



## Fair Trials' response to the European Commission call for evidence

### Proposal for (a) directive(s) on (1) addressing shortcomings in the European Investigation Order and (2) taking evidence in another EU country

#### Introduction

1. On 6 January 2026 the European Commission published the for evidence (the **Call**) on a potential legislative initiative relating to (1) improving cross-border gathering of evidence in criminal matters by way of, it appears by way of reform or amendment of Directive 2014/41/EU on the European Investigation Order (the **EIO Directive**) and (2) '*remote participation*' of suspects and accused persons in court hearings in another Member State.
2. This document sets out Fair Trials' initial comments, informed by a brief consultation of the Legal Experts Advisory Panel (**LEAP**). For now, these observations are confined to core issues which the proposal will inevitably have to address.
3. We look forward to contributing further once the Commission releases its proposal(s). Fair Trials has arranged a specific module on the topic of the Call at the LEAP Annual Conference in Athens, 6-7 Feb 2026, which it will draw upon for later contributions.

#### **(1) Remote participation of suspects and accused persons in court hearings from another Member State**

#### Background materials

##### Case-law of the ECtHR

4. The European Court of Human Rights has developed case-law on the question of videoconferencing (see its [case-law note](#) on the subject). The case-law holds that a person's physical presence at trial is not the end in itself but the means to ensure their *effective participation* at trial. As such, videoconference may in some circumstances be used, but on the basis of a legitimate aim and only to the extent that it enables effective participation and does not create unfairness. Illustratively:
  - a. 'As regards the use of a video link, the Court reiterates that this form of participation in proceedings is not, as such, incompatible with the notion of a fair and public hearing, but it **must be ensured that the applicant is able to follow the proceedings and to be heard without technical impediments**, and that **effective and confidential communication with a lawyer is provided for**' ([Sakhnovskiy v Russia 21272/03 \(02.11.2010\)](#), §98).
  - b. 'Although the defendant's participation in the proceedings by videoconference is not as such contrary to the Convention, it is incumbent on the Court to ensure that recourse to this measure in any given case **serves a legitimate aim** and that the **arrangements for the giving of evidence are compatible with the requirements of respect for due process**, as laid down in Article 6' ([Marcello Viola v Italy](#)



[45106/04 \(05.1.2006\)](#), §67). / ‘Si la participation de l’accusé aux débats par vidéoconférence n’est pas, en soi, contraire à la Convention, il appartient à la Cour de s’assurer que son application dans chaque cas d’espèce poursuit un but légitime et que ses modalités de déroulement sont compatibles avec les exigences du respect des droits de la défense, tels qu’établis par l’article 6 de la Convention’ ([Asciutto v Italy 35795/02 \(27.11.2007\)](#), §64).

### Other materials

5. Fair Trials’ report ‘[Safeguarding the right to a fair trial coronavirus pandemic: remote criminal justice proceedings](#)’ (March 2020) identified specific challenges, echoing matters referred to in the ECtHR case-law: effective legal assistance before, during and after remote proceedings; effective participation in such hearings; access to information; and presumption of innocence for those appearing from prison / detention settings.
6. The European Criminal Bar Association has published a ‘[Statement of Principles on the use of Video-Conferencing in Criminal Cases in a Post-Covid 19 World](#)’. The ECBA principles hold that participation of the accused in preliminary hearings (interrogations etc.) may be beneficial, in e.g. by avoiding surrender on Arrest Warrants (EAWs) to secure the accused’s unnecessary physical presence, reducing recourse to the more coercive option of temporary surrender, and enabling a more immediate form of hearing conventional mutual legal assistance. With regard to trial hearings, the principles hold that remote is not equivalent to physical presence; that physical presence should remain the rule; and that a remote trial must require the *consent* of the accused person. In terms of safeguards, the principles include inter alia that hearings must be subject to the consent of the suspect or accused, with prior legal advice with regard to consent; assistance by lawyers in both states before, during and after the hearing; confidentiality in such communications; and access to the case file.
7. The Council of Europe ‘[Guidelines on videoconferencing in judicial proceedings](#)’, drawing on the ECtHR case law, set forth specific guidelines for criminal cases, including that the use of a remote tool must serve a legitimate aim; effective participation (defendant must see and hear other participants and vice versa; effective access to legal representation before and during the hearing, in confidentiality and with interpretation if required).

