evidence is less likely to be required where the illegality relates to a violation of privacy rights as opposed to a violation of procedural rights.
 - It is relevant (but not determinative) whether national rules on exclusion of evidence were followed.
 - The nature and severity of the violation of the fundamental right is relevant, although (except in the case of torture) it is not clear how.
 - The weight given to the illegal evidence (and other lawfully obtained evidence) is relevant, although there is no requirement for corroborating evidence.
 - Whether the case is serious and there is a public interest is relevant to the willingness of the ECtHR to find a violation where illegal evidence is relied on.
 - Both EU law and the ECHR require defendants to have access to a fair procedure in national courts to challenge reliance on illegal evidence. The ECtHR will look more closely at how national courts addressed challenges to reliance on evidence where the illegality relates to a violation of procedural rights as opposed to privacy rights.
 - As a matter of general principles of assessment, the ECtHR has softened its previously strong stance on exclusionary rule for evidence obtained in violation of defence rights (most notably evidence obtained without access to a lawyer).
 - There has been criticism of the ECtHR's approach, including from ECtHR judges.
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3. Evidentiary remedies in domestic law and practice

Given the absence of clear regional standards, it is not surprising that law and practice varies significantly across EU Member States. Indeed, rather than being a result of a lack of clear regional standards, this longstanding variation in national legal systems' approach to evidentiary remedies could be the cause of the reluctance of regional bodies to set clear standards in this area. In this chapter, we look at the approach to evidentiary remedies in Croatia, Ireland, Lithuania, Poland and Sweden, both in law and in practice.

3.1. Legal framework

In each of the countries examined, we assessed the extent to which the law regulates the approach of domestic criminal courts to evidentiary remedies.

3.1.1. General rules on the legality and admissibility of evidence

Most of the countries examined have laws of evidence that apply in criminal cases, most often contained in Criminal Procedure Codes. These define what information can be treated as "evidence", and/or set out criteria for the admissibility of evidence in criminal proceedings. These rules commonly refer to several criteria including relevance, lawful collection, and reliability. The relevant legal rules are discussed in more detail in the relevant national reports published by our partners. However, we have briefly outlined below some of the key features of these laws of evidence:

In **Croatia**, there are extensive and robust laws on the legality and admissibility of evidence and the exclusionary rule. In general, criminal courts must consider evidence that is presented by the parties. They must, however, reject evidence which is "illegal" or where the fact the evidence is intended to prove is "irrelevant for a decision"⁹⁸ and court decisions may not be founded on evidence obtained in an illegal way.⁹⁹ Evidence can be found illegal by law or by judicial decision. Illegal evidence by law includes evidence obtained: by torture, cruel and inhuman or degrading treatment; through a violation of fundamental human rights to defence, dignity, reputation, honour, private and family life; in violation of the prohibition of discrimination; by applying any medical intervention or medication which may influence a person's will when giving a statement; or by the use of force, threat or other similar means. There are also about thirty procedural violations in evidence gathering that result in evidence being illegal and therefore inadmissible, including interrogation without previous written information about rights, failure to audio or video record an interview and tracking of telecommunications. With respect to some types of illegality, however, recent legal changes mean that

⁹⁸ *Croatian domestic report*, Section 4.1. p. 18.

⁹⁹ Article 10(1) of the *Croatian Criminal Procedure Act*. See *Croatian domestic report*, Section 4.2. p. 19.

evidence may be admitted in “severe forms of criminal offences (..) where the interest for criminal prosecution outweighs the violation of the right”.¹⁰⁰

In **Lithuania**, the term ‘admissibility of evidence’ encompasses two aspects: legality and reliability.¹⁰¹ According to the Code of Criminal Procedure, “[o]nly data obtained through lawful means and that can be verified by procedural actions (..) can become evidence”.¹⁰² With few exceptions¹⁰³ however, Lithuanian legislation does not explicitly define any “evidence” as inadmissible. Instead, the question of whether particular information can be recognised as evidence is determined by the court on a case-by-case basis. The law does prohibit the use of violence, threats, degrading treatment or acts harmful to health in the conduct of investigations,¹⁰⁴ and it is widely accepted that violations of these rights would render evidence inadmissible.¹⁰⁵ Likewise, it is believed that evidence would be inadmissible if: 1) it was obtained through violence, threats or other prohibited coercion; 2) it was obtained in violation of procedural principles such as inviolability of person or principle of proportionality; 3) the procedural action was performed without a required authorisation or 4) the results of the procedural action were not properly recorded.¹⁰⁶

In **Poland**, historically, for evidence to be admissible it must have been gathered legally. Polish law prohibits certain means of gathering evidence and evidence obtained in violation of these is inadmissible.¹⁰⁷ The Supreme Court has also found that, even where it is not clearly stated that there is an evidential remedy in the case of unlawful actions by law enforcement, the general rules derived from the entirety of the legal system can be applied.¹⁰⁸ The rules of evidence were, however, significantly weakened by a legal change in 2016. This prevents courts treating evidence as inadmissible on the grounds that it was obtained in violation of procedural rules (or by means of a prohibited act) unless the evidence was obtained in connection with a public official discharging their official duties in the consequence of manslaughter, intentionally committing bodily harm or unlawful detention.¹⁰⁹ As a result, an incriminating statement made by a suspect under threat of violence from a police officer would not, for example, be

¹⁰⁰ Article 10(3) of the *Criminal Procedure Act*.

¹⁰¹ *Lithuanian domestic report*, Section. 4.1., p.16.

¹⁰² Article 20(4) of the *Lithuanian Code of Criminal Procedure*.

¹⁰³ A notable exception to the general rule that admissibility is determined on a case-by-case basis is found in the Law of the Bar which states that “details of a meeting or communication between a lawyer and his client cannot be used as evidence.” (Art 45(2)).

¹⁰⁴ Article 11(2) of the *Lithuanian Code of Criminal Procedure*.

¹⁰⁵ *Lithuanian domestic report*, Section. 4.1., p.21.

¹⁰⁶ *Lithuanian domestic report*, Section. 4.1., p.21.

¹⁰⁷ For example, the prohibition of testimonies or other statements “taken in conditions excluding the freedom of expression”, prohibition of testimonies obtained by means of hypnosis or chemical or technical means influencing the mental processes of the person questioned, prohibition to question members of certain professions that rely on professional secrecy (clergymen, doctors, mediators). See *Polish domestic report*, Section 5.3.5., p. 24.

¹⁰⁸ *Polish domestic report*, Section 5.3.5, p. 25.

¹⁰⁹ Article 168a of the *Polish Code of Criminal Procedure* (as amended). See *Polish domestic report*, Section 5.3.5., p.20.

automatically inadmissible under Polish law.¹¹⁰ There is a considerable debate in Poland as to the constitutionality of this new law, including its compatibility with the prohibition of torture and inhuman or degrading treatment.

A Polish lawyer explained: I have doubts whether courts have been able to deal with [the 2016 law restricting the exclusionary rule]. The Article has ensured as a legal basis for the legalisation of inadmissible evidence. Not all judges will want to sacrifice their careers. As a result, such evidence will be sometimes used. This problem will persist as long as this provision remains in the Code.

In **Ireland**, evidence is only admissible if it is relevant and if none of the exclusionary rules apply. These rules are found primarily in case law developed by the courts and apply to, among other things, hearsay evidence, unconstitutionally gathered evidence, illegally obtained evidence (usually interpreted to mean evidence obtained in breach of the accused person's rights) or confessions (unless the prosecution has satisfied the trial judge that the confession was voluntary).¹¹¹ Until 2015, evidence obtained in breach of constitutional rights was automatically excluded, unless "extraordinary excusing circumstances" applied. This has, however, been softened. Evidence gathered in violation of constitutional rights can now be admitted where the "unconstitutionality concerned arose out of circumstances of inadvertence or by reason of developments in the law which occurred after the time when the relevant evidence was gathered".¹¹² In the case of other illegally obtained evidence, the courts take into account a range of factors when deciding whether to exclude evidence including the nature of the offence, position of the accused and the impact of the breach on the accused and the trial. Judges also have broad discretion to exclude evidence if they consider the prejudicial effect of this evidence on jury would be greater than its probative value.¹¹³ Different rules apply in terrorism and organised crime cases which are tried in the juryless Special Criminal Court where the same panel of judges decides on issues of admissibility and decisions on facts.¹¹⁴

Although the rules of evidence and admissibility differ between Ireland, Poland, Lithuania and Croatia, the real outlier is **Sweden**, where the rules of evidence are based on the principle of "free evaluation of evidence." This means the parties can rely on any evidence they can obtain and that the court must examine all evidence presented (with no evidence having a predetermined value).¹¹⁵ Thus, there are virtually no general rules on the admissibility of evidence. A notable exception is the requirement for courts to reject evidence that is irrelevant or ineffective but this is designed to create the conditions for a procedurally efficient

¹¹⁰ *Polish domestic report*, Section 5.3.5., pp. 20.

¹¹¹ *Irish domestic report*, Sections 4.1. and 4.2.

¹¹² Irish Supreme Court, *DPP v. JC*, 2015, IESC 31.

¹¹³ *Irish domestic report*, Section 4.1., p.22.

¹¹⁴ Offences against the State Act, 1939. See also *Irish domestic report*, Section 4.3., p.27.

¹¹⁵ *Swedish domestic report*, Section 4.1., p. 17.

trial rather than to address illegal evidence gathering.¹¹⁶ The rules that do exist on evidence-gathering serve as a framework for the investigating authority.¹¹⁷

In **Latvia**, the law describes categories of evidence as inadmissible and therefore prohibits reliance on them in a criminal trial.¹¹⁸ All of the categories of evidence relate to violations of Latvian laws governing the gathering of evidence, i.e. evidence obtained by violence, threat, blackmail, deception or coercion; evidence obtained by someone not lawfully authorised to carry out particular evidence gathering activity; evidence gathered in violation of the basic principles of criminal procedure; or evidence obtained during an unlawful search.

3.1.2. Reliance on international and constitutional law

As discussed in Chapter 3, some clear rules and some general principles relating to admissibility can be identified in EU law and international human rights law (including case law of the ECtHR). There are examples of national courts drawing on these principles to interpret or to supplement national law:

- In the absence of an express exclusionary rule, in **Sweden**, the Supreme Court has stated that in principle evidence such as statements obtained in violation of the prohibition of torture could be excluded based the jurisprudence of the ECtHR.¹¹⁹ In a case involving entrapment and use of evidence obtained through threat, however, the Supreme Court found the evidence admissible.¹²⁰
- In **Croatia**, judges can also assess the admissibility of the evidence obtained in violation of fundamental rights which are not expressly stipulated in domestic law. For example, the Supreme Court has developed relatively extensive jurisprudence regarding the inadmissibility of private recordings resulting from violations of the right to privacy in a non-public place.¹²¹
- In **Latvia**, judges have interpreted evidence obtained in violation of the basic principles of criminal procedure to include the general principle of protection of fundamental rights.¹²² Thus evidence obtained in violation of constitutional fundamental rights such as the right to a private life can be a basis for finding evidence inadmissible.¹²³

¹¹⁶ Article 7 of Chapter 35 of the *Swedish Code of Judicial procedure*. The court must also reject questions that are leading, manifestly irrelevant, confusing or otherwise inappropriate (According to Article 17 of Chapter 36).

