CONSTITUTIONAL COURT
OF THE ITALIAN REPUBLIC

WRITTEN OPINION
pursuant to Article 6(1) of the Supplementary Rules of Procedure of the Constitutional Court

FAIR TRIALS EUROPE

Background

1. Fair Trials Europe **[“Fair Trials”]** is a non-governmental organisation with seat in Brussels, focused on improving the right to a fair trial in accordance with European and international standards. Its work combines: (a) helping suspects and defendants understand and exercise their rights; (b) building an engaged and informed network of fair trial defenders (including non-governmental organisations, legal practitioners and academic experts); and (c) fighting the underlying causes of unfair trials through ongoing research, strategic litigation, political advocacy and campaigns. Fair Trials has a long history of pressing for improved protection of fundamental rights of suspects and defendants in criminal proceedings, and it has offered its opinion on procedural rights issues in cases before the European Court of Human Rights [**“ECtHR”**], notably *Pietrzak and Bychawska-Siniarska and Others v. Poland* (App. nos. 72038/17 and 25237/18), *Beuze v. Belgium* (App. no. 71409/10), *Ibrahim and Others v. United Kingdom* (App. no. 50541/08 and others), *AT v. Luxembourg* (App. no. 30460/13), and *Čierny v. Slovakia* (App. no. 29384/12). Two recent interventions in cases concerning the use of cryptophone evidence (EncroChat, ANOM) are pending before the Court.[1] Fair Trials also provides expert opinions in domestic cases, including a previous submission to the Italian Constitutional Court (Judgment no. 16/25).

2. With regard to the specific legal principles at issue in this case, Fair Trials has considerable research and advocacy experience. It also publishes guidelines for criminal practitioners on the interpretation and application of relevant Directives, notably the right to information (2012/13/EU), the right of access to a lawyer (2013/48/EU), and the right to interpretation and translation (2010/64/EU) as part of its Toolkits on EU procedural rights series.

[1] *Silgir v. Germany* (App. no. 22234/25) and *Raal and Reudolph v. Estonia* (App. nos. 14711/25 and 14712/25) (joint filing with the European Criminal Bar Association).

3. Fair Trials intervenes as Amicus Curiae pursuant to Article 6(1) of the Supplementary Rules of Procedure of the Constitutional Court of the Italian Republic, as adopted under Article 14(1) and Article 22(2) of Law no. 87 of March 1953. Article 6(1) sets out the legal basis for non-profit organisations with collective or diffuse interests that are relevant to the case under constitutional review to submit a written opinion. This is entirely consistent with the work undertaken by Fair Trials as outlined above.

4. The case concerns the provisions of Article 268(6) of the Code of Criminal Procedure and Article 89-bis of the implementing provisions of the Code (Legislative Decree no. 271 of 28 July 1989), which govern access to the digital archive of prosecution evidence and state that defence counsel—but not the defendant him or herself—may listen to audio recordings of intercepted communications. The proceedings for constitutional review were brought by the Court of Trento by order of 14 May 2026, entered under no. 119 of the 2026 register of referral orders and published in the Official Gazette, 1st Special Series, no. 34 of 26 August 2026, drawing particular attention to the fact that the audio recordings in this case included conversations in Arabic and Bengali, thus requiring the assistance of an interpreter. As far as Fair Trials is concerned, this arrangement imposes significant restrictions on the exercise of procedural defence rights and warrants evaluation under EU law.

Submissions

5. Fair Trials' submissions are focussed on the obligation of the Italian Republic to ensure the effective exercise of procedural defence rights under EU law.

6. It is submitted that, in principle, this obligation requires granting the defendant unmediated access to the audio recordings of intercepted communications, especially if these recordings include communications in a foreign language.

7. It is further submitted that exceptional restrictions to access to the recordings must be based on (i) a decision by a judicial authority, or by another competent authority on condition that the decision can be submitted to judicial review, and (ii) a balancing of rights and interests, taking into account the stage of the proceedings, instead of a blanket legislative ban.

8. The submissions are structured as follows:

   A. Procedural rights under Directives 2012/13/EU (right to information), 2013/48/EU (right of access to a lawyer) and 2010/64/EU (right to interpretation and translation) **["the Directives"]** and the fundamental right to a fair trial.

   B. Compatibility of Article 268(6) of the Code of Criminal Procedure and Article 89-bis of the implementing provisions of the Code with the procedural rights under the Directives and the fundamental right to a fair trial.

