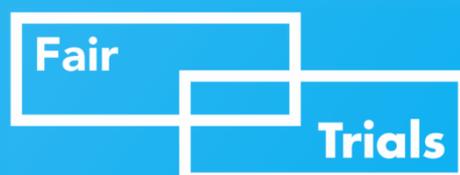


JUSTICE UNDER LOCKDOWN IN EUROPE

A survey on the impact of COVID-19
on defence rights in Europe



About Fair Trials

Fair Trials is a global criminal justice watchdog with offices in London, Brussels and Washington, D.C., focused on improving the right to a fair trial in accordance with international standards.

Fair Trials' work is premised on the belief that fair trials are one of the cornerstones of a just society: they prevent lives from being ruined by miscarriages of justice and make societies safer by contributing to fair and effective justice systems that maintain public trust. Although universally recognised in principle, in practice the basic human right to a fair trial is being routinely abused.

Its work combines: (a) helping suspects to understand and exercise their rights; (b) building an engaged and informed network of fair trial defenders (including NGOs, lawyers and academics); and (c) fighting the underlying causes of unfair trials through research, litigation, political advocacy and campaigns.

In Europe, we coordinate the Legal Experts Advisory Panel – the leading criminal justice network in Europe consisting of over 180 criminal defence law firms, academic institutions and civil society organisations. More information about this network and its work on the right to a fair trial in Europe can be found at: <https://www.fairtrials.org/legal-experts-advisory-panel>

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BACKGROUND AND METHODOLOGY

The COVID-19 pandemic, and responses to it, have had an unprecedented impact on criminal justice across Europe. Access to police stations and courts has been severely restricted, and many court hearings were postponed or moved online. These measures had (and in many cases, continue to have) serious implications for the ability of persons arrested, prosecuted, or detained to exercise their fair trial rights.

Countries have slowly re-opened courts and returned to past practices. However, in some cases, emergency measures are being extended into long-term legal or practice changes. It is therefore crucial to understand the impact of COVID-19 changes on defence rights, in particular the increasing use of technology as a substitute to physical presence, before engaging into long-term changes.

With the help of LEAP members and partners from the JUSTICIA network, Fair Trials conducted a survey of criminal justice actors, mainly defence lawyers, but also judges, prosecutors and law enforcement agents, in the following jurisdictions: Belgium, England and Wales, France, Italy (Antigone), Latvia, Netherlands, Romania (Association for the Defence of Human Rights in Romania – the Helsinki Committee, APADOR-CH) and Spain (Rights International Spain, RIS). Respondents were asked to share their opinions and experiences of how COVID-19 impacted their practice, and fair trial rights in their respective jurisdictions (see the basic questionnaire in the Annexe, which was adapted to reflect the law in the relevant surveyed countries). We received 294 responses in total,¹ the majority of which were from defence lawyers. The results of the survey conducted in England and Wales have been published in a separate report, [Justice under Lockdown](#), but are nonetheless analysed in this paper. A similar survey was also undertaken in Ireland by [Shalom Binchy & Co Solicitors](#), the results of which are also included in this report.²

The results of the survey show that COVID-19 measures have a broadly negative impact on the ability of people to exercise their defence rights and, in particular, on access to legal assistance at police stations and during remote hearings. Respondents noted that the ability of lawyers to consult with their client during detention was severely restricted. Restrictions on access to a lawyer added to the increased isolation of detained persons as a result of restrictions to visits from friends and family.

Lawyers also raised serious concerns about the confidentiality of lawyer-client conversations in places of detention. Most of the respondents also expressed the view that remote hearings limit the ability of their clients to effectively participate in court proceedings and to challenge evidence.

Practices related to the use of pre-trial detention varied from state to state. In certain locations, delays in court review hearings and investigations resulted in longer pre-trial detention periods, while the unsanitary and overcrowded conditions in detention facilities led some judges to make fewer pre-trial detention orders.

Beyond these general trends, the responses indicate discrepancies between countries and even within the same country, between different police stations and between different courts. The impact of the pandemic on criminal proceedings highly depends on the specific measures put in place by the authorities, the technology available and sometimes, the goodwill of individual police officers,

¹ Number of responses per country: Belgium: 12; England and Wales: 92; France: 5; Italy: 11; Latvia: 100; Netherlands: 32; Romania: 4; Spain: 38.

² The report is based on 25 responses.

judges and lawyers. Being able to call a lawyer from a private room prior to a police interrogation, receiving extra time for a legal consultation taking place over the phone, having access to a lawyer through videoconference during the interrogation, being able to submit and receive essential documents via an electronic platform, not limiting the time of a videoconference hearing and ensuring access to breakout rooms during videoconference are just a few examples of positive steps which helped to maintain fair trial rights during the COVID-19 pandemic.