¹¹⁷ For example, the *Code of Judicial Procedure* establishes a ban on seizure of documents protected by confidentiality and personal correspondence between the suspect and their close. The Swedish Prosecution Authority's handbook on seizures states that such communication, if seized, must be excluded. See *Swedish domestic report*, Section 4.2., p.19.

¹¹⁸ *Latvian Criminal Procedure Law* Articles 130(2)(1),(2) and (4).

¹¹⁹ Article 3 ECHR.

¹²⁰ *Swedish domestic report*, Section 4.3.1., pp. 19-20.

¹²¹ *Croatian domestic report*, Section 5.1.c., pp. 30-31.

¹²² *Latvian Criminal Procedure Law*, Article 12.

¹²³ Latvian Supreme Court, decision in case No. Nr. SKK – 78/2014, 7 April 2014 concerning a violation of the right to a private life where surplus evidence obtained through secret surveillance was used for prosecution of a minor crime which according to law could not be investigated using covert investigative methods.

- In **Sweden** the courts have used the jurisprudence of the ECtHR to conclude that exclusion of evidence is an exceptional measure reserved only for the gravest of violations such as torture. Although, in some cases, entrapment has been treated as an obstacle to prosecution and conviction; in others, relying on the “overall fairness” test, it has found that evidence obtained in a far-reaching deception to obtain incriminating information was admissible and could be relied on to convict.¹²⁴

3.1.3. Fruits of the poisonous tree

According to the doctrine of ‘fruit of poisonous tree’, evidence obtained indirectly from illegally gathered evidence should also be treated as illegal. This would for example mean that physical evidence obtained as a result of a confession obtained through torture would also be illegal. The rationale behind exclusion of evidence derived from illegal evidence is to prevent the prosecution benefitting indirectly from unlawful actions. The EU Directives on Access to a Lawyer and the Presumption of Innocence suggest that remedies should apply not only to suspect statements obtained directly as a result of the breach but also to other derivative evidence.¹²⁵

With the exception of **Croatia**, the fruit of poisonous tree doctrine is not clearly addressed or applied in the Member States examined in this report. In Sweden, for example, the fruit of poisonous tree doctrine is not found either in law or court practice. Similarly, in **Poland**, criminal procedural laws do not address the issue of evidence derived from unlawful evidence. It is therefore possible to gather and use evidence obtained as a result of information that has been found to be inadmissible. Some of the lawyers in Poland consider that it is necessary to adopt rules requiring exclusion of such evidence to prevent the abuse of the state’s inherent advantage over the accused.¹²⁶

A Supreme Court judge in Poland observed that if a judge handling a serious case is presented with unlawfully obtained evidence which is the only evidence of guilt of a very dangerous criminal, they will take measures to assess the evidence in a way that makes it admissible. If this evidence is followed by other proof, the judge will be able afford to declare the originally illegal evidence inadmissible.

In **Lithuania**, the fruit of poisonous tree doctrine is generally understood as not applicable or having only limited relevance. The Supreme Court also elaborated a balancing-based test, according to which in deciding whether particular evidence is admissible, factors to be taken into account encompass the nature and gravity of violations, the essence of the procedural (evidence gathering) activity, its

¹²⁴ See e.g., NJA 2007 p.1037 and RH 2010:62, referred to in *Swedish domestic report*, Section 4.4., p. 22.

¹²⁵ Article 12(2) of the Access to a Lawyer directive refers to both ‘statements made by suspects or accused persons’ and ‘evidence obtained in breach of their right to lawyer’. Recital 50 of the Access to a Lawyer Directive requires Member States to ensure that in the assessment of statements made by suspects or accused persons or of “evidence obtained in breach of their right to a lawyer” the rights of the defence and the fairness of the proceedings are respected.

¹²⁶ *Polish domestic report*, Section 6.4., p. 33.

relevance for the case and whether the evidence gathering activity was based exclusively on illegally obtained information. According to the Supreme Court: “the mere fact that procedural actions were performed on data that include those obtained in violation of legal requirements, does not in itself mean that these actions are unlawful and circumstances, established through such actions, cannot be relied on.”¹²⁷ Lawyers interviewed in Lithuania observed that in practice the evidence obtained through illegal data is declared inadmissible quite rarely and could not identify a single example from their practice.¹²⁸

Lawyers in Lithuania observed that sometimes investigators may opt for ‘informal interviews’ with potential witnesses or even suspects. Even though such data cannot be used as evidence and may not be reflected in the system, it can lead the investigation to other sources of evidence.

The only country we examined that has clear fruit of the poisonous tree rules is Croatia, where legislation clearly states that evidence “obtained through illegal¹²⁹ evidence” must also be considered illegal. Notwithstanding this clear position in law, as discussed below, its application appears to be more difficult in practice. Lawyers pointed out that the exclusion of original illegally obtained evidence is usually the only remedy applied (with no exclusion of derivative evidence). Research also pointed to the difficulty in establishing a connection between the original illegal evidence and derivative evidence and by the fact that derivative evidence is excluded only if the defence insists on this.¹³⁰

3.1.4. Other remedies

Where the exclusionary rules do not apply, or where courts have discretion not to apply it, they may resort to other remedies, such as reducing the weight given to the illegal evidence or requiring corroborative evidence:

- As discussed above, **Croatian** law sometimes allows evidence obtained in violation of some rights to be admitted where grave criminal offences are involved. Where this applies, the court’s decision may not however be based solely on that evidence, requiring additional independently gathered evidence to support a conviction.¹³¹
- In **Latvia**, reliable evidence obtained through relatively minor violations of procedural rules can be admitted and used for conviction, but its use may be conditional on there being remedial actions taken or corroborative evidence provided.¹³²

There are also perverse examples of evidence being given more weight because it was obtained in violation of procedural rights. For example, in a case concerning

¹²⁷ *Lithuanian domestic report*, Section 4.4.4., p. 33.

¹²⁸ *Lithuanian domestic report*, Section 3.3.1., p. 6.

¹²⁹ Article 10(2) of the *Criminal Procedure Act*.

¹³⁰ *Croatian domestic report*, Section 6.1., p.17 and p.33.

¹³¹ *Croatian domestic report*, Section 4.3., p.24.

¹³² Article 130(3) of the *Latvian Criminal Procedure Law*.

Poland, currently communicated to the ECtHR, an intoxicated suspect without a lawyer was 'informally' questioned by the police and confessed to an aggravated murder. He subsequently repeated his confession, again without a lawyer, to the police officers and a prosecutor in an official interview. Although the 'informal statements' of the applicant were not recorded and included into the case file, three police officers testified about the content of these statements. The court sentenced the applicant to 25 years in prison finding that the "initial statements of the applicant, i.e., those given to the police officers and to the prosecutor (before the arrival of his lawyer) were particularly credible, since the applicant had had no chance to think about his line of defence and must have been honest."¹³³

Not surprisingly, given its general approach to the exclusion of evidence, **Swedish** courts have found means of responding to illegal evidence that fall short of exclusion:

- Courts have discretion to assess the evidence on case-by-case basis and to adjust the weight given to it. Although they recognise that generally evidence gathered illegally should be viewed with caution, there is no prohibition of giving it high probative value.¹³⁴
- Practitioners in Sweden have indicated that elements of impropriety in investigations may also lead to mitigation of a sentence. This option is also available in the Netherlands, where a sentence discount (in proportion to the gravity of the illegality) is one of three possible sanctions criminal courts may impose when faced with illegally obtained evidence (the others being excluding the evidence or declaring the criminal proceedings as a whole unfair).¹³⁵
- Where evidence is gathered through means of a criminal offence committed by investigative authorities, it can be reported to the police or used to launch disciplinary proceedings.¹³⁶

3.2. Evidentiary rules in practice

In this section, we draw on the domestic research undertaken by our partners, to provide an overview of some key features of how rules of evidence apply in practice. This is based on our partners' review of cases and input from defence lawyers, prosecutors and judges. More detailed analysis is available in their domestic reports.

¹³³ ECtHR, *Lalik v. Poland*, App. No. 47834/19, case communicated on 18 September 2020, para. 2.

¹³⁴ For example, in a case concerning a person charged with driving under the influence of alcohol the accused person's blood sample was taken by a laboratory assistant instead of a licensed nurse or a doctor, as required by law. The Supreme Court found that generally high demands had to be placed on the probative value of the blood test as it had been gathered in breach of law, however in that case there was no reason to do so as the test had been administered correctly. On the other hand, an incorrectly filled speed violation form was deemed to have insufficient probative value resulting in dismissal of the case. See *Swedish domestic report*, Section 4.1., p. 17.

¹³⁵ Article 359a of the *Dutch Code of Criminal Procedure*.

¹³⁶ *Swedish domestic report*, Section 5.5.2., p. 28.

3.2.1. Mechanisms to “soften” exclusionary rules

Judicial discretion defines most countries' approach to evidentiary remedies. Many legal systems explicitly accord very high levels of discretion to judges in deciding how to handle illegal evidence. As described above, over recent years, laws have also been changed to increase the level of discretion so that they are not required to exclude evidence.¹³⁷ Even where the law is clear and requires certain types of evidence to be excluded, the courts nonetheless have a high degree of latitude in how they interpret those rules. Judges often appear to exercise their discretion or to interpret laws in ways that allow them to base their decisions on evidence that was obtained illegally.

In some cases in **Poland**, judicial interpretation has been used to narrow the scope of potentially unconstitutional legal provisions, in others it has been used to introduce concepts such as ‘substantive violations’ or ‘fundamental breaches’ that limit the scope of exclusionary rules. Interviews with practitioners reveal that the result of courts' assessment of evidence is normally a decision to admit, rather than exclude it. Indeed, Polish lawyers consider inadmissibility of evidence due to violations of procedural rights as a theoretical rather than a practical possibility. A significant number of interviewees in Poland from all practitioner groups concluded that they have rarely come across a situation in which courts even examine the inadmissibility of evidence, more commonly focusing solely on whether evidence is relevant or whether challenges to evidence are being used to stall proceedings.¹³⁸ Some lawyers did, however, note a growth in the use of exclusionary rules in criminal cases to sanction violations of the right to privacy.

A Polish lawyer noted that there is no established jurisprudence of the lower courts or Supreme Court, and you may only refer to decisions of international courts including the ECtHR, and provisions of, say EU directives, which are only partially implemented. In [Poland], however, these standards are severely undermined.

In **Lithuania**, even where the procedure for gathering evidence was violated, the Supreme Court has stated it is “necessary to assess whether the violations affected the reliability of data and whether these violations restricted the rights of the accused guaranteed by law”.¹³⁹ Lithuanian judges have also read across into rules of evidence, the concept of “fundamental breach of the Code of Criminal Procedure”, which was designed to help courts decide whether judicial decisions should be quashed in their entirety. This involves requiring breaches of procedural rules to lead “to restrictions of the rights of the accused [that] precluded the court from examining the case thoroughly and impartially and from adopting a fair judgment”.¹⁴⁰ Consultations with practitioners, both judges

¹³⁷ For example, the Polish reforms in 2016; and the changes in Ireland in 2015 following the Supreme Court decision in *DPP v. JC*.

¹³⁸ *Polish domestic report*, Section 6.2., p.30.

