

FUTURE PRIORITIES FOR EU CRIMINAL JUSTICE



About JUSTICIA

The JUSTICIA European Rights Network is the EU-wide network of civil society organisations on criminal justice and human rights, comprising 20 members from 19 Member States. It is a part of the Legal Experts Advisory Panel (LEAP), coordinated by Fair Trials. This paper sets out JUSTICIA's views on the priorities for the EU in the period 2020–2025 and draws on many years' combined expertise of working to advance respect for human rights in criminal justice systems.

Members of the JUSTICIA Network are: Associazione Antigone Onlus (Italy); Association for the Defence of Human Rights in Romania – the Helsinki Committee (Romania); Bulgarian Helsinki Committee (Bulgaria); Civil Rights Defenders (Sweden); Croatian Law Centre (Croatia); Fair Trials (Europe) - coordinator; Greek Helsinki Monitor (Greece); Helsinki Foundation for Human Rights (Poland); Human Rights Centre (Estonia); Human Rights Monitoring Institute (Lithuania); Hungarian Helsinki Committee (Hungary); Irish Council for Civil Liberties (Ireland); KISA-Action for Equality, Support, Antiracism (Cyprus); Centre for Human Rights (Latvia); League of Human Rights (Czech Republic); Ludwig Boltzmann Gesellschaft – Institute of Human Rights (Austria); Open Society Institute Budapest Foundation, through its operative program the Open Society Justice Initiative; Rights International Spain (Spain); Statewatch (United Kingdom); and The Peace Institute (Slovenia).



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Justice in Europe

The current situation

The shared values that underpin the EU face unprecedented threat from populist, nationalist and anti-minority movements. The rule of law is in crisis in some Member States, most notably Poland and Hungary.¹ Governments are strangling independent civil society and free speech to prevent independent critique of and opposition to policies that violate human rights and the rule of law.² The austerity agenda has starved investment in fair and effective criminal justice.³

The new European Commission and European Parliament must respond. Continued terrorist atrocities across the EU have shown how citizens' security depends on Member States' ability to cooperate to fight serious cross-border crime. The EU's work to build an area of security, freedom and justice in Europe has never been more important. This must be underpinned by a clear commitment to the rule of law, human rights and justice in Europe.

We commend the considerable progress the EU has made to strengthen respect for human rights in criminal justice since the Lisbon Treaty made this a mainstream area of EU competence.⁴ The EU has belatedly started to redress the imbalance created by its historical approach of increasing law enforcement powers (based on the principle of mutual recognition) while disregarding defence rights.⁵ Although much work is needed to ensure their effective implementation, the six procedural rights Directives⁶ and associated Guidelines offer real promise of an EU area of security, freedom and justice.⁷

Example: The Information Directive

- a. New legal requirements have been created to give people accessible information on their rights when they are arrested.
- b. Domestic practices, which have long hidden information from the defence which is crucial to a fair trial, are being challenged.

2020–2025 KEY PRIORITIES⁸

We recognise the many challenges faced by the EU, but the EU institutions should not be distracted from its work to advance fair and effective criminal justice in Europe. The EU should capitalise on the opportunities created by the existing Directives and take further legislative and non-legislative steps to address long-standing and emerging threats. We highlight four key priorities:

1. Effective implementation

Adoption of legislation is only the first step towards improved fair trial protections. EU-wide laws will only have an impact in practice if they are implemented effectively. JUSTICIA members have consistently highlighted the importance of this.⁹ In recent years, JUSTICIA members have contributed to effective implementation of the Directives, including by monitoring the status of implementation in EU Member States;¹⁰ developing and delivering training;¹¹ undertaking advocacy at a regional and national level;¹² strategic litigation;¹³ and by means of technical assistance to support implementation efforts.¹⁴

Over the next five years we believe the priorities for implementation to be:

- **Technical support:** Effective implementation of the Directives is not always easy for Member States and requires far more than legal transposition. Take, for example, the right to early access to a lawyer. This requires states to create systems for the swift appointment of an independent and effective lawyer who will attend police stations at unsociable times of day and night.¹⁵ Although some progress has been made in this area, many Member States are still failing to realise this.¹⁶ The Commission (directly and through civil society) should assist States in addressing such practical challenges.