This survey does not intend to present a comprehensive overview of criminal justice issues and trends in Europe during the pandemic. Instead, this report highlights how legal practitioners in Europe experienced and understood the policy changes implemented because of COVID-19, with the hope that these insights will inform future reforms. These views will shed light on the implications of COVID-19 related policies that some jurisdictions are looking to retain or expand, including through measures relating to the digitalisation of justice. Responding to the challenges faced by EU's judicial systems during the COVID-19 crisis, the European Commission will be initiating legislation as part of the [Roadmap on "Digitalisation of justice in the EU"](#), which is expected before the end of 2020.

This survey complements a report produced by Fair Trials, '[Beyond the emergency of the COVID-19 pandemic, Lessons for defence rights in Europe](#)' (June 2020). In this report, we identify key trends that emerged in Europe during the COVID-19 pandemic and compare them against the relevant applicable regional legal standards. Based on this information and analysis, we make practical recommendations to support a rights-based approach for states considering a shift from crisis-responses to long-term changes in their criminal justice systems. We therefore invite readers to consult that report for further guidance on criminal justice reforms.

KEY FINDINGS

1. Defence rights in police custody

Quality of legal assistance

There was a strong consensus amongst defence lawyers that the measures adopted in response to the COVID-19 pandemic restricted their ability to consult with their clients in police stations. Instead of in-person attendance for consultations and police interrogations, **legal advice and assistance was primarily being provided remotely**, either via telephone or video-link – and often limited to the consultation that takes place prior to the interrogation by the police.

This was largely due to the **lack of health and safety measures available for lawyers in police stations**. For instance, respondents in Ireland and England and Wales described inconsistent approaches amongst police stations to follow social-distancing guidelines and only a few officers wore personal protective equipment. In the Netherlands, lawyers complained that screens were set between police officers and suspects, but the same facilities were not provided for lawyers when meeting their clients. Spanish respondents explained that many lawyers requested remote assistance due to the complete lack of protective measures in police stations, including masks and gloves. A Spanish lawyer noted that lawyers would provide assistance over the phone if their client wished to exercise their right to remain silent, but in other instances, they would go in-person to the police to attend the client and ensure effective legal assistance, despite the health risks involved.

"Security was by no means guaranteed, due to the fact that at the police station there were only screens between police and suspect, and not between suspect and lawyer.

That is why many lawyers opted for the telephone assistance option, as this was the responsible choice.” Dutch respondent

Respondents also cited other reasons for resorting to remote assistance, such as restrictions to access police stations, excessive formalities, as well as recommendations from the authorities or bar associations to only proceed by phone consultations.

Across Europe, remote assistance was mostly viewed as a poor substitute for in-person legal assistance before and during the interview. Lawyers expressed the view that being unable to meet their clients in person undermined the **quality of legal assistance**. Effective legal assistance during the early stages of the proceedings is crucial as the evidence obtained during this stage determines the framework in which the offence charged will be considered. But a lawyer’s presence at the early stages of the criminal proceedings does not only help to prevent prejudice to the suspect’s defence, it can also increase the chances of release or alternative measures to detention being applied and, as a result, contributes to limiting the use of pre-trial detention to cases in which it is really justified and, therefore, also easing prison overcrowding.³

“The rights of the defence have taken second place.” French respondent

*“Telephone assistance speeds up the process but undoubtedly reduces guarantees”
Spanish respondent*

More specifically, respondents identified the following key issues that undermine the quality of remote legal assistance in police custody.

- **Difficulties in building trust/rapport with clients:** it was harder for lawyers to interact with their client and to build a trusting relationship through remote communication, in particular with new or vulnerable clients. Some respondents pointed out the negative impact of the absence of non-verbal communication.

*“It’s extremely hard to build a relationship suitable to gain the client’s trust over the telephone. Add the pressures of the police station environment and people being scared for the health implications, and the impact on justice is severe. And that’s without factoring in those clients with mental health difficulties, vulnerabilities (e.g. due to age)”
British respondent*

“Especially in cases when lawyer and defendant have never met before, the contact between lawyer and counsel cannot be carried out at a distance because it affects the professional and fiduciary relationship.” Italian respondent

“Certainly when suspects and lawyers do not know each other well, telephone assistance is less thorough.” Dutch respondent

- **Limited assistance prior to police questioning:** the EU right to access a lawyer includes the right to receive legal assistance prior to any questioning by the police. This is key – a lawyer’s presence at the early stages of criminal proceedings helps a person understand their legal situation and the consequences of their choices, which may impact the overall fairness of

³ For further research on this issue, please refer to Fair Trials, [A Measure of Last Resort? The practice of pre-trial detention decision-making in the EU](#), May 2016; Fair Trials, [Effective legal assistance in pre-trial detention decision-making: Regional handbook for lawyers](#), October 2019.

the whole proceedings. However, respondents reported that it was generally more difficult to provide advice to and take instructions from their clients before police interrogations. Dutch respondents pointed to the difficulty of obtaining the necessary information from their clients. In England and Wales, respondents pointed out that their consultations were shorter; whereas Irish lawyers reported that they were provided extra time to have a lengthy phone consultation. In England and Wales, respondents did not perceive the initial telephone consultation as a suitable replacement to in-person consultations.