¹³⁹ See e.g., Lithuanian Supreme Court, decision in a criminal case No. 2K-78-648/2020, 9 July 2020, para. 61 referred to in *Lithuanian Domestic Report*, Section 4.1.1., p. 22.

¹⁴⁰ *Lithuanian Domestic Report*, Section 4.1.1., p. 22.

and lawyers, showed that in Lithuania exclusion of evidence obtained in violation of fundamental rights is rare.¹⁴¹ For example there are cases where the testimony of a suspect who was questioned as a witness was admitted and used as the sole evidence for conviction.¹⁴²

Croatia has a strong statutory basis for exclusion of illegal evidence, but exclusion of evidence is more difficult in practice. Regarding the fundamental rights of defence, the greatest risk of rights violations exists in the earliest stages of pre-trial proceedings, at the police station. At this stage, however, it is very difficult to establish that a violation has occurred because no lawyer is present and there is no recording. Without that evidence, the exclusionary rule cannot be applied. In areas where judges have discretion about whether to apply the exclusionary rule, the practice of Croatian courts is unclear. Practitioners, however, said that procedural violations in evidence gathering are rarely a reason to exclude evidence. A prosecutor stated they had never had a case where evidence was excluded due to procedural rights violations, while another noted that evidence has been excluded in that situation because it is irrelevant or inappropriate, but not because it is illegal.¹⁴³

Although exclusionary rules exist in Ireland and the Supreme Court has developed a test for assessment of unconstitutionally obtained evidence, in practice a decision on admissibility of evidence is highly dependent on the discretion of trial judges. Research shows that the Supreme Court's decision in *DPP v JC* has increased the amount of illegally-obtained evidence that is admitted in criminal trials.¹⁴⁴

3.2.2. Inconsistency

In practice, broad judicial discretion exercised without clear guiding principles, leads to unpredictable and inconsistent case law. As a result, the outcome of challenges to reliance on illegal evidence, often depends on how an individual judge weighs competing interests.

In **Lithuania**, for example, a decision on admissibility of evidence obtained in violation of requirements provided in law, involves assessing "whether in obtaining it, the accused was deprived of rights guaranteed by law, or such rights were substantially restricted"(insert footnote: Case-law of the Lithuanian Supreme Court cited in Lithuanian Domestic Report, Section 4.1.1., p. 22.) There is a lack of guidance on what procedural violations should be considered as resulting in "substantial restrictions" on the rights of the defendant. In addition, as evaluation of legality of evidence is intertwined with verifying its reliability, sometimes judges tend to prioritise the reliability over legality. This results in a *de facto* balancing approach, where the interests of the accused are weighted against the interest of criminal justice in determining the truth and different judges or courts may adopt different decisions. For example, in a case considered

¹⁴¹ *Lithuanian Domestic Report*, Section 3.2., p. 18 and Section 4.1.1., p. 24.

¹⁴² *Lithuanian Domestic Report*, Section 4.1.1., p. 24.

¹⁴³ *Croatian domestic report*, Section 4.2.b, p.21.

¹⁴⁴ *Irish domestic report*, Section 4.2., p. 26.

by our partners in Lithuania, evidence obtained from the unauthorised seizure of hard drives (before the official launch of criminal proceedings) was excluded by first instance and, finally, Supreme Court, but declared admissible by the court of appellate instance.¹⁴⁵

In **Poland** the interpretation of the highly criticised 2016 law¹⁴⁶ depends on the specific court or even individual judge. Some courts have sought to read the impact of the provision restrictively. The Court of Appeal in Wroclaw, for example, has interpreted it in light of the Polish Constitution and the ECHR to conclude that it does not require evidence obtained unlawfully to be admitted. Other courts have, however, interpreted the law to mean that a violation of rules of procedure cannot result in exclusion of evidence if they do not fall within one of the exceptions.¹⁴⁷

In **Croatia**, as discussed above, judges have considerable discretion to decide on the admission of some evidence where the interest of criminal prosecution outweighs the violation of the right in question.¹⁴⁸ According to prosecutors, the current case law on how these interests are weighed is inconsistent and in some cases lacks logic, allowing for surveillance tapes to be used in cases of bribery, but not in cases of rape. Defence lawyers also agreed that there is a lack of clarity, caused primarily by a lack of consistent case law.¹⁴⁹

3.2.3. Indirect means to admit illegal evidence

Even where exclusionary rules exist, and are applied, the content of illegally obtained evidence is still indirectly admitted and used to convict.

Informal questioning

It is common in some countries for people who are suspected of committing crimes to be questioned by police before formal proceedings start, despite clear legal requirements that access to a lawyer is given before the first interrogation by the police.¹⁵⁰ This is known as 'informal questioning'.

This practice was observed in **Poland** where 'informal questioning' takes place before a person has been legally classified as a "suspect", in some cases, even while they are under the influence of alcohol. The statements are formally excluded as evidence, but they remain in the case files. They can also be

¹⁴⁵ *Lithuanian Domestic Report*, Section 4.1.1., p. 27.

¹⁴⁶ Article 168a of the *Polish Code of Criminal Procedure*.

¹⁴⁷ *Polish domestic report*, Section 5.3.5., p. 21.

¹⁴⁸ Article 10(3) of the *Croatian Criminal Procedure Act*.

¹⁴⁹ *Croatian domestic report*, Section 4.3., p. 24.

¹⁵⁰ *A.T. v. Luxembourg*, App. No. 30460/13, 9 April 2015, § 63; Article 3(2) of the Directive 2013/48/EC 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 requires that presence of a lawyer be ensured even before the questioning by the police or by another law enforcement or judicial authority.

admitted through the testimony of police officers.¹⁵¹ One Polish prosecutor that was interviewed by our partners admitted that he resorted to questioning police officers to obtain information disclosed by the suspect during an inadmissible 'informal' interview to get the information on record. A judge also explained that this method can be used to evade the privilege against self-incrimination. An internal police memorandum detailing the content of an informal interview is not treated as evidence but if a police officer is questioned about the circumstances mentioned in the memorandum, including the content of the 'informal interview', this might be treated as evidence from a police witness.¹⁵²

Similarly, lawyers in **Lithuania** explained that sometimes investigators opt for 'informal interviews' with potential witnesses or even suspects. Even though the information obtained in these interviews cannot be used as evidence, it may lead the investigation to other sources of evidence.¹⁵³

In **Croatia**, defence lawyers reported significant problems in informal interview before the person who is suspected is classified as a "suspect" and entitled to a defence lawyer. During that period, in the absence of a lawyer or record of what takes place, it is usually impossible to present any evidence of illegality, making it likely that allegations will be rejected as speculative and unsubstantiated.

The European Union's Agency for Fundamental Rights (FRA) has reported similar practices of 'informal' evidence gathering in the absence of a lawyer or proper information about suspect's rights in multiple Member States.¹⁵⁴ According to the FRA, this practice is referred to as "informal intelligence talks" by lawyers in Bulgaria, "the grey zone" in Greece or "informal questionings"¹⁵⁵ in Romania.

3.3. Procedures for challenging evidence

As discussed in Chapter 3, EU law requires Member States' courts to provide effective judicial protection of rights and the CJEU has emphasised that the defence must be able to challenge the legality of evidence in a way that respects the adversarial principle. The ECHR has also emphasised the importance of defendants being able to challenge illegal evidence in national courts. Where procedural rights violations are involved, it has also examined the effectiveness of these challenges and even the reasons given by courts for allowing evidence to be admitted.

¹⁵¹ *Polish domestic report*, Section 6.1., p.29, see also ECtHR, *Lalik v. Poland*, App. No. 47834/19, case communicated on 18 September 2020.

¹⁵² *Polish domestic report*, Section 6.1., p.20.

¹⁵³ *Lithuanian domestic report*, Section 3.3.1., p.9.

¹⁵⁴ *European Union Agency for Fundamental Rights*, Rights in practice: access to a lawyer and procedural rights in criminal and European arrest warrant proceedings, Luxembourg: *Publications Office of the European Union*, 2019, pp. 12, 23, 29 and 31.

¹⁵⁵ *Ibid.*, p. 23

3.3.1. Challenging evidence pre-trial

Timing of challenges

In determining whether the proceedings as a whole were fair, the ECtHR usually assesses whether the rights of the defence have been respected. In particular, the court looks at whether the applicant was given an opportunity to challenge the authenticity of the evidence and to oppose its use. What is often left out of the court's assessment is whether the defence and, in some instances, even the judges have access to enough information about evidence gathering process to be able to assess the legality of evidence effectively. In this context, timing of the right to challenge is key. Investigations can sometimes last for months or even years therefore it is important to address the legality of evidence early in the proceedings, particularly in cases of serious violations of the rights of defence.

Timely exclusion of illegal evidence pre-trial can also prevent illegal evidence being embedded so deeply in the case that its negative effect is impossible to fully remove later in proceedings. Furthermore, it can make it harder to use illegal evidence to gather new, derivative, evidence: by trial, even if the original statement is excluded, it is often impossible to trace what additional evidence was gathered as a result of it.

In some of the countries examined, delays in challenging evidence are also used against the suspect. One Croatian Supreme Court decision, for example, involved the defence challenging the legality of a confession given by the defendant after a full day of coercive questioning (as the defence has argued) by police officers. The Supreme Court dismissed the challenge stating as one of the reasons that the defence had not objected to the record of the police questioning at the time of signing the confession.¹⁵⁶

Not all countries, however, permit evidentiary challenges pre-trial. This is, for example, the case in Lithuania. In many countries this is also impossible to do in practice due to the numerous practical obstacles to challenging evidence early in proceedings, in particular the absence of proper procedure or adequate information about evidence gathering process.

Ex-officio review

In most of the countries we examined, the prosecutor is primarily responsible for supervising the investigation and deciding whether to include information obtained in the evidence presented at trial. On the one hand, the prosecutor must ensure that enough evidence is collected to identify, charge and ultimately convict the perpetrator. On the other hand, the prosecutor must make sure that the investigation is carried out legally and that evidence included in the case file is admissible. The question of whether prosecutors are independent judicial arbiters is heavily contested.¹⁵⁷

¹⁵⁶ Supreme Court of Croatia, case I Kž-Us 1172019-4, 29 November 2019, referred to in *Croatian domestic report*, Section 5.1.b., p. 27.

¹⁵⁷ See Fair Trials, *Who qualifies as a 'judicial authority' for the purposes of issuing a European Arrest Warrant?*, 2019.