- **Enforcement** of the rights protected by the Directives is crucial to effective implementation. Enforcement action initiated by the Commission incentivizes Member States to comply with EU law but the Commission has in general failed to challenge implementation failures. This must be addressed as a matter of urgency. Furthermore, for the Directives to have practical effect Member States' courts must provide effective remedies when rights protected by EU law are violated. The lack of clarity in the Directives on the meaning of "effective remedies" means the Directives lack the teeth needed to ensure rights are protected in day-to-day criminal cases.
- **Interpretation of the Directives:** Inevitably, the text of the Directives leaves considerable uncertainty. Although the Court of Justice of the European Union ("CJEU") has started to provide clarity through preliminary rulings on certain aspects of the Directives,¹⁷ further clarity is needed. The Commission can support this through its interventions in cases before the CJEU, by ensuring domestic courts' rights or obligations to refer questions to the CJEU are respected,¹⁸ and by supporting training on EU law and other initiatives to encourage references.¹⁹
- **Follow-up activities:** Additional in-depth evaluations on specific aspects of previously completed EU projects are very useful, especially in the light of institutional and systematic hurdles that different stakeholders face in their everyday work. Further, it would be important to assess how good practices and recommendations of former EU projects could be best implemented also in the framework of follow-up activities.

2. New legislation

The Roadmap presents important first steps towards common minimum defence rights in Europe, but it is not “job done”. A number of other key aspects of a fair and effective justice system are being violated in EU Member States which could be usefully addressed by minimum EU standards.²⁰ Notwithstanding this, we recognise the practical limits to the speed with which the EU can create new legislation. Crucially, pursuit of new legislation must not distract from the unfinished business of implementing the existing Directives. We believe the following two areas are priorities for legislative action over the next five years:

- **Reform of the European Arrest Warrant (“EAW”):** Mutual recognition is in crisis in the EU with grave implications for the effectiveness of judicial cooperation. Misuse of the EAW is violating the human rights of EU citizens.²¹ In addition to effective implementation of the Directives (to build a sound basis for mutual trust), in line with the European Parliament’s recommendations,²² the EAW Framework Decision should be amended to create clear grounds to refuse surrender on human rights grounds (notwithstanding CJEU caselaw in this area²³), proportionality checks, post-surrender monitoring and a requirement to use less severe alternatives where available.²⁴
- **Pre-trial detention:** Extensive research by numerous expert organisations has demonstrated that the excessive use of pre-trial detention is a pervasive problem in many Member States, contributing to prison overcrowding and inhumane conditions.²⁵ In 2011, 20 EU Member States responded to a European Commission survey on whether to legislate on pre-trial detention and a majority of respondents favoured some form of common standards.²⁶ Despite Commissioner Jourova indicating that reform in this area was a priority,²⁷ and consistent calls for EU standards by the Parliament,²⁸ legislation was dropped from the Commission’s programme. Legislation tackling failures in pre-trial detention decision-making should be introduced urgently.²⁹

3. Address emerging issues and long-standing challenges

In addition to these urgent priorities for legislative intervention, the Commission should use the next five years to address long-standing and emerging challenges to justice in Europe, assessing the potential for EU intervention (including legislative):

- **Evidence/admissibility:** Evidence has always been at the heart of criminal justice, forming the building blocks of the criminal case. The EU has also increasingly engaged in facilitating the cross-border exchange of evidence between Member States.³⁰ However, challenges remain to address questions regarding the admissibility of evidence which is relied on by the prosecution, whether obtained from another Member State or in violation of the EU's procedural rights standards. Proposals for new mechanisms for cross-border e-evidence exchange also raise grave concerns for human rights.³¹ Effective rights-based standards on the admissibility of evidence is crucial to effective cross-border evidence sharing and to the enforcement of the Directives.
- **Trial waivers:** Countries across the globe, including EU Member States,³² are seeking to make criminal justice more efficient by creating new incentives for defendants to waive their human right to a trial by pleading guilty (including through "plea bargaining").³³ Without safeguards to ensure fairness, transparency in the justice system and to prevent coercive "incentives", this can create considerable challenges for human rights and the rule of law. If properly implemented and enforced, the pre-trial procedural rights protected by the Directives could mitigate many of these risks. The EU is well-placed to be a world-leader on a rights-based approach to trial waivers.

- **Big data and algorithms:** Some EU Member States are piloting projects in their criminal justice systems which gather and process large quantities of data through the use of algorithms.³⁴ Existing experience of this in the United States demonstrates the threats and opportunities it poses, including by “baking in” bias in criminal justice.³⁵ The EU is again well-placed (given its focus on fighting discrimination and protecting privacy) to get ahead of the curve and develop a rights-compliant regulatory framework for algorithmic criminal justice in Europe.
- **Discrimination:** Criminal justice is not equal with discrimination operating directly and indirectly. Some groups require special protections for their right to a fair trial to be respected on equal terms with others. The EU has recognised this in the context of children but committed to protections for a broader group of vulnerable suspects.³⁶ This agenda should continue with one priority being people with mental health conditions and learning disabilities.³⁷ In terms of direct discrimination, while in principle there is a commitment to equal justice within EU Member States; in practice, certain racial and religious groups are disproportionately affected. The EU should work to increase recognition and understanding of this reality and should support practical initiatives to address it.³⁸
- **Audio-visual recording** could play a key role in preventing coercion during police interviews, mistreatment in places of detention and in assessing whether other pre-trial procedural rights are being respected in practice. This is recognised in the context of the Children’s Directive,³⁹ but the reducing cost of audio-visual recording equipment (and the increasing number of global best practice examples) means it could be applied much more broadly. The Commission should encourage and support the roll-out of audio-visual recording across the EU.⁴⁰