A. **Procedural rights under Directives 2012/13/EU (right to information), 2013/48/EU (right of access to a lawyer) and 2010/64/EU (right to interpretation and translation), and the fundamental right to a fair trial.**

9. Fundamental rights form an integral part of the general principles of EU law. Under Article 6(1) TEU, the Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union **["the Charter"]**, 'which shall have the same legal value as the Treaties.' Article 6(2) TEU states that the Union shall respect fundamental rights, as guaranteed by the European Convention on Human Rights **["ECHR"]**.

10. The **right to a fair trial** is enshrined in Article 47 of the Charter. Article 48(2) of the Charter further specifies that '[r]espect for the rights of the defence of anyone who has been charged shall be guaranteed.' The relevant provisions in Article 6(1) and (3) of the ECHR are more explicit, stating that, at a minimum, anyone charged shall have the rights 'to have adequate time and facilities for the preparation of his defence; to defend himself in person or through legal assistance...; [and] to have the free assistance of an interpreter if he cannot understand or speak the language used in court.' According to Article 52(3) of the Charter, the meaning and scope of the Charter rights shall be the same as those laid down in the ECHR. However, nothing prevents the Union from moving beyond those minimum protections.

11. To date, the Union has adopted six procedural rights Directives, each designed to concretise and secure the application of a different aspect of the right to a fair trial. Of these, Directives 2012/13/EU on the right to information, 2013/48/EU on the right of access to a lawyer, and 2010/64/EU on the right to interpretation and translation are relevant in this case.

12. Directive 2012/13/EU on the **right to information** was transposed into Italian law by Legislative Decree no. 101 of 1 July 2014. As reflected in Recitals 14 and 42, the Directive builds on the Charter and the ECHR. Accordingly, all 'provisions... that correspond to rights guaranteed by the ECHR should be interpreted and implemented consistently with those rights, as interpreted in the case-law of the European Court of Human Rights.'[2] In this case, the relevant provision is Article 7 (right of access to the materials of the case).

13. Article 7(1) and (2) of the Directive distinguish between suspects and defendants who have been arrested or detained and those who have not. Where an arrest has taken place, Member States need to ensure that 'documents... which are essential to challenging effectively... the lawfulness of the arrest or detention' are made available to the arrested person or his or her lawyer (Article 7(1)). Across all cases, suspects and defendants or their lawyers have a right to access the 'material evidence' to safeguard the fairness of the proceedings and to prepare the defence (Article 7(2)). As made clear by Recitals 30 and 31, respectively, both the term 'documents' and the term 'material evidence' are interpreted broadly to extend to audio and video recordings as well as photographs; and indeed, 'material evidence' under Article 7(2) includes all inculpatory and exculpatory evidence 'contained in a case file or otherwise held

[2] Recital 42 of Directive 2012/13/EU.

by competent authorities in any appropriate way in accordance with national law.'[3] That is, both physical and digital evidence are included and to be treated alike.

14. As for the timing of access, 'essential documents' must be made available 'in due time to allow the effective exercise of the right to challenge the lawfulness of the arrest or detention.'[4] Similarly, access to 'material evidence' needs to be 'granted in due time to allow the effective exercise of the rights of the defence.'[5] This is in line with ECtHR case-law, which emphasises that equality of arms requires that access be granted at the earliest opportunity, especially if the evidence is complex and voluminous.[6]

15. Article 7(1) of the Directive is subject to no derogation. That is, access to documents which are essential to challenge arrest and detention must always be granted, if need be with special arrangements made for specific parts containing confidential information.[7]

16. Under Article 7(4) of the Directive, 'access to certain materials [in the sense of section (2)] 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 qualifiers used to describe relevant threats and interests, etc. ('serious', 'important') make clear that any restrictions are highly exceptional and, therefore, 'should be interpreted strictly.'[8] To ensure this is the case in practice, Article 7(4) mandates that a decision to refuse access needs to be taken by a judicial authority, weighing the rights and interests concerned as well as taking into account the stage of the proceedings;[9] or, failing that, subject to judicial review. In any case, Article 7(4) states that restrictions of access are permitted only 'provided that this does not prejudice the right to a fair trial.' However, this will generally be the case. As the ECtHR has found, 'unrestricted access to the case file and unrestricted use of any notes, including, if necessary, the possibility of obtaining copies of relevant documents, are important guarantees of a fair trial. The failure to afford such access has weighed, in the Court's assessment, in favour of the finding that the principle of equality of arms had been breached.'[10] Access to materials under Article 7(2), therefore, may rarely be restricted and, if so, only by a decision referencing exceptional circumstances.