“It was difficult to assess your client’s needs and recognize some potential personal problems. (...) You do not get all the information from a telephone conversation.” Dutch respondent

“The biggest concern is the loss of face-to-face conferences with clients prior to interview. Telephone conferences are not a suitable replacement, but that is what we’re having to do. [...] However, nobody other than the defence community seems remotely concerned by any of this.” British respondent

- **Restricted or impossible assistance during police questioning:** the right to access a lawyer also includes the physical presence and effective participation of their lawyer during questioning by the police. Lawyers must be able to actively assist their clients and to intervene during the questioning to ensure respect for their client’s defence rights. Numerous respondents across Europe indicated that legal assistance during the interview was severely limited. In England and Wales, defence representation attendance by telephone was becoming the default. In some countries, remote consultation between a suspect and their lawyer was simply not possible during the police questioning. Respondents in Ireland pointed to good practice in some police stations, where interrogating officers allowed persons to interrupt the questioning and step outside the interview room to receive telephone legal advice, despite the remote attendance of the lawyer during questioning not being possible.

“In some cases, telephone assistance was possible for questioning, but in many cases the telephone connections are not good enough for this, and personal contact is also lacking.” Dutch respondent

- **Disregard for confidentiality:** under EU law, authorities are required to ensure that communications with lawyers take place in a confidential setting. However, the vast majority of lawyers surveyed expressed serious concerns about the confidentiality of client-lawyer consultations. In practice, lawyers could not discuss crucial and sensitive matters with their client due to the **absence of adequate facilities**. Clients had to contact their lawyers via telephones situated in open areas. In Romania, where in-person meetings were still possible, there was no designated rooms in police stations where lawyers could talk confidentially with their client. Both Romanian and Latvian lawyers stressed that masks and the sanitary distance, almost 2 metres in some cases, prevented low tone conversation which affected the confidentiality of their exchanges.

“Police stations in the Northern Netherlands did not have confidential telephone lines. Strategy for interrogation could not be discussed and no confidential communication could be made.” Dutch respondent

“In-person consultation and confidentiality have been severely restricted by the use of remote consultation tools [in police stations]. Confidentiality is essentially non-existent in practice.” Italian respondent

“I couldn't have a really confidential discussion with my client, I had to speak with my mask on my face and from a considerable distance of almost 2m, so that it was hard for us to understand each other. The police gave me less time to study the case file.” Romanian respondent

“My work was very limited and I did not have the opportunity to talk to the defendant alone.” Spanish respondent

In other cases, calls were facilitated by **police officers who remained present** and could therefore overhear the conversation between a suspect and their lawyer. Respondents in Spain noted that remote communication with detained clients was recorded and police agents were attending the call next to the detained person – one lawyer concluded that such interviews were therefore useless. Similarly, in England and Wales, one respondent complained that on at least two occasions, a police inspector was facilitating the call.

“[Lawyer-client conversations in police stations] are not conducted in private. Both due to the fact that they are recorded and because the officer usually stands with the detainee with the loudspeaker on.” Spanish respondent

- **Absence of safeguards against police coercion:** direct physical presence of a lawyer is also crucial for the prevention of ill-treatment or coercion by the police. A French lawyer expressed serious concerns about the impossibility to check police coercive techniques and possible pressure not to call in legal assistance.

“The physical absence of the lawyer in the custody premises is a real problem in the balance of power between the police officers and the accused. Outside the COVID period, some services are already doing everything to dissuade the respondent from hiring a lawyer, even officially appointed, claiming in particular that this will waste too much time ... It is easy to imagine the consequences in a pandemic period.” French respondent

Such concerns were echoed by a Latvian lawyer, who noted that the presence of prison staff during video consultations with the lawyer (where the person was in prison) made it impossible for their client to tell them about any human rights violations in prison.

KEY RECOMMENDATION

The relevant authorities must make necessary efforts to enforce appropriate health and safety standards in police stations and enable safe, in-person legal assistance prior and during police questioning. States cannot require lawyers or suspects to make a choice between the right to health and the right to legal assistance. It is essential that health risks do not act as a deterrent from the exercise the right of access to a lawyer. In addition, the inability for lawyers to provide effective legal advice amounts to a violation of fair trial rights. The right to legal assistance is a ‘gateway’ to other fair trial rights, enabling suspects and accused persons to, inter alia, understand and exercise their defence rights, and ensure their rights are being respected at all stages of criminal proceedings.