4. Increasing the Commission's capacity

Three broader, institutional challenges must be urgently addressed to achieve justice in Europe:

- **Data:** The collection of consistent and reliable data on the operation of criminal justice systems in the EU would significantly assist in implementation efforts (as well as identifying priorities for future legislative and non-legislative action).⁴¹ Shockingly little data is currently being collected in this area. One mechanism would be for the Commission to expand the EU Justice Scoreboard to criminal justice. It currently only focuses on civil, commercial and administrative cases.⁴²
- **Resources:** The Commission needs greater resources to monitor Member States' work on implementation of the Directives, take enforcement action where states are non-compliant and to advance new initiatives. We understand that, at present, there are fewer than 10 staff members in the Procedural Criminal Law Unit in the DG for Justice and Consumers. This compares to over 800 staff members in team charged with enforcing EU competition law.⁴³ The scale of this disparity demonstrates a shocking disinterest in the EU acquis on criminal justice.
- **Civil society** should be more actively engaged by the Commission in its work in the field of criminal justice. There are numerous examples of other parts of the Commission doing this much more effectively. For example, the EU's recent work to counter illegal hate speech online has actively engaged civil society organisations alongside Member States and service providers.⁴⁴ The EU should also continue to provide financial support to civil society to support its work and, including through its own actions, encourage Member States to recognise the important role that civil society plays. This is increasingly pressing given the shrinking space for civil society in some Member States, including restrictions on receiving financial support from philanthropic bodies.⁴⁵

NOTES

- 1 Cf [Infringement proceedings against Poland](#)
- 2 Cf [Hungary's Act VI of 2018](#) on amending certain laws relating to measures to combat illegal immigration
- 3 Cf [Protests in the Netherlands on cuts to legal aid in February 2018](#)
- 4 European Commission, [Fact Sheet on the European Union: Judicial Cooperation in Criminal Matters](#)
- 5 Cf [NGO "Joint Position on Procedural Safeguards", July 2009](#)
- 6 Directive 2010/64/EU on the right to interpretation and translation; Directive 2012/13/EU on information in criminal proceedings; Directive 2013/48/EU on the right of access to a lawyer; Directive (EU) 2016/343 on the strengthening of certain aspects of the presumption of innocence; Directive (EU) 2016/800 on procedural safeguards for children; and Directive (EU) 2016/1919 on legal aid.
- 7 Cf Hungarian Helsinki Committee, [Accessible Letters of Rights in Europe – Comparative study](#), 2017 and a recently launched project to assist in developing accessible letters of rights (coordinated by Hungarian Helsinki Committee) – “Demystifying Justice”
- 8 Cf [previous joint statement on EU priorities](#), 2013
- 9 Cf LEAP Network, [Towards an EU Defence Rights Movement](#), 2015; and LEAP Network, [Defence Rights: The Road Ahead](#), 2016
- 10 Cf Blackstock et al., [Inside Police Custody](#), 2013; and JUSTICIA's [Inside Police Custody 2](#), 2018; Fair Trials' [Stockholm's Sunset: New horizons for justice in Europe](#), 2014; Fair Trials' [Defence Rights: The Road Ahead](#), 2016; and the project ["The Importance of Appearances"](#) (coordinated by Hungarian Helsinki Committee)
- 11 Cf Fair Trials' [online training on the Directives](#); [Online and in person training on advancing the defence rights of children](#) (coordinated by Fair Trials); JUSTICIA's [materials on the Directives](#); and [SUPRALAT](#) (coordinated by Hungarian Helsinki Committee)
- 12 Cf [LEAP toolkits on implementation of the Directives](#)
- 13 Cf ECtHR interventions by Fair Trials (drawing on JUSTICIA member expertise) such as in [AT v Luxembourg](#) (ECtHR 30460/13) and [Beuze v Belgium](#) (ECtHR 7149/10); [engagement in CJEU preliminary references](#); and Helsinki Foundation for Human Rights, [To Luxembourg instead of Strasbourg](#), 2018
- 14 Cf [projects on accessible letters of rights](#) (coordinated by the Hungarian Helsinki Committee)
- 15 Cf Fair Trials and LEAP, [Toolkit: Access to a Lawyer](#)
- 16 [Inside Police Custody 2](#), 2018
- 17 [Mapping CJEU Case Law on EU Criminal Justice Measures](#), 2019
- 18 In Hungary, in December 2018, Judge Ewa Maciejewska (District Court in Łódź) was summoned to confess to the disciplinary commissioner (appointed by the Minister of Justice/Prosecutor General) that she requested the Court of Justice for preliminary ruling regarding disciplinary proceedings
- 19 Cf Helsinki Foundation for Human Rights, [To Luxembourg instead of Strasbourg](#), 2018
- 20 Cf ECBA's [Agenda 2020: A new Roadmap on minimum standards of certain procedural safeguards](#)
- 21 See, for example, the [short film as part of the Beyond Surrender project](#) (coordinated by Fair Trials)
- 22 European Parliament, Resolution of 27 February 2014 with recommendations to the Commission on the review of the European Arrest Warrant, 2013/2109 (INL)
- 23 Cf [Joined Cases C-404/15 PPU and C-659/15 PPU](#) (Aranyosi and Căldăraru), [Case C-216/18 PPU](#) (Minister for Justice and Equality v LM)
- 24 Cf [Beyond Surrender](#), 2018 (coordinated by Fair Trials); Fair Trials' [Stockholm's Sunset: New horizons for justice in Europe](#), 2014
- 25 Cf [A Measure of Last Resort?: The Practice of Pre-Trial Detention Decision-Making](#), 2016 (coordinated by Fair Trials) and European Parliament Research Service, [The Cost of Non-Europe in the area of Procedural Rights and Detention Conditions](#), 2017
- 26 COM (2011) 327 final of 14 June 2011