17. Directive 2013/48/EU on the **right of access to a lawyer** and Directive 2010/64/EU on the **right to interpretation and translation** are relevant here only insofar as they meaningfully intersect with Article 7 of Directive 2012/13/EU. They were transposed into Italian law by Legislative Decree no. 184 of 15 September 2016 and Legislative Decree no. 32 of 4 March

[3] Recital 31 of Directive 2012/13/EU.
[4] Recital 30 of Directive 2012/13/EU.
[5] Article 7(3) of Directive 2012/13/EU.
[6] See, e.g., *Nevzlin v. Russia* (App. no. 26679/08), *Öcalan v. Turkey* (App. no. 46221/99).
[7] See *Dochnal v. Poland* (App. no. 31622/07) paras. 87-88.
[8] Recital 32 of Directive 2012/13/EU.
[9] Recital 32 of Directive 2012/13/EU.
[10] *Beraru v. Romania* (App. no. 40107/04) para. 70.

2014, respectively; Directive 2010/64/EU on the right to interpretation and translation was reinforced by Legislative Decree no. 129 of 23 June 2016. Like Directive 2012/13/EU, both instruments lay down a set of common procedural standards with the aim of strengthening the application of the Charter and the ECHR, as interpreted by the ECtHR.[11]

18. Article 3(1) of Directive 2013/48/EU contains the right of access to a lawyer. Article 3(3) provides a list of what this right shall entail; yet, as reflected in Recital 12 of the Directive, that list is not exhaustive. The ECtHR has made clear that the right of access to a lawyer is tied to what a lawyer is *for*: to protect the fundamental right to a fair trial, 'an accused person is entitled... to be assisted by a lawyer, and not only while being questioned... Indeed, the fairness of proceedings requires that an accused be able to obtain the whole range of services specifically associated with legal assistance...: discussion of the case, organisation of the defence, collection of evidence favourable to the accused, preparation for questioning, support of an accused in distress and checking of the conditions of detention.'[12]

19. According to Article 3(6) of the Directive, temporary derogations from the requirement of effective access to a lawyer under Article 3(3) are permissible only in exceptional circumstances and for a compelling reason and only at the pre-trial stage. Furthermore, Article 8(2) specifies that any such derogation 'may be authorised only by a duly reasoned decision taken on a case-by-case basis, either by a judicial authority, or by another competent authority on condition that the decision can be submitted to judicial review.' At the trial stage, the right of access to a lawyer is absolute (unless waived).

20. Article 3(1) of Directive 2010/64/EU on the right to interpretation and translation provides suspects and defendants with the right to a 'written translation of all documents which are essential to ensure that they are able to exercise their right of defence and to safeguard the fairness of the proceedings.' According to Article 3(2), '[e]ssential documents shall include any decision depriving a person of his liberty, any charge or indictment, and any judgment.' However, as reflected in Recital 30 of the Directive, this is not an exhaustive list; it merely contains the types of documents which 'should always be considered essential.' Article 3(3) specifies that, 'in a given case', other documents may also be essential, and that the defence 'may submit a reasoned request to that effect.' It is, therefore, not possible to know *a priori* and in all cases which documents must in fact be translated. Yet, the ECtHR in its case-law on Article 6(3)(e) of the ECHR has emphasised that a suspect or a defendant has the right to 'all those documents or statements in the proceedings instituted against him which it is necessary... to have rendered into the court's language in order to have the benefit of a fair trial.'[13] At a minimum, this includes inculpatory evidence which supports the documents listed in Article 3(2) of the Directive. However, it is submitted that equality of arms and an effective exercise of the right of defence in accordance with Article 3(1) requires that key exculpatory evidence be considered 'essential', as well.

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[11] Recital 12 and 53 of Directive 2013/48/EU; Recitals 14 and 33 of Directive 2010/64/EU.
[12] *Dayanan v. Turkey* (App. no 7377/03) para. 32.
[13] *Hermi v. Italy* (App. no. 18114/02) para. 69.

21. According to Article 3(7) of the Directive, the oral translation or oral summary of essential documents is the exception and permissible only 'on condition that such oral translation or oral summary does not prejudice the fairness of the proceedings.'

B. Compatibility of Article 268(6) of the Code of Criminal Procedure and Article 89-bis of the implementing provisions of the Code with the procedural rights under the Directives and the fundamental right to a fair trial.