### **Our comments at this stage**

#### Fundamental rights must be the purpose, not a counterpoint

8. The Call identifies a legal basis of Article 82(1) TFEU (mutual recognition / cooperation basis), apparently for both aspects of the proposal including remote participation. The proposed basis is *not* Article 82(2) TFEU (rights of individuals in criminal procedure).
9. We emphasise that the subject matter at issue – remote participation of an accused in a criminal case, from abroad – has direct impact upon an accused person’s exercise of fair trial rights. Regardless of legal basis issues, we urge the Commission to approach this



exercise with that consideration firmly in mind. The establishment of rules on remote participation must serve the purpose of facilitating the exercise of fair trial rights. It must not be driven by efficiency considerations with fundamental rights as an afterthought.

### Relationship with the EIO

10. It is not clear to us whether the Call is based upon the idea of a *single initiative* revising the EIO, or whether the Commission envisages *two separate instruments*, i.e. one to deal with core EIO evidence-gathering issues and another establishing an autonomous EU framework for the use of videoconference for remote participation in criminal hearings.
11. The EIO provides for the use of videoconferencing at Article 24, including for suspects and accused persons. This is in the context of an instrument the purpose of which is to have '*investigative measures*' carried out '*to obtain evidence*'. The Court of Justice of the EU (CJEU) also clarified in [Case C-325/24 Bissili](#) that an EIO may be issued in order to hear a suspect or accused at his or her *trial*, '*in so far as that measure has an evidential objective*'.
12. The EIO Directive therefore covers some, but not all of the situations governed by the [Second](#) and [Third](#) Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters. Hearings at which a person is to participate in some other way (e.g. by simply observing proceedings, acceptance of an agreed sentence etc.) would appear to fall, currently, only within the Council of Europe legal architecture (hence, see the Call where it says '*remote participation is currently not regulated at the EU level*'). The boundaries between these systems are not distinct, which is a source of complication.
13. The Council of Europe instruments encourage fragmentation, as the application of the provisions on videoconferencing for suspects and accused is left to states' *discretion*. There is divergence between EU Member States: some allow it, some have declarations excluding it. De facto, this means that the availability of an alternative to surrender under an EAW is a matter of government discretion, despite the EAW being a judicial system. It also means that the principle of proportionality operates differently from state to state.
14. The above suggests there would be merit in making dedicated provision for the use of videoconferencing in criminal court hearings, placing the use of cross-border videoconference on a dedicated EU law footing, separately from the EIO Directive. However, for Fair Trials, the form is a matter of choice; what matters is substance.

### Informed consent must be a sine qua non

15. By adopting a common approach, this initiative is likely to increase the availability of videoconference, at all stages of criminal proceedings. With that comes the risk of the instrument being used for convenience, to save complications vis a vis those in other jurisdictions – in particular those whose extradition may be difficult to obtain, due to e.g. serious prison conditions problems in the issuing state.
16. In this new world, we believe that a safeguard of the type currently contained in Article 24(2)(a) of the EIO Directive (a *discretionary* ground for refusal where the suspect or



accused has not consented) is insufficient. It leaves open the possibility that executing states' legislation might permit hearings to be pursued this way against a suspect's will.

17. Fair Trials, supported in this regard by LEAP feedback, believes that consent of the accused should be a sine qua non for the use of videoconference. We consider that in a European Union context specifically, given the availability of the EAW, it should be possible to obtain the attendance in person of a person who does not consent to appearing by video (but does not waive presence). If any discretion is to exist, we suggest that it should be limited to those less serious criminal cases which fall outside the scope of the EAW FD.
18. There must be a proper process for obtaining the necessary consent, which (we agree with the European Criminal Bar Association) implies prior legal advice to ensure the person understands the implications of consenting to their case being heard this way.