Access to case files

Typically, lawyers have to go to court buildings in person in order to submit court documentation such as applications for release and access to criminal case files held by law enforcement authorities, which is key to preparing an effective defence. However during the pandemic, lawyers may be reluctant (or not allowed) to leave their homes and courthouses may be closed. Survey responses revealed that states in Europe were uneven in whether they adjusted their practices to allow for submissions to the court electronically, rather than in person. Where court documentation could not be submitted in person or electronically, proceedings may be severely delayed. Where a person is held in pre-trial detention, this means an extension of their stay in prison – during a time of heightened risk to their health and safety. Where lawyers could not access the case file, because it is only available in paper in the courthouse, they could not prepare the defence and had to apply for hearings to be postponed. Again, this can lead to extended periods of pre-trial detention despite the crisis and need for urgent release of people to protect health.⁴

- **Restriction on access to paper files:** court closures and limited access to police stations caused delays in gaining access to case files, where kept on paper – notably in Belgium, and in some locations in Latvia and Spain. A Belgian lawyer added that detained persons had no opportunity to consult their own case files as this is not possible in prisons and they were not transferred to courts. Some lawyers in England and Wales also indicated that their clients who were held in detention had no access to their case files, making it impossible to review the evidence with the client and take instructions from them.
- **Greater access to electronic files in certain jurisdictions:** lawyers also reported positive judicial practices which they hope might be prolonged in the future. Some jurisdictions allowed for electronic access to case files, notably in the Netherlands. In Italy, some courts organised effective electronic access via certified emails which proved more efficient than the traditional system. However, Italian respondents also expressed concerns about the improvised means of access in some courts, and notably the use of ordinary email or WhatsApp to share documents without any security guarantee. Others also complained about limitations in the documents circulated or access limited to certain proceedings. In Romania, some courts allowed remote access to case files, but limited the access time to 20-30 minutes only.

“During the worst phase of the epidemic, documents (if urgent procedures were involved) were sent by e-mail. A virtuous and functional practice compared to the current one, where access to the file is guaranteed through the possibility to book the in-person consultation (waiting even for a few days).” Italian respondent

KEY RECOMMENDATION

Restricted access to material evidence influences the time and facilities – guaranteed by law – that the defence has available for preparing their case. It risks putting the defence in an even more unequal position against the prosecution, which has unrestricted access to all case materials. States should promote remote access to case files as an efficient avenue to secure more timely and unrestricted access to the information necessary to prepare the defence. Access to case file must be implemented in a way that lawyers can consult files with their clients.

⁴ See Fair Trials, <https://www.fairtrials.org/news/public-health-need-keep-people-out-detention-practical-guidance> (March 2020).

Access to interpretation services

Respondents reported difficulties to **access interpretation services** during police interrogations. EU law guarantees the right to interpretation for suspects or accused persons who do not speak the language of the proceedings so that they understand the proceedings against them and are able to give their own reading of the events. Non-nationals are over-represented among the European prison population, often due to a lack of address or residence permit, or insufficient language skills.⁵ It is therefore key that interpreters are provided to ensure the active participation of non-nationals in police interviews and their effective legal representation.

In the Netherlands, a lawyer reported difficulties in arranging interpreting services when legal assistance is exclusively provided via telephone. Regarding remote interpreting itself, another respondent noted that it was already often practiced before COVID-19.⁶ One Italian respondent found that the COVID-19 pandemic made it more difficult to find interpreters.

KEY RECOMMENDATION

Fairness of proceedings demands that those persons have access to interpretation services, including in the early stages of the proceedings, where they do not speak or understand the language of the proceedings. Where interpretation is also needed for lawyer-client communication, police authorities must provide the necessary practical facilities and grant additional time for the consultation to compensate for the time needed for interpretation.

2. Defence rights in remote hearings

In response to the pandemic, many states introduced the ability for suspects and accused persons to be heard remotely, i.e. from home or prison (where detained), instead of in person.

While some respondents pointed out the efficiency of virtual hearings, especially for technical hearings, the majority of lawyers expressed concerns about the impact on defence rights, specifically in light of their possible extended use in the future. The impact of remote hearings on defence rights varies from country to country or even from court to court, depending on the practical measures set by the authorities to facilitate defence participation (e.g. efficient and unlimited video connection, video platforms allowing breakout rooms). In Latvia, one respondent observed that upon request, courts were willing to postpone the hearing until it can be conducted in person. In Spain, most law enforcement officials did not observe any major impact on defence rights due to the use of remote hearings. Their perception contrasts with the difficulties expressed by other lawyers, notably in communicating with their client before and during the hearing.