In **Lithuania**, prosecutors reported that they consistently review adherence to the principle of legality while supervising the pre-trial investigation. Interviewed lawyers, however, were sceptical about the effectiveness of such review as a possible evidentiary remedy. They pointed to three interrelated factors which undermine this prosecutorial review function: first, formally the evidence is considered as mere 'data' until the court admits it as evidence; secondly, a decision on admissibility is an exclusive competence of the court; and, thirdly, prosecutors have a general obligation to submit to the court all materials (data) gathered in the case.¹⁵⁸

In **Croatia**, prosecutors also have a duty to ensure the legality of the evidence they present. Although they do examine the legality of evidence, particularly evidence obtained by the police (and even exclude some pieces of evidence from the case file), traces of illegal evidence nevertheless should remain in the case file, for example to aid in verifying the legality of any derived evidence.¹⁵⁹

In **Ireland**, prosecutors must assess the evidence to ensure it was properly obtained and must not seek to adduce inadmissible evidence. The prosecutor can refuse to admit evidence at trial where they believe it has not been gathered in accordance with the law or have other concerns about it, such as its credibility. They can also seek information from police as to how evidence has been gathered. There does not, however, appear to be any publicly available internal guidelines on how evidence is reviewed by prosecutors.¹⁶⁰

In **Sweden**, given the principle of free evaluation of evidence, unsurprisingly there is no regulation specifying that the person in charge of an investigation must ensure that evidence has been lawfully obtained. Interviews with practitioners indicate that the general assumption is that the rules have not been violated unless, for example, the defence lawyer points to an error. The prosecutors have a general duty of objectivity but no explicit obligation to ensure the rights of suspects are respected during the investigation.¹⁶¹

Access to information to facilitate challenges

The ability to challenge the legality of evidence is one of the fundamental aspects of the right to a fair trial.¹⁶² As discussed above, a key consideration of the ECtHR, in when applying the "overall fairness" test is also whether the applicant was given an opportunity to challenge the authenticity of the evidence and to oppose its use. What is often left out of the ECtHR's assessment, however, is whether the defence, and in some instances even the judges, have access to enough information about how the evidence was gathered to be able to assess its legality effectively.

¹⁵⁸ *Lithuanian domestic report*, Section 4.2., pp. 33-34.

¹⁵⁹ *Croatian domestic report*, Section 6.1., p. 34.

¹⁶⁰ *Irish domestic report*, Section 3.3 (ii), p. 13.

¹⁶¹ *Swedish domestic report*, Section 3.2.1., p. 14.

¹⁶² Article 6(3)(c) ECHR.

Limited access to case materials pre-trial is one of the most common problems faced by the defence across the EU¹⁶³. Control over access rests almost entirely with the investigating or prosecuting authorities. Although the right to early access to case materials is set out in the Right to Information Directive,¹⁶⁴ there are limitations on this right if information is not required to challenge the legality of the arrest or detention. The Directive provides:

(3) ... access to the materials [...] shall be granted in due time to allow the effective exercise of the rights of the defence and at the latest upon submission of the merits of the accusation to the judgment of a court ...

(4) By way of derogation from paragraphs 2 and 3, provided that this does not prejudice the right to a fair trial, access to certain materials may be refused if such access may lead to a serious threat to the life or the fundamental rights of another person or if such refusal is strictly necessary to safeguard an important public interest, such as in cases where access could prejudice an ongoing investigation or seriously harm the national security of the Member State in which the criminal proceedings are instituted.

The kinds of restrictions envisaged in the Directive are found in the law of all Member States and are usually applied broadly in practice.¹⁶⁵ This includes not only access to evidence, but also to information about how evidence was gathered.

In **Croatia**, defence lawyers are not normally allowed to be present when evidence is gathered unless it involves the defendant or questioning of a defence witness. Access to case materials pre-trial is also limited both for the defence and judges. For this reason, even though Croatian law makes it possible to challenge the legality of evidence pre-trial, in practice when such challenge is made, the judges seldom accept it because they don't usually know well the content of the case file. Even where the defence is given access to materials, at a later stage, defence lawyers pointed out that these do not contain sufficient information about how evidence was gathered to assess its legality.¹⁶⁶ This is especially challenging in the context of informal interviews, where a defence lawyer is not present.¹⁶⁷

Lawyers in **Poland** described similar experiences. The defence must make a plausible allegation that a procedural step has been carried out wrongfully to challenge the evidence but, pre-trial, they cannot verify how evidence has been gathered making it virtually impossible to substantiate a challenge.¹⁶⁸

In **Ireland**, the evidence prosecutors intend to rely on is often disclosed to the defence at an advanced stage in proceedings, making it impossible to address the legality of evidence early in proceedings. The Irish Law Reform Commission

¹⁶³ European Union Agency for Fundamental Rights report, Rights of suspected and accused persons across the EU: translation, interpretation and information, 2016, pp. 79-82.

¹⁶⁴ Article 7(2).

¹⁶⁵ Report from the Commission to the European Parliament and the Council on the implementation 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, Section 3.7.4.

¹⁶⁶ Croatian domestic report, Section 5.1.b, p. 27.

¹⁶⁷ Croatian domestic report, Section 5.1.b, pp. 27-28.

¹⁶⁸ Polish domestic report, Section 6.9., p. 36.

has stated that this may not be sufficient to comply with the duty of disclosure or the requirements of the Right to Information Directive, which requires access to case materials as soon as practicable.¹⁶⁹ Issues may arise also from limited scope of legal aid which often does not cover the review of often very large amounts of electronic data that is disclosed very late. In September 2021 a new procedure was introduced to pay defence lawyers for their work reviewing some disclosure, but it remains problematic.

In **Lithuania**, during the pre-trial stage the prosecutor may make a reasoned decision to refuse access to part of the case material if, “in the opinion of the prosecutor, this could prejudice the success of the pre-trial investigation.”¹⁷⁰ Thus only limited information is provided to the defence. One lawyer noted that they can only see the written records that directly relate to their client – searches, seizures, etc. All interviewed lawyers emphasized that getting access to information on how and what other evidence was gathered, whether secret methods were used, is nearly impossible before the end of the investigation. This is especially so, when covert investigative methods are involved as these are classified as a state secret and are thus inaccessible to defendants and their lawyers.¹⁷¹

Lithuanian lawyer:

“You can only get acquainted with the written records that directly relate to your client – his searches, searches of premises, seizures, records of detention, records of questionings, that’s it. No other data is revealed during the investigation, it is revealed only at the end of it. Getting access to data before the end of the investigation is an extremely rare situation. Whether criminal intelligence was used – nobody knows, because it is a state secret, thus you can question its legality only after this information is declassified. In exceptional cases, part of the information is declassified during pre-trial investigation, otherwise – at the end of it or during trial proceedings.”

3.3.2. Challenging evidence at trial

In most of the countries examined, challenges to reliance on illegal evidence are dealt with at trial.

The same judge that decides on admissibility decides on guilt or innocence

A recent study on effective remedies for a violation of the right to a lawyer found that in an overwhelming majority of Member States that apply the exclusionary rule (15 out of 23), excluded evidence is brought to the attention of trial judges.¹⁷²

¹⁶⁹ *Irish domestic report*, Section 3.3.(iv), p.15.

¹⁷⁰ *Lithuanian domestic report*, Section 5.1., p. 42.

¹⁷¹ *Lithuanian domestic report*, Section 5.1., p. 42.

¹⁷² *Anneli Soo (Effective) Remedies for a Violation of the Right to Counsel during Criminal Proceedings in the European Union: An Empirical Study*, *Utrecht Law Review*, Vol. 14, Issue 1, 2018, pp. 31-32, in particular, Figure 2.

This holds true for Sweden, Lithuania and Poland and means that evidence is examined, assessed, and, if necessary, excluded by the same judges that subsequently make the final decision on the guilt or innocence of the accused.

In **Lithuania** at the beginning of a trial all evidence is considered 'data'. All case materials, including potentially illegal evidence, have to be submitted to the court and are therefore visible to judges.¹⁷³ One prosecutor noted that requirement to submit to the court all case materials was introduced in order to preclude prosecutors from excluding exculpatory evidence from the case file.¹⁷⁴

There is also no special procedure for challenging the admissibility of evidence, with objections usually raised during the final speeches.¹⁷⁵ Only once the hearings on merits have ended will the court evaluate firstly, whether the data examined during the trial can be recognized as evidence, and, secondly, how it will use that evidence to support its judgment.¹⁷⁶ Even where evidence is 'excluded' in reality this only means the judge will not explicitly refer to it in their reasoning.

This system, not unique to Lithuania, is based on the assumption that judges will be able to distance themselves from the information they have seen or heard and will base their decision only on legal evidence. However, this is not realistic, especially where the reliability of evidence is not in question. What it demands of judges is impossible – to remove from his or her consciousness impermissible, but reliable and convincing information or to “unbite the apple of knowledge”.¹⁷⁷ A Polish judge observed that if a judge handling a serious case is presented with unlawfully obtained evidence which is the only evidence of guilt of a very dangerous criminal, then, for psychological reasons, the judge will take measures to assess the evidence in a way that allows him to consider the evidence admissible.

Ireland and Croatia have developed ways to address this challenge. In **Ireland**, which uses jury trials in most ordinary criminal proceedings, the admissibility of evidence is usually decided in a separate hearing by the trial judge.¹⁷⁸ This is held within the trial but in the absence of the jury. The media may not report on what takes place and, where evidence is excluded, no mention of it can be made. Thus, the jury is able to make a decision based only on evidence that is ruled admissible.¹⁷⁹

¹⁷³ *Lithuanian domestic report*, Section 4.4.2., p. 39.

¹⁷⁴ *Lithuanian domestic report*, Section 4.4.2., p. 39.

¹⁷⁵ *Lithuanian domestic report*, Section 4.3., p. 34.

¹⁷⁶ *Lithuanian national report*, Section 3.2., p.6.

¹⁷⁷ Damaška, M. R. (1997). *Evidence Law Adrift*. Yale: Yale University Press, 1997, p. 48, quoted in *Lithuanian domestic report*, Section 4.4.2., p. 40.

¹⁷⁸ *Irish domestic report*, Section 3.5., p 18. Notable exceptions to this are the summary-only offences and some hybrid offences that are tried in the District Court before a single judge sitting without a jury and the Special Criminal Court. In both these courts the judge or judges decide on both the questions of law and fact and also on whether or not evidence is admissible.

¹⁷⁹ *Irish domestic report*, Section 3.5., p 18.

In **Croatia**, evidentiary matters are normally dealt with by either the investigative judge or indictment panel before the start of the trial. After the prosecutor files the indictment, the indictment panel (consisting of three judges) decides whether to exclude the evidence. This prevents the trial court seeing the excluded evidence.¹⁸⁰ Excluded evidence is then kept separately by the investigative judge, separate from all other case files.¹⁸¹ It is also possible to challenge evidence before trial judges.¹⁸²

Where there is no trial

Independent examination of the legality of evidence is even more problematic when a suspect waives their right to a full criminal trial, in exchange for a benefit from the state (such as a lower sentence). These trial waiver processes are increasingly common in Europe.¹⁸³ Where there is no trial (or a perfunctory one), evidential issues are almost entirely dependent on the prosecutor's review or on the defence challenging the evidence. The former is unrealistic, as the prosecutor often plays a leading role in negotiating the trial waiver. It is also, in practice, hard to imagine the defence challenging the legality of evidence,¹⁸⁴ including because the accused person will not have an incentive to do so (they are waiving their rights to get a shorter sentence or lower charge). At best, evidential issues become one matter for discussion in the agreement trial waiver. Although some countries do provide for judicial oversight of trial waivers, this is often limited to checking compliance with the agreement and with formal legal criteria. The court does not independently verify the legality or even the reliability of evidence. Thus, there is a considerable risk that illegally obtained evidence that otherwise would not be admissible may be used in trial waiver negotiations.

Domestic law and practice - key conclusions

- The laws in EU Member States vary enormously. While most have some form of legal regime governing the admissibility of illegal evidence, this is not the case in Sweden.
- Over the past decade, legal changes in a number of Member States have increased the level of discretion judges have to admit evidence obtained in violation of fundamental rights.
- Legal systems give judges a lot of discretion about whether to admit evidence. In practice this is normally used to admit evidence, with exclusion of evidence being rare.
- Even where there are seemingly clear obligations to exclude evidence, in practice the law is often interpreted to allow courts to rely on evidence.