22. In light of the standards and requirements set out in paras. 9-21, it is clear that the absolute exclusion of the defendant from the digital archive raises concerns on several grounds. It is Fair Trials' understanding that at the trial stage the defence must review the evidence held in the digital archive and identify which intercepted communications are to be transcribed and included in the evidentiary file. According to the provisions under review, this is designed as a two-step process: defence counsel may enter the archive and listen to the audio recordings—the ones pre-selected by the prosecution and any additional ones upon request; he may then obtain copies of recordings deemed relevant but can confer with the defendant only at a later stage. Where intercepted communications are in a foreign language, an interpreter is present to assist counsel.

23. It is submitted that this arrangement is incompatible with the Directives, notably the right of access to the materials of the case under Article 7(1) and (2) of Directive 2012/13/EU, the right of access to a lawyer under Article 3(1) of Directive 2013/48/EU, and the right to translation of essential documents under Article 3(1) and (7) of Directive 2010/64/EU.

24. Firstly, while the wording of Article 7(1) and (2) of Directive 2012/13/EU states that access to the materials shall be granted to suspects and defendants 'or their lawyers', it is submitted that barring the defendant from accessing the digital archive or—at least—from accessing it *with* counsel renders the right ineffective. Particularly where there is an extensive number of intercepted communications, defence counsel would have to be intimately familiar with every aspect of the defendant's life and relationships to be in a position to evaluate the relevance of the recordings. Moreover, certain phrases, specific dates and names may only make sense once contextualised by the defendant him or herself. It is submitted, therefore, that the defence's capacity to review and request evidence necessary to challenge the lawfulness of detention, to safeguard the fairness of the proceedings, and to prepare an adequate defence is greatly compromised. The introduction of a further intermediary only deepens these concerns. The interpreter assisting counsel in listening to communications in a foreign language provides literal translations of what is being said. Subtle conversational nuances, coded words, etc., will thus be easily lost on counsel and deemed irrelevant.

25. Secondly, the two-step process requiring counsel to listen to the recordings and then convey the content to the defendant, possibly with the help of copies, is both time-consuming and inefficient—because, again, particularly where there is an extensive number of intercepted communications, defence counsel will need to go back and forth multiple times, essentially having to take a 'blind stab' at the evidence, conferring with the defendant, then going back

to review and retrieve additional recordings. All the while, the prosecution have had ample opportunity and staff to review the evidence in full. It is submitted, therefore, that barring the defendant from accessing the digital archive with counsel runs risk of preventing timely access to the materials of the case, as mandated by Article 7 of the Directive and the case-law of the ECtHR (see above para. 14). It further undermines the core principle of equality of arms by placing the defence at a substantial disadvantage vis-à-vis the authorities.

26. Thirdly, contrary to Article 7(4) of the Directive, access to the audio recordings is restricted not just exceptionally based on a balancing of rights and interests in the individual case but by a legislative ban which extends to 'essential documents' in the sense of Article 7(1).

27. Fourthly, isolating defence counsel from the defendant during the review of key evidence not just weakens the collaborative effort of an effective defence but, as outlined above, puts the lawyer as a barrier between the evidence and their own client. It is submitted, therefore, that contrary to the right of access to a lawyer under Article 3(1) of Directive 2013/48/EU, the provisions under review keep the defendant from availing him or herself of the 'whole range of services specifically associated with legal assistance' (see above para. 18).

28. Finally, seeing as the transcription and inclusion of relevant recordings in the evidentiary record depends on the selection made by defence counsel after listening, it is submitted that this arrangement creates unfair obstacles for the inclusion of foreign-language evidence. If parts of the evidence need to be translated into the court's language, and if the defendant is barred from assisting counsel in assessing which communications are essential, then there is a real risk that, contrary to Article 3(1) of Directive 2010/64/EU, key pieces of evidence and especially exculpatory ones are not translated and included. The finality of this error is worth emphasising. If counsel fails to select a particular recording, the defendant never gets to hear it and see its translation added to the record—which means, contrary to Article 3(7), the defendant is expected to rely blindly on oral summaries conveyed by counsel.

29. **It is incumbent on EU Member States to assume responsibility for ensuring fair trials in compliance with the Charter, specifically Articles 47 and 48 and the corresponding provisions of the ECHR, as interpreted by ECtHR, and to give effect to EU secondary legislation on procedural rights under Directives 2012/13/EU (right to information), 2013/48/EU (right of access to a lawyer) and 2010/64/EU (right to interpretation and translation). In this case, that means adopting a legal principle in favour of granting the defendant unmediated access to intercepted communications, especially where the recordings include communications in a foreign language.**

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