"Criminal law in particular, remains a branch of the law where 'people' are concerned, a judge has to judge an act, and then an offender/victim. The presence of those involved at the trial is particularly important, in order to provide nuances to also give messages to those involved. Criminal law, like family law, is a sector par excellence for involving people in their trial. [...] Remote hearings via Zoom [...] are suitable for technical issues

⁵ See Fair Trials, [A Measure of Last Resort? The practice of pre-trial detention decision-making in the EU](#), May 2016, p. 23; Council of Europe, [CPT urges European states to hold persons in remand detention only as a measure of last resort and in adequate conditions](#), 2017, p. 79.

⁶ Fair Trials, [Short Update: Language interpretation now being performed remotely in the Netherlands](#), 30 March 2020.

(e.g. control of nomenclature, (sometimes) procedural regulations, petition procedures, or the subsequent management of internment in uncontested cases) but not for the "decisive" stages of the procedure (pre-trial detention, debate on the merits,...)." Belgian respondent

"Remote hearings have been a useful tool for an emergency phase but [...] they have shown all their limits both in the relationship between defendant and lawyer and in making it more difficult for the judge to evaluate the person." Italian respondent

The survey responses reveal the importance of considering the views of all stakeholders when addressing the long-term challenges of the COVID-19 crisis, including lawyers and the persons impacted. Fair Trials has produced a [guide](#) which summarises human rights' concerns related to the use of remote justice procedures and provides practical recommendations for states considering the use of remote communications systems in criminal justice proceedings.

Suspect's participation in hearings

Most of the respondents reported that remote hearings limit the ability of the accused to effectively participate in the proceedings. Respondents explained that remote hearings are more complex for suspects or accused persons to navigate than in-person ones, in particular for vulnerable people. The right to a fair trial guarantees the right of a person to participate effectively in their criminal trial. Effective participation means that suspects or accused persons are able to understand what is happening in the trial and to be able to make interjections either themselves or through their defence lawyer.

- **Ineffective participation and unreliable technology:** defence lawyers across Europe reported suspects or accused persons had less time to express themselves and appeared helpless. Responses also highlighted that the poor quality or unreliability of the available technology, affecting participation in the trial. Technical problems led to a certain fatigue of the participants who, as a result, were less inclined to intervene.

"[The suspect] is isolated, in a room with policemen, who refuse to remove his handcuffs for security reasons and everything is through a video conference that he does not know how to use. The situation of helplessness is very great. Greater if he belongs to a vulnerable group." Spanish respondent

"Remote hearings could in some cases generate a certain insecurity for the accused persons, as they do not have the lawyer physically next to them and they are held in an environment that may be unfamiliar to them. Therefore, the accused persons or their lawyer should have the right to request, if they consider it necessary for their defence, the physical presence of the lawyer next to the accused, unless there is some risk of contagion." Spanish respondent

- **Stronger impact for vulnerable persons and persons in need of interpretation:** lawyers noted that the impact of remote justice, such as isolation and confusion, was even more severe on vulnerable persons, notably people in need of interpretation assistance. In Latvia, for instance, simultaneous interpretation made it difficult for the suspect to understand what is being said, but courts did not allow for consecutive interpretation as it makes the process significantly longer.

“The use of masks coupled with video conferencing has made the statement [of detainees by videoconference] difficult. Even more so for foreign people speaking Spanish. In these cases, if they had a lot of accent or strange grammatical twists, communication was difficult.” Spanish respondent

“Simultaneous interpretation [on top of direct speech] makes it difficult to grasp what is being said for an accused who does not speak the official language. If each sentence is interpreted consecutively, it makes the process significantly longer and the court does not accept that.” Spanish respondent

- **Violations of the right to be present at trial:** EU standards recognise the right to be present at trial as a fundamental guarantee of the right to a fair trial. This right entails that the accused is able to present its defence, in person, to a judge, to examine witnesses and, where relevant, to have the free assistance of an interpreter. We were particularly concerned to learn about cases in the Netherlands where suspects and accused persons were forced to waive their right to be physically present at their trial, because they could not attend their hearing, and the facilities were not available to enable them to attend remotely (e.g. through videolink).

“Clients were forced to relinquish their right to be present because they simply could not be physically present, nor through the connection. They did not feel heard or understood. This also had a negative effect on the contact between suspects and his counsel, because the suspects were also uncertain about what had been presented on their behalf. It always helps if the suspect can see for himself that someone is standing up fervently for him / her. If that right lapses, the suspects actually lose all control of the trial against them.” Dutch respondent

Similarly, Belgian lawyers noted that the presence of the suspect or the accused person was random, as detained persons were not transferred from prisons to court for hearings, even for hearings on the merits of the case (as opposed to procedural issues). An Italian lawyer told us that in some instances, the court proceeded to the hearing despite the lawyers being unable to connect.