¹⁸⁰ *Croatian domestic report*, Section 5.1.a., p.26.

¹⁸¹ *Croatian domestic report*, Section 5.2.a., p. 32.

¹⁸² *Croatian domestic report*, Section 5.2.a., p. 32.

¹⁸³ Fair Trials, *The Disappearing Trial: Towards a rights-based approach to trial waiver systems*, Report, 2017.

¹⁸⁴ *Ibid.*, pp. 23-34.

- 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 ECHR caselaw to justify a less robust approach to evidentiary remedies.
 - Although there are major benefits to allowing evidential challenges pre-trial, in most countries this is not possible. What little oversight exists at this stage normally rests with prosecutors.
 - Challenges to reliance on illegal evidence normally take place at trial by the same judges that will decide the case, meaning they will have been influenced by the evidence.
 - There are significant practical challenges to the defence in challenging reliance on illegal evidence, in particular a lack of early access to the case file and to information on how evidence was gathered.
-

4. Methodology for a principled assessment of evidentiary remedies

4.1. Regional standards and national law show us the problems, not the solutions

It is clear in regional standards that evidence should be excluded if it is unreliable, a result of entrapment, or tainted by torture.¹⁸⁵ Beyond this, however, there is a lack of clear guidance in regional law about when illegal evidence should be excluded. Regional courts accord a high degree of deference to the decisions of national courts, increasingly so in the case of the ECtHR, resulting in case law that is inconsistent and unclear.

This would not be a problem if, notwithstanding the lack of clear regional standards, countries had their own national rules which are clear and sufficiently robust and if these rules applied in an appropriate way in criminal cases. However, this is far from the case. National laws are also often vague and have been changed over the past decade to weaken evidentiary protections.¹⁸⁶ National law also gives courts considerable discretion which, in practice, rarely seems to be used to strengthen the safeguards towards exclusion of illegal evidence. People accused of criminal offences also face enormous procedural and practical barriers in challenging illegal evidence, which often make evidentiary remedies illusory.

¹⁸⁵ Fair Trials, *The Disappearing Trial: Towards a rights-based approach to trial waiver systems*, Report, 2017, pp. 23-34.

¹⁸⁶ A worrying trend found in the legislation of at least three Member States either outright acceptance of illegality in evidence gathering, as is the case in Poland, or creation of different, less strict set of evidentiary rules for special categories of more serious crimes as is the case in Ireland and Croatia.

Divergence in legal regimes is, in most Member States, based on established constitutional traditions, which makes it hard to address the problems outlined in previous chapters, whether through the creation of new regional standards or by initiating reforms of law and practice at a national level. This is clearly demonstrated by Sweden's response to the proposal, during negotiation of the Access to a Lawyer Directive, that confessions should be excluded where obtained in the absence of a lawyer.¹⁸⁷ It cited Sweden's long-standing commitment to judicial discretion in the "free evaluation of evidence".

Perhaps an even more significant challenge to addressing shortcomings in evidentiary remedies, is the desire not to impede the courts' ability to punish a person they believe has committed a crime. This is understandable. It is also understandable why, in such a context, the ECtHR has been reluctant to find a trial unfair. Regardless of the judge's personal view, they (and the legislators that craft laws on evidentiary remedies) will be conscious of the public and political outcry that ensues in the rare cases where a person is acquitted of a serious crime as a result of evidence being excluded (especially evidence that seems reliable).

It is not easy to develop and implement effective systems for evidentiary remedies. In part, of course, this is due to the systemic underfunding of criminal justice systems which place enormous strains on all those working within them. It is also due to the huge number of variables involved: illegality in evidence gathering can range from the extremely serious to the relatively trivial. The violation can be either brief and accidental or law enforcement could be intentionally flouting the law, knowing they can get away with it. The evidence in question could be a crucial piece of the prosecution's case or a minor part of it.

While the scope of these will be disputed, there appears little doubt that there are some situations where evidence must be excluded, for example where the illegality makes the evidence unreliable, in the case of entrapment or where evidence has been obtained through torture or inhuman or degrading treatment. It also seems inevitable that some degree of judicial discretion is needed to allow the courts to address the facts before them: there is no way legislation could address all the possible variables. Indeed, there is a risk that if the courts are given no discretion at all, they will find ways of concluding that the situation before them falls outside of the scope of the strict rules – perhaps by finding that the evidence-gathering acts are not unlawful. However, to ensure fair and consistent outcomes and to build trust in the rule of law, this discretion must not be unlimited. It must not be a veil behind which judges can decide whatever they want on whatever grounds they consider appropriate. Judicial discretion must be guided by agreed principles and exercised fairly, consistently and transparently.

¹⁸⁷ See e.g., Steven Cras, *The Directive on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings*, EUCRIM 1(2014), p. 40.

4.2. Judicial rationales for evidentiary remedies

Given the lack of clarity in regional and national law and practice, we recommend that it is best to first start by looking at underlying principles to define when evidence should always be excluded and how judicial discretion should be exercised. Therefore, in this section we look at whether to exclude illegally obtained evidence from a normative perspective and examine the main rationales for the exclusion of illegally obtained evidence: reliability, the deterrence or disciplinary principle, the remedial or protective principle and the integrity principle.¹⁸⁸

These rationales do not provide clear “bright line” rules and none of them (taken on their own) provide a convincing overarching rationale. Taken together, however, they provide the starting point for a valuable normative framework, helping to explain why, in certain circumstances, evidence should always be excluded and, in cases where judicial discretion is appropriate, they provide a principled framework within which that discretion should be applied.

4.2.1. Reliability or truth finding

Establishing the truth – whether and what criminal offence has been committed, who is the perpetrator and whether they bare criminal responsibility for their actions – is one of the main objectives of criminal proceedings. Truth finding first and foremost prevents miscarriages of justice, which can have devastating consequences on the lives of wrongfully convicted defendants, their families and loved ones. Wrongful convictions also deprive victims of justice and may have detrimental impact on public trust in criminal justice.

The truth can only be established on the basis of reliable information. Therefore, courts must base their decisions only on evidence that is not subject to any doubt as to its authenticity or accuracy. Broadly speaking, reliability means that evidence has probative value, i.e., that the evidence in question can provide accurate information about facts that can prove or disprove any of the relevant elements of the case. Given the central role that the establishment of truth plays in criminal justice, any doubt that the circumstances in which evidence was obtained may have impacted its reliability and accuracy is sufficient to deem the evidence unreliable.¹⁸⁹

Reliability and accuracy of evidence may be affected by multiple factors that do not necessarily arise from illegal actions, for example, passage of time, contamination of forensic material or technical errors in data collection

¹⁸⁸ This section is largely based on the work of our academic partner – Catholic University of Leuven (Katholieke Universiteit Leuven), in particular, Associate Professor of Criminal Law Michele Panzavolta and Postdoctoral Researcher Elise Maes. Their work under the project titled “Exclusion of evidence in times of mass surveillance. In search of a principled approach to exclusion of illegally obtained evidence in criminal cases in the European Union” submitted for publication in *International Journal of Evidence and Proof*, publication pending.

¹⁸⁹ ECtHR, *Bykov v. Russia*, App. No. 4378/02, 10 March 2009, para. 90.

or recording.¹⁹⁰ However, reliability can also be affected by the (illegal) manner in which evidence was collected. The ECtHR confirms this link by stating that the “quality of the evidence must be taken into consideration including whether the circumstances in which it was obtained cast doubt on its reliability or accuracy.”¹⁹¹ Thus, although reliability seemingly focuses on the quality of evidence itself rather than the quality (legality) of evidence gathering, the manner in which a piece of evidence is collected may also be relevant.

One of the clearest examples of reliability being affected by illegal evidence gathering is confessions or other incriminating statements obtained using torture or inhuman and degrading treatment. In addition to finding these acts offensive to ordinary standards of humanity and decency, the ECtHR has found evidence obtained in these ways to be “inherently unreliable” as the person subject to torture “will say anything – true or not – as the shortest method of freeing himself from the torment of torture”.¹⁹² Another example where the ECtHR has found the failure to observe proper procedures and safeguards to cast doubt on the reliability of evidence are searches conducted in violation of legal rules that require the presence of independent witnesses to dispel doubts about evidence being planted.¹⁹³

As unreliable evidence cannot be used to support a conviction, a strict exclusionary rule should apply. While courts may have some discretion in determining whether the manner in which the evidence was collected casts doubt on its reliability, once such doubt is established, the courts should be required to exclude the unreliable evidence.¹⁹⁴ In the context of torture evidence, for example, there is a clear non-derogable obligation on States to “ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings”.¹⁹⁵

While the reliability rationale addresses the quality of evidence, it only addresses illegality of evidence gathering in so far as it affects the accuracy and reliability of evidence. If courts were guided by reliability alone, evidence obtained through serious violations of fundamental rights or abuses of state power, that do not affect the reliability of the evidence, could be used to support a finding of guilt.

Case study: In *Lisica v. Croatia*¹⁹⁶ Police found incriminating evidence during an unauthorised search of a private vehicle belonging to one of the applicants

¹⁹⁰ *Legal System In Denmark Cites Errors In Cell Data*, New York Times, 21 August 2019, Section A, Page 6.

¹⁹¹ ECtHR, *Ayetullah v. Turkey*, App. Nos. 29084/07 1191/08, 27 October 2020, para. 126.

¹⁹² ECtHR, *Othman (Abu Qatada) v. the United Kingdom*, App. No. 8139/09, para. 264.

¹⁹³ ECtHR, *Ayetullah Ay v. Turkey*, App. Nos. 29084/07 1191/08, 27 October 2020, para. 144; ECtHR *Lisica v. Croatia*, App. No. 201000/06, 25 February 2006, para. 56; ECtHR, *Megrelishvili v. Georgia*, App. No. 30364/09, 7 May 2020, para.33.

¹⁹⁴ *Maes E., Panzavolta M.*, Section 3.1.

¹⁹⁵ *United Nations Convention Against Torture*, Article 15. See Fair Trials and REDRESS, *Tainted by Torture*, 2018.

¹⁹⁶ ECtHR, *Lisica v Croatia*, App. No. 20100/06, 25 February 2010.

suspected of a robbery. Neither the applicants nor their defence counsel had any knowledge of the search. The ECtHR concluded that lack of any independent witnesses to the search cast doubt as to its reliability, which could not be eliminated. The doubts about reliability of the evidence were reinforced by the fact the evidence had only been found at a second search while the first, legally authorised search did not result in such findings. The ECtHR stressed that it attaches significant importance to appearances in matters of criminal justice noting that the police officer cannot be considered independent as the police force is a part of the State apparatus and acts in the criminal proceedings as an ally of the prosecution. The ECtHR concluded that the manner in which this evidence was used in the proceedings against the applicant had an effect on the proceedings as a whole and caused them to fall short of the requirements of a fair trial.