#### Fair Trial safeguards

19. The ECtHR case-law specifically emphasises (i) confidential legal advice and (ii) effective participation as key tests for the Article 6 compliance of videoconference hearings. As set out below, other aspects also require clear protection in any EU law instrument.
20. **Access to a lawyer** – As other materials acknowledge, and as LEAP have emphasised, there must be effective legal assistance before and during the hearing. We also agree with the ECBA that there should be such facility after the hearing too.
21. To be clear, there must be access to counsel in the trial state, which must be confidential. In particular, there must be a functional equivalent of a 'private booth' which enables the person to communicate confidentially in the margins of the hearing before the court.
22. There is a need to explore the inter-relationship with Directive 2013/48 with a view to ensuring that such assistance is *effective*; in particular, assistance arising only immediately before the hearing may be symbolic and ineffective, and there is a much greater risk of this happening in cross-border cases in which the defendant's access to their lawyer may present challenges, e.g. if they are in custody. The issuing state must ensure a lawyer appointed *ex officio* has had sufficient opportunity to obtain instructions and assist the accused in preparation, ahead of the hearing itself.
23. **Effective participation** – We emphasise the importance of ensuring that any remote connection replicates as near as possible the context of a court room so that the suspect or accused may see and hear all participants, and be seen and heard by them in a manner which is not prejudicial to their giving best evidence or their presumption of innocence.
24. LEAP members have specifically emphasised to us the fact of technical impediments obstructing the proper participation of an accused. Whilst such things may be unavoidable, any EU law instrument should include clear obligations as to cessation of hearings in which effective participation proves to be impossible.



25. **Access to case materials** – We believe that this is an inherent prerequisite to effective legal assistance and participation. We emphasise the need to explore the inter-relationship with Directive 2012/13 and access to case materials under Article 7 thereof. A defendant abroad may be at a disadvantage in receiving information prior to a case coming to a trial hearing, particularly if they have had limited access to their lawyer from abroad.
26. **Translation & interpretation** – Remote participation exacerbates difficulties in interpretation. There is a need to ensure alignment with Directive 2010/64, in particular with regard to courts’ obligation to verify the quality of interpretation in a remote videoconference setting, which that directive may not have had clearly in contemplation when adopted 16 years ago. That exercise should deal with the particular risks with regard to simultaneous and/or consecutive interpretation in a remote context.

#### Remote ‘presence’ at trial and the link to Directive 2016/343

27. We invite the Commission to reflect upon the inter-relationship with Directive 2016/343 and in particular as to whether a trial should be regarded as being in ‘presence’ of an accused, if they have attended by video, or whether this participation (with informed consent) should still be regarded as an waiver of presence at trial.
28. We draw attention to the case-law of the ECtHR emphasising the condition of effective legal assistance and participation, which must be enabled before videoconference can begin to satisfy the requirements of Article 6 ECHR. We will make further observations on this critical topic in due course, after further discussion with the LEAP network.

#### Stages of proceedings

29. There are distinctions to be drawn between stages of proceedings, e.g. with regard to appeals of a purely legal nature. Trial proceedings must of course attract the highest level of safeguards. We suggest that the position should be approached broadly in that any hearing at which an Article 6 ‘charge’ is determined in fact and law should be afforded commensurate safeguards, in particular where earlier or fresh evidence is (re-)heard.

### **(2) On the improvements in the cross-border gathering of evidence in criminal matters**

30. The [EncroChat and Sky ECC cases](#) and the ruling of the CJEU ([C-670/22](#)) highlight significant concerns regarding the methods by which data is obtained, shared, and used across the EU. These cases raised important questions about the legality and transparency of the actions taken by law enforcement agencies, particularly in relation to the interception of encrypted communications and cross-border data exchanges.
31. For present purposes, it is sufficient to note the core theme consistently expressed both within LEAP and more widely: that trial state courts (and the defence) are often presented, downstream, with the product of earlier secret cooperation via an EIO, at a significant disadvantage in terms of scrutinising how the material was obtained.

32. On the issue of an effective remedy, our 2021 report on [Unlawful evidence in Europe's courts: principles, practice and remedies](#) underlines the need to provide for 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.
33. Given the breadth of the topic, and forthcoming consultations, Fair Trials for the time being emphasises three general topics drawn to our attention within the LEAP network, which we will develop further when commenting on proposals released.