- **Violation of the presumption of innocence:** A Spanish lawyer reported the case of a detainee who appeared in a videoconference with handcuffs as the policemen refused to remove them for safety reasons. Under EU law, physical restraints in the courtroom must be avoided as it can damage the suspect’s reputation and affect the perception about a person’s guilt or innocence.

KEY RECOMMENDATION

Remote hearings restrict accused persons’ rights to effective participation at trial and should therefore remain an exception. Courts must be equipped with appropriate videoconference equipment and apply extra diligence to ensure effective participation of the defence in remote hearings. In addition, detained persons appearing via remote proceedings must never be required to wear prison clothes, handcuffs or have prison infrastructure displayed in the background.

Quality of legal assistance during remote hearings

Numerous respondents explained that remote hearings limited the lawyer's ability to provide effective legal assistance during court proceedings, mainly due to difficulties in communicating confidentially with the suspect or the accused person. As highlighted in the first section, the right of access to a lawyer in criminal proceedings is a key component of the rights of the defence and, more broadly, of the right to a fair trial. A lawyer helps to secure the fundamental aspects of a person's defence. Limited legal assistance during hearings may impact both the right to liberty of the suspect and the outcome of the case.

- **Restricted legal assistance during the hearing:** responses highlighted difficulties for accused persons to consult with their lawyers, and to seek advice before, during, and after court hearings. This negatively affected the effectiveness of legal assistance. Several lawyers, notably in Italy, England and Wales, and the Netherlands, reported that communication with their client was simply not possible during remote hearings. One Dutch lawyer added that the client could not even see their lawyer on screen. Others told us that even for in-person hearings, the new court environment and screens between lawyer and client made communication hardly possible.

"The fact that you're not in the same room with the client and that you even didn't have the opportunity to discuss this beforehand has a negative impact. Also because it affects the trust relationship. I notice that in COVID-19 it is more difficult to connect with clients." Dutch respondent

"Communication during the hearing is not possible in digital hearings. Even during physical hearings, communication is hardly possible due to the layout of the courtroom and the screens between lawyer and client." Dutch respondent

"Consultation between client and lawyer during such a hearing is not possible, which is a serious shortcoming. Moreover, the position is such that client cannot see the lawyer, and sometimes I cannot see the client either." Dutch respondent

- **Lack of confidential communication:** many lawyers raised concerns about the impossibility to have confidential conversations with their client during remote hearings. In England and Wales as in Latvia and Romania, lawyers needed to request a recess so that courtrooms could be vacated and lawyers could speak to their clients in private, sometimes with time limits. In Latvia, lawyers could also request a confidential consultation before the hearing, but it was usually made clear that this should be as quick as possible not to delay the hearing.

"The client was permanently guarded and there was also technical staff near him, in charge of transmitting the hearing by videoconference." Romanian respondent

"During videoconference confidential consultation with the client is impossible without the presence of a third person who is responsible for ensuring the video link works (guard, court official)." Latvian respondent

"Complete confidentiality during videoconference is not ensured. In one case the prosecutor even blamed the defence lawyer that he was consulting his client and thus late for the hearing." Latvian respondent

- **Difficulties to challenge evidence:** The majority of respondents also reported that remote hearings made it harder for suspects and their lawyer to review and challenge evidence.

They attributed these difficulties to the lack of equipment necessary to enable online evidence-sharing. In Spain, for instance, one lawyer noted that they were unable to correctly witness the evidence through videoconference.

“The remote hearing, with the tools used, does not guarantee the possibility of a clear conversation with the magistrate and the accused, limits the possibility of presenting documents, exhibiting and viewing documents etc.” Italian respondent

KEY RECOMMENDATION

Long-term legal changes should ensure that the right for persons to exchange confidentially with their lawyers is practically ensured and implemented before, during and after the hearing. Allowing lawyers to appear from the same location as their clients, with the necessary sanitary measures in place, is a first step to facilitate communication between the lawyer and their clients and improve the accused person’s ability to navigate the proceedings and to actively participate in the hearing.

Equality of arms

Some respondents noted that remote hearings impacted the communication between the judge and the defence. More generally, they felt that remote hearings impacted the fundamental principle of equality of arms in criminal proceedings due to the difficulties for the suspects and their lawyers to communicate confidentially, to prepare the defence before or during the hearing itself, and the limited participation of both the accused persons and their lawyers in the hearings. According to the principle of equality of arms, each party must be given a reasonable opportunity to present their case under conditions that do not place one party at a substantial disadvantage vis-à-vis the other. Unfair balance between the defence and the prosecution may impact the outcome of the proceedings and the suspect’s right to liberty.