4.2.2. Deterrence or disciplinary

The term 'illegally obtained evidence' implies that law enforcement agencies in the execution of their duty to gather evidence in a criminal case have violated legal rules. The exclusion of evidence is also justified by a disciplinary rationale according to which courts should exclude illegally obtained evidence to discourage law enforcement officers from committing improprieties or illegal acts in the investigation of crime.¹⁹⁷ The prosecution and investigative authorities should not benefit from breaking the law and, if judges routinely excluded illegally obtained evidence, this would send a message that there is no benefit to be gained from acting outside the law.¹⁹⁸

The disciplinary rationale is closely related to the need to prevent abuses of power and preserve the rule of law. If they remained unaddressed, abuses of power could also significantly damage public trust in the fairness of criminal justice. However, courts will also often weigh this against their perceptions of the interests of victims and of the public in the delivery of justice. If the disciplinary rationale were applied strictly, it could lead to the exclusion of evidence and result in the acquittal of person who is factually guilty.¹⁹⁹ This could be disproportionate in cases where the violation of legal rules is relatively minor and unintentional.

For this reason, unlike the reliability rationale which implies the application of a strict exclusionary rule, the application of the disciplinary rationale would typically give courts some discretion to allow different interests to be balanced. One of the aspects relevant for this assessment would be the motives of the police. In cases where law enforcement officers have deliberately violated the law, the need for exclusion of evidence to prevent future misconduct would be greater than in cases where the violation has occurred due to ignorance or mistake.²⁰⁰

¹⁹⁷ *Maes E., Panzavolta M.*, Section 3.2.

¹⁹⁸ *Maes E., Panzavolta M.*, Section 3.2.

¹⁹⁹ *Maes E., Panzavolta M.*, Section 3.2.

²⁰⁰ *Maes E., Panzavolta M.*, Section 3.2.

The disciplinary rationale would also be problematic as a single rationale to determine the admission or exclusion of illegally obtained evidence. Notably, the deterrence rationale is not concerned with the illegality of 'privately obtained evidence' i.e., evidence that has not been obtained by state officials. If courts were only guided by the deterrence rationale, evidence obtained illegally by private parties could be admitted into criminal cases and used for conviction. This approach was clearly rejected in the recent judgment of the ECtHR in *Ćwik v. Poland*, where the admission of statements obtained through ill-treatment by private parties was found to be incompatible with the right to a fair trial.²⁰¹

The deterrence rationale also fails to adequately address questions relating to the gravity of the impact of the violation on the rights of the defence. For example, if evidence obtained through violations of the law have a significant detrimental impact on rights of defence and ultimately on the fairness of criminal proceedings, the deterrence principle might nonetheless allow that evidence to be admitted and used for conviction if the violation is not deliberate.

Case study: In *Elkins v. the United States*,²⁰² the US Supreme Court considered deterrence to be the primary purpose of the exclusionary rule. The defendant had been indicted for interception and divulging telephone communications. He challenged the admissibility of some of the evidence, arguing that the search and seizure conducted at his home had been unlawful. The evidence was nevertheless admitted resulting in conviction. The Court of Appeal of the Ninth Circuit affirmed the conviction arguing that it was not necessary to determine the lawfulness of the search and seizure because the exclusionary rule obtained through unlawful search only applied where federal, not state agents conducted the search. The Supreme Court, however, found the evidence inadmissible as it violated the defendant's right to be protected from unreasonable searches and seizures under the Fourth Amendment of the United States Constitution. In doing so, the Supreme Court stated that "The [exclusionary] rule is calculated to prevent, not to repair. Its purpose is to deter - to compel respect for the constitutional guaranty in the only effectively available way - by removing the incentive to disregard it."

4.2.3. Remedial

The remedial rationale is mainly concerned with protecting the holder of rights from the consequences of a violation of those rights²⁰³. In other words, if a legal system sets certain standards for criminal investigations, people should have corresponding rights. If those rights are violated, the suspect or accused person should not be placed at a disadvantage because of that violation and the evidence obtained through such violation should not be used against that person.²⁰⁴ This rationale appears to be endorsed by the CJEU in *Prokuratuur*.²⁰⁵

²⁰¹ ECtHR, *Cwik v. Poland*, App. No. 31454/10, 5 November 2020, paras. 88-89.

²⁰² U.S. Supreme Court, *Elkins v. U.S.*, 364 U.S. 206 (1960).

²⁰³ *Maes E., Panzavolta M.*, Section 3.3.

²⁰⁴ *Maes E., Panzavolta M.*, Section 3.3.

²⁰⁵ CJEU, Case C-746/18 H.K. and *Prokuratuur*, 2 March 2021, para. 42.

[I]t should be noted that the objective of national rules on the admissibility and use of information and evidence is, in accordance with the choices made by national law, to prevent information and evidence obtained unlawfully from unduly prejudicing a person who is suspected of having committed criminal offences.

The remedial rationale is based on the right to an effective remedy which guarantees “everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal”.²⁰⁶ The same principle is reiterated in two of the Procedural Rights Directives which oblige Member States to “ensure that suspects or accused persons in criminal proceedings, as well as requested persons in European arrest warrant proceedings have an effective remedy under national law in the event of a breach of the rights under this Directive”.²⁰⁷

It has been argued that for the remedy to be effective, the suspect should be put, as far as possible, in the position they would have been in if the rights violation had not occurred. Thus the remedy should “as far as possible, have the effect of placing the suspects or accused persons in the same position in which they would have found themselves had the breach not occurred”.²⁰⁸ In contrast to the disciplinary rationale, the remedial principle focuses on the rights of the suspect therefore the motives or intentions of police conduct do not matter.²⁰⁹

At its most extreme, the remedial rationale could be seen as requiring all evidence obtained in breach of suspects' rights to be excluded. Academic debate²¹⁰ and court practice, however, point to a more nuanced approach, involving an assessment of the nature of the violation and its impact on defence rights. Thus, while the exclusion of evidence is deemed the most appropriate means of protecting a suspect's rights, “*prima facie* justification for exclusion may sometimes be outweighed by other considerations”.²¹¹ This shift is demonstrated by the ECtHR's case law on the right of access to a lawyer. In the seminal ruling in *Salduz v. Turkey*, the ECtHR appeared to require the exclusion of evidence on the basis that “the rights of the defence will be irretrievably prejudiced where statements made without access to a lawyer are used for conviction”.²¹² It has since backtracked, moving to an assessment of “overall fairness” (discussed in Chapter 2) even where the denial of access to a lawyer was entirely unjustified.²¹³ In the absence of a clear and systematic approach for applying this “overall

²⁰⁶ Article 47(1) of the *EU Charter of Fundamental Rights*. Also see ECHR Article 13.

²⁰⁷ Directive (EU) 2016/343 on the *Presumption of Innocence and of the Right to be Present at the Trial*, Article 10(2); Directive 2013/48/EU on the *Right to Access to a Lawyer*, Article 12(2).

²⁰⁸ *Presumption of Innocence Directive*, Recital 44. See also Anneli Soo, '(Effective) Remedies for a Violation of the *Right to Counsel* during Criminal Proceedings in the European Union: An Empirical Study', *Utrecht Law Review*, Vol.14, Iss.1, 2018, p.20.

²⁰⁹ *Maes E., Panzavolta M.*, Section 3.3.

²¹⁰ *Maes E., Panzavolta M.*, Section 3.3.

²¹¹ A. Ashworth, *Excluding Evidence as Protecting Rights*, [1977] *Criminal Law Review* 731.

²¹² ECtHR, *Salduz v. Turkey*, App. No. 36391/02, 27 November 2008, para.55.

²¹³ See e.g., ECtHR, *Beuze v. Belgium*, App. No. 71409/10, 9 November 2018.

fairness" test, this practice has been criticised as casuistic, lacking coherence and clarity²¹⁴ and leaving space for prosecutions to benefit from violations of a person's fundamental rights.

The CJEU has also suggested that remedies other than exclusion could be considered effective. For example, in *Prokuratuur*, while the remedial rationale was the primary consideration, the CJEU considered:²¹⁵

That objective may be achieved under national law not only by prohibiting the use of such information and evidence, but also by means of national rules and practices governing the assessment and weighting of such material, or by factoring in whether that material is unlawful when determining the sentence.

If, for example, the violation of legal rules is relatively minor and has not caused serious prejudice to the fairness of the proceedings, Member States may allow the use of the illegally obtained evidence but either require corroborative evidence or apply another remedy such as a sentence reduction.²¹⁶

One major challenge of the remedial principle is its failure to take into account other important interests. Notably this rationale, as in *Quadrature du Net*, fails to address violations of third parties' – in this case, the entire population's – rights to privacy that are breached by indiscriminate wholesale retention of telecommunications data.²¹⁷ It equally fails to address the public interest in prevention of such practices.²¹⁸

Case study: In *Salduz v. Turkey*²¹⁹ the defendant made a confession to police while being denied access to a lawyer. At the time, the Turkish law did not afford suspects the right to have access to a lawyer from the moment they were taken into custody if the charged offences fell within the jurisdiction of the state security court. He subsequently retracted the confession, but was nevertheless remanded in custody, at which point the defendant was allowed to meet a lawyer. The applicant was subsequently convicted based, inter alia, on the initial confession. The ECtHR found that the use at trial of the incriminating statements made without the presence of a lawyer constituted a violation of Article 6(3)(c) in conjunction with Article 6(1). In this regard, it stated that the denial of access to a lawyer can be justified but whatever the justification, the restriction may not unduly prejudice the rights of the accused under Article 6. The ECtHR noted that the rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction.

²¹⁴ Joint partly concurring opinion of judges Pinto de Albuquerque and Bošnjak in *Dragoş Ioan Rusu v. Romania*, para. 3.

²¹⁵ CJEU, Joined cases C-511/18 *La Quadrature du Net*, C-512/18 *French Data Network and Others* and C-520/18 *Ordre des barreaux francophones et germanophones and Others*, 6 October 2020, para. 225.

²¹⁶ *Maes E., Panzavolta M.*, Section 3.3.

²¹⁷ *Maes E., Panzavolta M.*, Section 3.3.

²¹⁸ *Maes E., Panzavolta M.*, Section 3.3.

²¹⁹ ECtHR, *Salduz v. Turkey*, App. No. 36391/02, 27 November 2002.

4.2.4. Integrity

The fourth key rationale for the exclusion of illegally obtained evidence focuses on the integrity of the criminal justice system. It supposes that people will lose faith in the administration of justice if judges condone wrongdoing by state authorities too easily.²²⁰ For example, in a case where failure to observe proper procedures for a car search could not clear suspicion of planted evidence, the ECtHR has stressed:²²¹

[I]t attaches significant importance to appearances in matters of criminal justice, since justice must not just be done but must be seen to be done. What is at stake is the confidence which the courts in a democratic society must inspire in the public.

According to this rationale, in deciding whether to exclude illegal evidence, courts must apply their own standards of decency and propriety to preserve the legitimacy and integrity of the criminal justice system.²²²

A clear example of illegal evidence corrupting the integrity of criminal proceedings is the use of evidence obtained by torture or inhuman or degrading treatment. It is true that such evidence is inherently unreliable, but even where it could be supported by other evidence, torture evidence casts a shadow on the integrity of the whole criminal process. In *Othman v the United Kingdom*, the ECtHR expressed the essence of integrity principle as follows:²²³

[N]o legal system based upon the rule of law can countenance the admission of evidence – however reliable – which has been obtained by such a barbaric practice as torture. The trial process is a cornerstone of the rule of law. Torture evidence damages irreparably that process; it substitutes force for the rule of law and taints the reputation of any court that admits it. Torture evidence is excluded to protect the integrity of the trial process and, ultimately, the rule of law itself.