- 27 “My priority here is to improve the procedural safeguards related to pre-trial detention. The lack of minimum procedural safeguards for pre-trial detention can hinder judicial cooperation.” Vera Jourová – European Commissioner of Justice, Consumers and Gender Equality, 25 April 2016 speech on EU Criminal Law
- 28 Cf European Parliament Research Service, [The Cost of Non-Europe in the area of Procedural Rights and Detention Conditions](#), 2017; European Parliament resolution of 15 December 2011 on detention conditions in the EU, [P7_TA\(2011\)0585](#), paragraph 10; European Parliament resolution of 27 February 2014 (2013/2109(INL)), [P7_TA\(2014\)0174](#), paragraph 17; European Parliament resolution of 13 December 2016, [P8_TA-PROV\(2016\)0485](#), paragraph 43
- 29 JUSTICIA members continue to be engaged in multi-country projects in this area including the [“Effective Assistance in Pre-Trial Detention”](#) project (coordinated by Fair Trials); and [“Victims of Violent Crime in Detention”](#) project (coordinated by Fair Trials)
- 30 Cf Proposal for a Regulation of the European Parliament and of the Council on European production and preservation orders for electronic evidence in criminal matters, 17 October 2018, [12113/1/18/REV 1](#) and [Directive 2014/41/EU](#) of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters
- 31 Cf Fair Trials, [Policy Brief: The impact on the procedural rights of defendants of cross-border access to electronic data through judicial cooperation in criminal matters](#), 2018
- 32 For example: Italy has been employing both abbreviated trials and plea bargaining for decades; Hungary enacted legislation authorising guilty pleas in July 2018; and Slovenia has used trial waivers for 6 years.
- 33 Fair Trials, [The Disappearing Trial: towards a rights-based approach to trial waiver systems](#), 2017
- 34 Cf [Trial of algorithmic risk assessments for detention decision in Durham, UK](#) and [Danish use of AI in predictive policing](#)
- 35 Cf [studies in the USA on algorithmic risk assessment](#)
- 36 Resolution of the Council, 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings [2009/C 295/01](#), Measure E
- 37 Cf Ludwig Boltzmann Institute, [Dignity at Trial](#), 2018; and the [“Advancing the Defence Right of Children”](#) project (coordinated by Fair Trials)
- 38 Cf JUSTICIA, [Disparities in Criminal Justice Systems for Individuals of Different Ethnic, Racial, and National Background in the European Union](#), 2018
- 39 Article 9
- 40 Cf [“Audio-Visual Recording of Interrogations”](#) project (coordinated by Hungarian Helsinki Committee)
- 41 Cf Open Society Justice Initiatives, [Strengthening Pre-Trial Justice: a Guide to the Effective Use of Indicators](#), 2015
- 42 Cf https://ec.europa.eu/info/policies/justice-and-fundamental-rights/effective-justice/eu-justice-scoreboard_en
- 43 <http://ec.europa.eu/competition/publications/kd0216250enn.pdf>
- 44 Cf https://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=54300
- 45 Cf [Hungary’s Law on the Transparency of Organisations Receiving Foreign Funds](#), 13 June 2017