- **Impact on judges’ assessment:** respondents across Europe explained that the judge’s ability to read a person’s non-verbal cues and to evaluate the person was severely limited. They reported that the whole proceedings were ‘dehumanised’.

“Because the suspect is not physically present, judges do not see that they are deciding on a person of flesh and blood.” Dutch respondent

“Seeing a suspect in person has an influence on the conversations between suspect and judges.” Dutch respondent

“The presence of [detained persons] at the hearing was not possible, so judges have to judge ‘on paper’, for instance to assess the imposition of conditions [for release]. Justice has become much more clinical during COVID-19”. Belgian respondent

“The fact that the suspect does not physically meet his judge dehumanizes the entire procedure in a negative way” Belgian respondent

- **Impact on the equality of arms:** several respondents, notably in the Netherlands, Italy and Spain, felt that remote hearings impacted the balance between prosecution and the defence: the inability of the defence to participate meaningfully in the trial limited the

adversarial debate and gave more weight to the police investigation, impacting the overall fairness of the proceedings. A Dutch lawyer expressed serious concerns about the practice adopted by a number of judges to discourage lawyers from appearing in court and to insist on a written settlement, where the legal basis for a written procedure does not actually exist. A Latvian respondent also feared that more cases could be dealt with in writing, infringing fair trial and defense rights.

“My impression is that, although judges are now really aware of the exceptional nature of the frequent treatment of suspects who are not present or not physically present, this will become more and more normal and therefore the weight of the police investigation, which is often contradicted by that suspect, will lead more quickly to a conviction. This would turn the Dutch criminal trial even more into a verification meeting than is already the case” Dutch lawyer

“[I am] concerned that decisions to examine the case in written proceedings are and will continue to be taken. In my opinion it is a question of the right to a fair trial and the right to defence.” Latvian respondent

- **Rushed hearings:** responses from the Netherlands also indicated that the hearings were rushed as video connections were time limited (45 minutes), partly due to the scarcity of technical resources. In one example, the lawyer had no time to ask questions during a remote witness interview; in another, the hearing continued without the suspect. One lawyer also noted that due to their expedite nature, remote hearings gave the impression that the defense was not heard and that verdicts were already ready. Some Spanish and Latvian lawyers also complained about rushed hearings.

“It gave the impression that all the operators, that is, judges, prosecutors, lawyers and officials, were eager to finish the hearings as soon as possible.” Spanish respondent

“[I am] concerned about the focus on the speed of the proceedings in court, because the balance between the interest of [the State] to examine the case faster and the right to a fair trial and right to defence of the defendant and potentially also victim could be broken. [...] Given the current practice not to pay too much attention to ensuring [the possibility to use defence rights] in the beginning of the investigation, there are serious concerns about defendants’ ability to make real use of their defence rights during the investigation phase of the criminal proceedings.” Latvian respondent

KEY RECOMMENDATION

Due to the COVID-19 pandemic, European states have conducted remote hearings at an unprecedented scale. While they turned out to be efficient in certain circumstances to prevent delays, the experience also revealed numerous challenges, both for the defence and the judicial decision-making process. Any decision to extend the use of remote justice tools beyond the emergency period must be taken cautiously and only after a full assessment of their impact on the right to a fair trial. Survey respondents indicate that remote hearings can severely undermine defence rights and ultimately lead to an unfair outcome. Further research and inclusive dialogue with all the stakeholders concerned is crucial to better understand the numerous and diverse implications of online tools on the conduct of criminal proceedings.

3. Pre-trial detention

Under EU law, holding legally innocent persons in pre-trial detention is only acceptable as an exceptional measure of last resort, when a genuine requirement of public interest outweighs the right to individual liberty. Moreover, the need for any continued or prolonged detention must be regularly verified by a court. Unfortunately, these strict limitations are often violated across Europe. While this is by no means a new challenge, the COVID-19 pandemic illustrated once again the failure to address the situation of persons held in pre-trial detention.

Practices related to the use of pre-trial detention during the COVID-19 pandemic varied from state to state. Most respondents in Spain, Romania and Latvia did not see any particular changes in the use of pre-trial detention. In certain locations, however, respondents indicated that delays in court hearings and investigations resulted in longer pre-trial detention. In contrast, respondents also noticed that some judge ordered less pre-trial detention to mitigate the pandemic's impact in prison and protect the health of the detained persons. The [World Health Organisation](#) expressly recognised that persons deprived of their liberty were more vulnerable to the COVID-19 outbreak than the general population because of the confined conditions in which they live for prolonged periods of time.