The integrity principle would apply where the methods of investigation overstep the legitimate role of law enforcement agencies in a legal order based on democracy and rule of law, even where the reliability of evidence obtained is not in question and even where the impact on defence rights is relatively minor. This rationale might assist courts in responding to issues of mass surveillance, where the evidence obtained may well be reliable and where the impact on the rights of the defendant may be minimal. Sadly, in *La Quadrature du Net*, by adopting the remedial rationale, the CJEU failed to take account of how the use of evidence taken from wholesale surveillance of telecommunications data of the entire population might impact on the legitimacy and integrity of the criminal justice system.²²⁴ It failed to address how the EU legal order (and respect for EU rights) could be enforced by criminal courts at a national level if they refused to give legitimacy to these violations.

²²⁰ *Maes E., Panzavolta M.*, Section 3.4.

²²¹ ECtHR *Lisica v. Croatia*, App. No. 201000/06, 25 February 2006, para. 56.

²²² *Maes E., Panzavolta M.*, Section 3.4.

²²³ ECtHR, *Othman (Abu Qatada) v. the United Kingdom*, App. No. 8139/09, para. 264.

²²⁴ *Maes E., Panzavolta M.*, Section 3.5.

Case study: In *Othman (Abu Qatada) v. the United Kingdom*²²⁵ the applicant, a Jordanian national, had been detained under the Anti-terrorism, Crime and Security Act 2001 and was facing deportation from the United Kingdom following his release from detention. In this case there was a real risk that evidence obtained through torture of a third party would be used in his trial in Jordan, as he had already been convicted in absentia based on testimony of his co-defendants allegedly obtained by torture. The applicant appealed against the deportation decision, but his claims were dismissed by the domestic courts. The ECtHR found that there was a real risk of evidence obtained by torture of third persons being used in the retrial which would amount to a flagrant denial of justice. The ECtHR stated that there were “powerful legal and moral reasons” for unequivocally opposing the admission of torture evidence, reiterating admission of torture evidence only “legitimize the morally reprehensible conduct that the authors of Article 3 of the ECHR sought to proscribe”. Further, the ECtHR considered that no legal system that is based on the rule of law can condone admission of evidence obtained by such “barbaric practice as torture” and that torture evidence irreparably damages the trial process, which is the cornerstone of the rule of law. Torture evidence must be excluded “to protect the integrity of the trial process and, ultimately, the rule of law itself.”

4.3. Applying these principles in practice – a guide for judicial authorities

The evidence gathering process is generally complex and might involve violations of the applicable legal framework with varying implications. This could include serious violations of defence rights such as a complete denial of access to a lawyer in pre-trial stage, to less serious and technical procedural violations. How much discretion courts have in assessing violations of law in evidence gathering, their impact on different aspects of the criminal proceedings and ultimately in choosing the appropriate remedy largely depends on each state's national law. Similarly regional courts are guided by their specific function and competence.

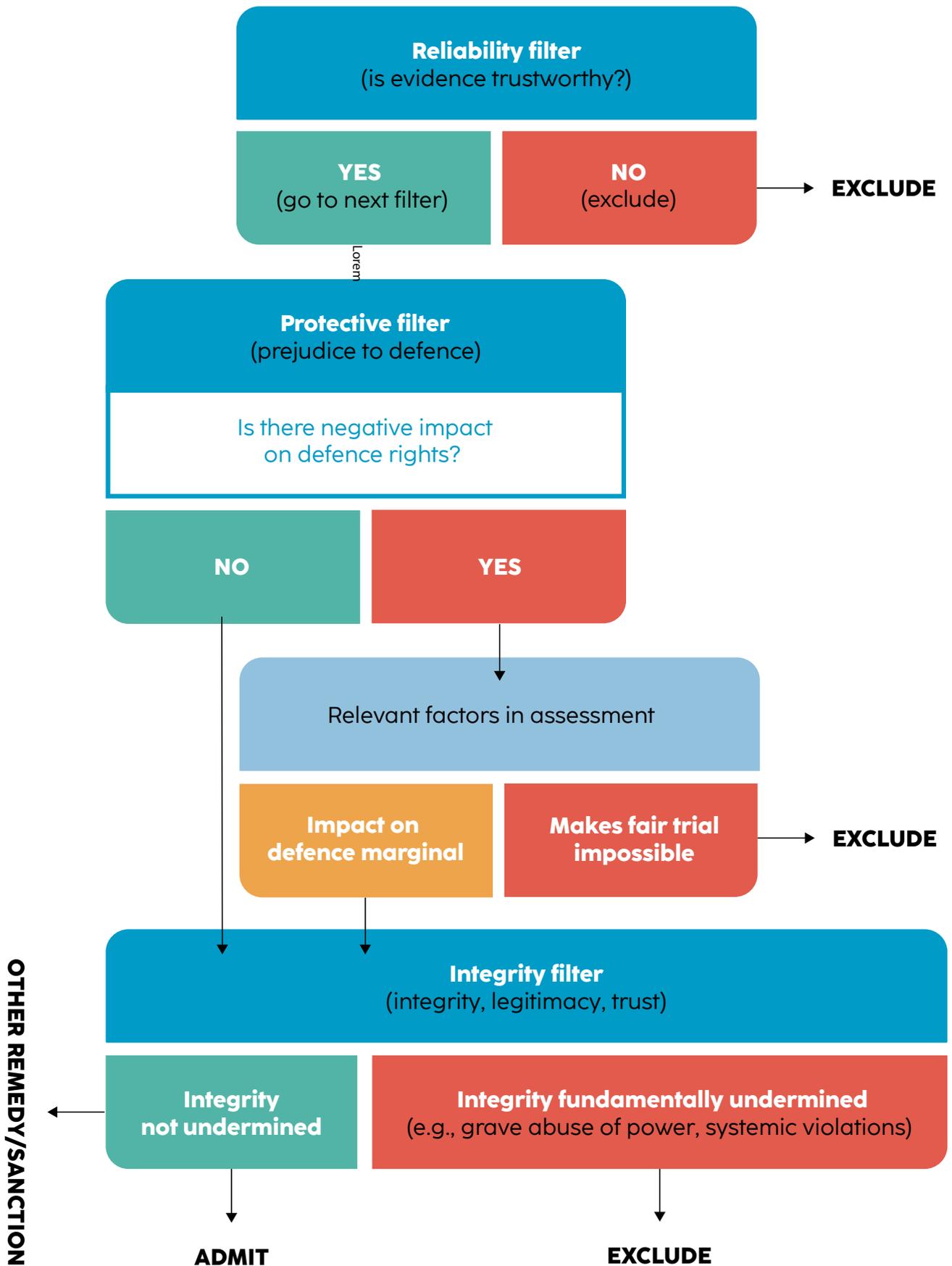
Where the exclusionary rules are detailed in national law, courts will generally have less discretion to apply a different remedy if evidence is found to be illegal. The same holds true for exclusionary rules found in international or regional human rights documents such as the Charter of Fundamental Rights of the European Union, the European Convention for the protection of Human Rights and Fundamental Freedoms, Convention against Torture and other Cruel or Inhuman Treatment, International Covenant for Civil and Political Rights and others. However, where courts have certain discretion in the choice of appropriate evidentiary remedy our research shows a general lack of guidance in how this assessment should be conducted. This leads to lack of consistency, uniformity and legal certainty in courts' reasoning.

²²⁵ ECtHR, *Othman (Abu Qatada) v. the United Kingdom*, App. No. 8139/09.

To assist judicial and prosecutorial decision making on illegally obtained evidence we propose the following methodology. It was developed pursuant to extensive comparative research and is built on the existing case law of regional and national courts adding structure to different rationales and interests that have already been assessed by courts in evidentiary proceedings. It incorporates different rationales for the exclusion of illegally obtained evidence and allows us to comprehensively assess the impact of violations of law in evidence gathering on both individual fairness as well as on broader public interest in proper administration of justice.

This methodology presupposes that the judicial authority (or prosecutor when deciding on inclusion of evidence into the case file) assessing illegally obtained evidence has a certain discretion in the choice of an appropriate remedy. Where national law defines strict exclusionary rules and accordingly discretion is reduced, national law must be applied, and this methodology may be less helpful. On the other hand, where there is some judicial discretion in the choice of an appropriate remedy, this methodology can provide useful guidance. This methodology is primarily aimed to assist judicial (or prosecutorial) decision making but can be used by policy makers to amend national legislation where effective evidentiary remedies are not provided by law or are unavailable in practice.

NB! Please note that this methodology is intended for the assessment of illegally obtained evidence, i.e., evidence that has already been found to be gathered in violation of national law regulating the particular evidence gathering procedure or fundamental rights of suspects, accused persons or other persons. This methodology also does not address crucial aspects concerning the effectiveness of evidentiary remedies such as access to information about evidence gathering procedures or physical exclusion of illegal evidence from criminal case file.



Methodology for assessment of illegally obtained evidence

Step 1 — Reliability filter

Establishing the truth – whether and what criminal offence has been committed, who the perpetrator is and whether they bare criminal responsibility for their actions – is one of the main objectives of criminal proceedings. Truth finding is at the core of the whole criminal process as it first and foremost prevents miscarriages of justice. Wrongful convictions have devastating consequences on the lives of wrongfully convicted defendants, their families and loved ones. They also deprive victims of justice and may have detrimental impact on public trust in criminal justice and the authority of law enforcement agencies.

Under this step:

- verify whether the manner in which the evidence was collected, in particular the violation of legal rules governing the evidence gathering process, cast doubt on the accuracy and reliability of the evidence
- if there are any doubts about the reliability and accuracy of evidence, exclude the evidence.

Example: confessions or other incriminating statements obtained through use of torture or inhuman and degrading treatment, or any other form of ill-treatment are inherently unreliable and must be excluded from criminal proceedings.²²⁶

Example: where national law requiring that a search be conducted in the presence of independent witnesses is breached in the evidence gathering process and doubts about the authenticity and reliability of the evidence gathered in such search cannot be dispelled, evidence must be excluded.²²⁷

Where the violation of legal rules in evidence gathering process has not cast doubt on the accuracy or reliability of the evidence, proceed to the next step of the assessment.

Step 2 — Protective filter

If there is no doubt about the reliability of evidence, the next step of assessment should address the impact of the violation on individual fairness, that is, the impact on defence. The objective of this step of the proceedings is to evaluate the impact that inclusion and potential use of the illegally obtained evidence in question would have on the fairness of the trial.

²²⁶ ECtHR, *Othman (Abu Qatada) v. the United Kingdom*, App. No. 8139/09, para. 264.

²²⁷ ECtHR, *Ayetullah Ay v. Turkey*, App. Nos. 29084/07 1191/08, 27 October 2020, para. 144; ECtHR *Lisica v. Croatia*, App. No. 201000/06, 25 February 2006, para. 56; ECtHR, *Megrelishvili v. Georgia*, App. No. 30364/09, 7 May 2020, para.33.