#### Marginal defence involvement in the EIO process

34. At the 'upstream' stage when an EIO is issued and executed, the role of the defence is marginal – leaving a significant onus upon the defence at trial later on (see below).
35. The defence is normally completely unaware of the issuance of an EIO by the issuing authorities. Proceedings are typically secret at this stage; consequently, it is difficult — if not impossible — to give meaningful effect to the right to challenge the measure.
36. Further, the defence also remains largely unaware of EIO proceedings at the stage of execution. Unless the requested measure requires the participation of the suspect (such as an interrogation or the collection of bodily samples), the defence is generally not informed either of the EIO itself or of its execution. This again makes it extremely difficult for defence lawyers to lodge challenges before the executing authorities.
37. Furthermore, Difficulties in challenging EIO proceedings also arise when the evidence is subsequently used at trial or in custody proceedings in the issuing State. When lawyers gain access to the case file, they typically see only the EIO request and the evidence obtained. On that basis, it is very difficult to challenge the legality of the evidence or, more broadly, the lawfulness of the EIO proceedings as such.
38. We recognise that temporary secrecy may be essential for successful law enforcement. Equally, we note that at Council of Europe level (specifically in Article 4(4)(b) of the [Third Additional Protocol](#) to the Convention on Mutual Legal Assistance) (2025) provision was recently made for notification to a person affected by execution of a mutual legal assistance measure requiring interception of telecommunications, after the interception has taken place. That suggests that there *can* be a balance between (a) investigative secrecy and (b) enabling an affected person to consider legal challenges at an earlier stage, which does not devolve the exercise of rights by the individual downstream to the trial process. We suggest that the Commission give further consideration to this.

#### The issue of dual defence

39. Given the transnational nature of cross-border proceedings, it is often necessary for the defence to assemble a team of lawyers operating in different countries. This can be extremely costly, and no specific provisions adequately address this situation, either in terms of procedural prerogatives or in terms of financial support. We note that Directive 2016/1919 offers little dual defence perspective save on a limited basis for EAWs.

#### Use of EIO evidence at trial: remedies and exclusion



40. The absence of common evidentiary rules at European Union level constitutes a significant problem, particularly in light of the increasing circulation of evidence across borders. In practice, cross-border evidence is almost never excluded from the file. Only very few judicial authorities have reached such a conclusion. In the majority of cases, evidence obtained abroad is admitted without substantial scrutiny.
41. In order to allow the use of cross border evidence, the courts sometimes refer to a presumption of reliability of evidence gathered in another Member State — an approach that is in conflict with fair trial guarantees, insofar as it presumes evidence to be reliable and fair, excluding a possibility to control it. In other instances, they invoke the principle of mutual trust or mutual recognition of evidence. Such reasoning is problematic. The principle of mutual recognition does not, in itself, regulate the admissibility of evidence, nor does it eliminate the need to verify compliance with fundamental rights.
42. The growing tendency to use evidence regardless of the manner in which it was obtained, and with limited control over its reliability, raises serious concerns for the rights of the defence and the broader guarantees of a fair trial.
43. Meanwhile, as was also noted above, it is difficult for lawyers to raise successful challenges on the legality of the evidence, given that they have very limited information on how the evidence was collected. It is also not infrequent that judge give a depth ear to the challenges or that they refuse to enquire into them. For instance, it happens that judges turn down challenges because the defence did not prove that there was any hint of illegality, without any willingness to collect evidence, or ask for further information, in order to shed light on the request raised by the defence.
44. There is a perception of confusion across the EU as to the standard that judges should employ when controlling the legality of the evidence – e.g. those of the issuing State, those of the executing State, or some general transversal standards of legality/fairness. It will be well known to the Commission that there are divergent national court decisions. It would, therefore, appear appropriate to consider the case for a common minimum remedial rule, at least with regard to EIO-derived evidence. In this regard, we note the pending case of Silgir (No 2) before the ECtHR, and insist that any EU standards must be such as to ensure compliance with the (still) emerging case-law of the ECtHR, rather than to enshrine an approach overly reliant on mutual trust which might later fail that test.

**3 February 2026**