The objective of this step is to prevent as much as possible a violation of legal rules and safeguards regulating the process of gathering particular evidence from unduly prejudicing the suspect or accused person.²²⁸ In order to achieve this, the suspects or accused persons should be put, as far as possible, in the position in which they would have been if a violation of their rights had not occurred.²²⁹ This may require the exclusion of evidence in question. In case of a more technical violation that does not significantly affect the exercise of defence rights or fairness of the proceedings a violation can be remedied by other means e.g., by reducing the probative value of the evidence or reducing the sentence.

To evaluate the impact of the illegally obtained evidence on defence and fairness of the proceedings:

- verify whether the defence has been able effectively challenge the legality and inclusion of the illegally obtained evidence in the case file. Specifically look at:
 - whether the defence had timely and sufficient access to information about evidence gathering procedure
 - whether there was clear and accessible procedure for challenging the legality and use of evidence
 - whether defence had right and practical ability to effectively present arguments on the illegality of evidence and, where relevant, comment on what evidentiary remedy should be applied.
- assess how the illegally obtained evidence affects the fairness of the proceedings. In doing so take into account:
 - stage of the investigation in which the evidence was gathered
 - the nature of the violation (e.g., minor procedural violation or violation of essential fundamental rights safeguards)
 - the impact of the illegally gathered evidence (information) on the development of prosecution's case, i.e., whether the illegal evidence is included indirectly or used as basis for gathering further evidence
 - whether the actions of investigative authorities or the prosecution have fundamentally undermined the possibility to remove the content of illegally gathered evidence from the case and prevent it from affecting the outcome of the trial (e.g., use of the illegally obtained confession to confront the suspect in subsequent interviews)
 - in case of a statement whether the consequences of the initial statement and the right to remain silent was clearly and understandably explained in subsequent interviews
 - other relevant considerations.

²²⁸ See, e.g, CJEU Case C-746/18 H.K. and *Prokuratuur*, 2 March 2021, para. 42.

²²⁹ Recital 44 of the 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*.

If inclusion of the illegally obtained evidence would make a fair trial impossible, exclude it.

Example: where a suspect has given an incriminating statement while being denied access to a lawyer, assessment of legality and effective remedy should address not only the statement itself but the broader impact of the violation. If the statement is subsequently repeated it should be verified whether subsequent interviews relied on this information, whether there was meaningful access to a lawyer, whether suspects' rights and the inadmissibility of the previous statement was appropriately explained. If inclusion of the illegally obtained statement would fundamentally affect the outcome of the case in a way that makes fair trial impossible, the statement and potentially subsequent evidence gathered as a result of the initial violation of *right to access to a lawyer* must be excluded.

Example: a suspect who does not speak the language of criminal proceedings may be asked to sign either a written information about rights or a protocol of a police interview containing incriminating statements in a language they do not understand. Without adequate interpretation or translation services, the suspect's right to make informed choices about the exercise of other rights is fundamentally undermined therefore the evidence obtained as a result of this breach must be excluded.

Where there is no impact on defence rights or this impact is marginal and could be remedied by other means such as diminished probative value or independently gathered corroborative evidence, proceed to the next step and assess the integrity aspect criminal proceedings.

Step 3 — Integrity filter

The final step of the assessment is the integrity filter. This step addresses the various public interests that are relevant for preservation of public trust and integrity of criminal proceedings.

- Under this step, evaluate whether inclusion of the illegally obtained evidence would undermine:
 - respect for the rule of law
 - prevention abuse of power (police or prosecutorial misconduct)
 - protection of integrity and legitimacy of criminal justice
 - maintenance of public trust in criminal justice system.

If these essential public interests would be undermined, exclude the evidence.

Example: where there is a well-established, systemic practice of conducting 'informal interviews' in the absence of a lawyer, exclusion of all evidence obtained and derived from such practice may be necessary to prevent systemic police misconduct and maintain trust in the criminal justice system.

Example: where evidence is gathered by means exceeding the role and function of law-enforcement in criminal justice, such as police entrapment, it must be excluded to prevent abuses of power and preserve trust in the criminal justice system (including legitimacy of investigations).

Example: where evidence is gathered by means of control unacceptable in a democracy, such as wholesale surveillance of the entire population, it should be excluded to prevent abuses of power and preserve trust in the criminal justice system.

Example: where the police has led a covert operation to access electronic data such as communications on an encrypted platform and denying access to information about how the operation was conducted, effectively preventing a legality review over their operation.

Where the admission of evidence does not undermine the integrity of criminal proceedings, consider whether prejudice caused to defence (see Step 2) requires a remedy other than exclusion of evidence, e.g., reduced probative value, independently obtained corroborating evidence or reduction of sentence.

5. Recommendations

Below are recommendations for different stakeholders, to enable the principled approach to evidentiary remedies set out in Chapter 4 above, and help address some of the key shortcomings in the existing legislative frameworks and practice identified in our research. However, these recommendations do not represent a comprehensive system for evidentiary remedies and other actions may be needed to ensure effective remedies are available for violations of fundamental rights in evidence gathering processes. We welcome further discussion and debate on this fundamental question.

The European Union

The EU has already adopted legislation setting common standards on procedural safeguards that can help support evidentiary remedies. EU Procedural Rights Directives need to be connected to the cross-border instruments in law and practice to enable their effective functioning and promote mutual trust.

However, to achieve their potential, the EU must:

- Clarify that the right to information disclosure under Directive 2012/13/EU includes materials to be included in case file to include evidence gathering process.
- Clarify that the Procedural rights directives apply to cross-border evidence gathering and exchange, evidence gathered by the EPPO, and procedures relating to evidential challenges in that context.
- Exercise effective and robust oversight over the implementation of procedural rights directives as they relate to evidentiary remedies, specifically:
 - the availability of a right to an effective (evidentiary) remedy for violations of suspects' and accused persons' procedural rights in accordance with Article 12 of Access to a Lawyer Directive, Article 10 of *Presumption of Innocence Directive* and Article 47 of the Charter in law and in practice.
 - Article 7(2),(3) and (4) of the Right to Information Directive to ensure that the defence is able to raise timely and effective challenges to the legality of evidence obtained in violation of suspects' or accused persons' procedural rights.
- Adopt supplementary legislation to require that Member States adopt a right for the suspect or accused person to challenge and seek judicial review over the admissibility of cross-border evidence gathered through EU cross-border instruments such as the EIO and the proposed E-evidence package (if adopted) as well as evidence gathered by the EPPO.

Regional courts

Regional courts have a key role to play in setting standards for national courts on the review of evidence. They can clarify the existing legislation to ensure effective protection of rights in evidence gathering process and guide national courts in the assessment of illegally obtained evidence. However, the guidance provided by regional courts needs to be more structured and detailed, especially regarding the principles and rationales that should guide national judges when using their discretion.

ECtHR

We are calling on the ECtHR to:

- Provide clear and structured guidance in their judicial reasoning to national courts on the assessment of illegally obtained evidence, including the assessment of different rationales for requiring the exclusion of evidence (see the Methodology above).
- Clarify existing case law to reflect that the exclusionary rule applies to all evidence obtained directly or indirectly from a violation of inhuman, cruel or degrading treatment.
- Clarify the methodology of assessment of the exclusionary rule under national law to account for practical aspects of exclusion and their impact on the effectiveness of exclusionary rule, including:
 - Availability of information about evidence gathering procedures to enable effective challenges to the legality of evidence;
 - The physical exclusion of evidence from case files;
 - The procedural separation of evidentiary proceedings and trial on merits, i.e., whether the contents of the illegal evidence are examined and known to trial judges.
- Review existing case law to require effective remedies for violations of the right to private life in evidence gathering process, in light of increasing resort to electronic evidence obtained through broad surveillance powers.

CJEU

We are calling on the CJEU to:

- Provide clear, structured and accessible guidance to national courts on assessment of illegally obtained evidence, based on general principles of EU law and the Charter. This should include the assessment of different rationales requiring the exclusion of evidence (see the Methodology above).
- Clarify the scope of Article 47 of the Charter to ensure accountability and effective remedy for violations of defence rights and other fundamental rights in cross-border gathering and exchange of evidence, as well as evidence gathered by the EPPO.
- Develop a body of case law explaining the role of effective evidentiary remedies in protection of fundamental rights and to require effective remedy for violations of the right to private life, in particular through mass surveillance and gathering of personal data.

National legislators and policy makers

We are calling on national legislators and policy makers to:

- Adopt strict rules requiring the inclusion of detailed information about evidence gathering procedures into the case file (for the defence and courts/judges).
- Repeal laws that create diminished standards for the legality of evidence gathering and the admissibility of illegally obtained evidence depending on the gravity of charges.
- Repeal any legal rules that allow the admission of evidence gathered through substantive violations of law or the fundamental rights of people suspected or accused of a crime.
- Ensure that criminal justice systems are structured and adequately resourced to enable effective pre-trial challenges to the legality and admissibility of evidence.

Prosecutors

We are calling for prosecutors to:

- Exercise robust oversight over criminal investigations to identify and prevent violations of the law and fundamental rights in specific cases and on a systemic level.
- Independently and impartially verify the legality of evidence presented by the investigative authorities and, where necessary exclude illegally obtained evidence (see the Methodology above).
- Ensure the defence has timely access to information about evidence gathering process.
- In light of increasing resort to electronic evidence obtained through broad surveillance powers acquire appropriate training on the electronic evidence gathering methods and surveillance techniques to enable effective oversight of legality of investigation based on their impact on fundamental rights.

National courts/judges

We are calling on judges to:

- Verify the legality of evidence presented by the prosecution.
- Provide appropriate detailed and case-specific reasoning for any decisions denying access to information about evidence gathering process to the defence.
- Provide appropriate detailed and case-specific reasoning for any decisions dismissing a substantiated challenge to the legality of evidence.
- Provide appropriate detailed and case-specific reasoning for the choice of the effective remedy (exclusion, admission, diminished probative value etc.) for illegally obtained evidence, including the assessment of different rationales requiring the exclusion of evidence (see the Methodology).

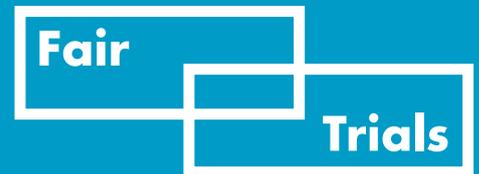
As a matter of principle reject indirect inclusion and use of inadmissible evidence in criminal proceedings, for example, through police memoranda, police testimony.

Adopt measures, such as regular electronic updates disseminating latest case law on admissibility of evidence, regularly updated case law guides or summaries on evidentiary matters, regular training to encourage consistent principled court practice on evidentiary remedies.

Defence lawyers

- Challenge violations of law or fundamental rights in evidence gathering process as early as possible in the procedure.
- Request or, where relevant, challenge restrictions on access to information about evidence and evidence gathering process.
- Request, if necessary through appeal or similar proceedings, appropriate reasoning for any prosecutorial or judicial decisions denying access to information.
- Request, if necessary through appeal or similar proceedings, appropriate reasoning for any prosecutorial or judicial decisions dismissing substantiated challenges to the legality of evidence.
- Invoke EU law, where relevant, suggesting preliminary reference procedure, to request an effective evidentiary remedy for violations of fundamental rights, including procedural rights of suspects or accused persons, in evidence gathering process.
- Exchange information to coordinate coherent challenges to violations of fundamental rights in evidence

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