- **Case delays and impact on the time spent in pre-trial detention:** in England and Wales, respondents generally felt that due to delayed hearings, persons held in pre-trial detention were more likely to spend longer in detention and that chances of release were smaller. Responses suggest that custody time limits were being extended routinely as a direct result of delays to trial proceedings due to COVID-19, with little regard for the necessity of continued pre-trial detention.

“Quite frankly, [custody time limits] may as well not exist. They are extended as a matter of routine in our local courts and any argument against extending them is met with incredulity that one has dared advance an argument.” British respondent

In Belgium, France, Italy and the Netherlands, views were more varied regarding the time spent in pre-trial detention during the COVID-19 pandemic – most respondents thought it was about the same as before, but some mentioned shorter pre-trial detention while a few pointed out cases being postponed and lack of consideration of prison conditions as a ground for release. For instance, a Dutch lawyer explained that judges blatantly disregarded the vulnerability and the complete isolation of detained persons who could not receive a visit for months, did not receive any extra calling opportunities and had to share a tablet for Skype calls with 60 other people.

“Cases were suddenly not dealt with substantively, but postponed while detained suspects remained in detention without actual contact with their relatives.” Dutch respondent

Several lawyers across Europe indicated that court closures and/or delays of hearings and investigation caused **confusion and uncertainty for their clients, especially for those in detention**, who had little to no idea when their trial would take place, and how much longer they would be detained. In England and Wales, for instance, lawyers reported trials being delayed for over a year and often no new date was set for adjourned hearings. A Belgian lawyer gave the example of a case initially scheduled for May 2020 which has now been postponed to March 2022.

- **Impact of longer pre-trial detention on sentence:** due to delays and longer pre-trial detention, a Dutch lawyer explained that for small misdemeanours, the judge could not order alternative sanctions anymore as the longer pre-trial detention was equivalent to the prison term. Similar concerns have been raised in England and Wales about pre-trial detention overpassing the possible sentence faced by the suspect. This echoes [previous Fair Trials research](#) which indicates that judges may be unwilling to order imprisonment for shorter periods than those actually spent in pre-trial detention, so as to avoid questions about the legality of the pre-trial detention.

“Everything lasts endlessly and in the meantime clients are stuck. This has an impact on punishments because by the time one is in session the sentence has actually already been served in full in small cases and therefore no community service can be imposed.” Dutch respondent

“Clients are in some cases having to essentially choose between having a trial via video link or have their custody time limits (CTL) extended. If they say make the choice that they do not want a trial via video link from prison (which is our advice) then the CTL may be extended and they have in one incident served more than they would otherwise have got, even if they were convicted.” British respondent

- **Sanitary concerns and reduced number of pre-trial detention orders:** responses in Belgium, England and Wales, France, Italy and the Netherlands suggest that judges, in an effort to reduce numbers of people in prison, ordered less pre-trial detention, especially at the start of the pandemic and for minor offences. For instance, a Belgian lawyer reported that at the peak of the epidemic, suspects were put in pre-trial detention only for the most serious offences such as attempted murder or participation in a criminal organisation. Accordingly, judges were also more likely to adopt alternative measures such as electronic bracelets in Belgium or house arrest in Italy. While these initiatives to reduce the number of persons held in pre-trial detention should be welcomed, they reflect a more correct application of pre-trial detention standards: an exceptional measure, only to be used as necessary and proportionate and in compliance with the presumption of innocence and the right to liberty.

“The only positive trends that should have in fact been the case in normal times was that after the adoption of guidelines in courts and investigative authorities [...] the courts at last really examined requests through the prism of “pre-trial detention should not be applied” instead of “pre-trial detention should be applied”. Latvian respondent

“There has been a more careful assessment by judges on the reasons for giving pre-trial detention.” Italian respondent

““During COVID-19 people were arrested or detained only in case of “absolute necessity”. Latvian respondent

“The use of pre-trial detention has been significantly reduced during the covid-19 emergency as well as the number of arrests of persons, in particular, for minor offences. The use of house arrest and other more minor forms of restriction of freedom were the tools most frequently used by the judiciary.” Italian respondent

“The use of pre-trial detention was limited also because of the dramatic overcrowding in Italian prisons.” Italian respondent

KEY RECOMMENDATION

Fair Trials [has long been at the forefront of the movement to reduce the use of pre-trial detention in Europe](#), urging courts to impose the least restrictive conditions necessary to ensure the course of justice can take place. The backlog of cases built up during the COVID-19 lockdown is likely to have a long-lasting impact, resulting in inordinate delays to criminal cases, and possibly prolonged pre-trial detention for many detained suspects. Legally innocent persons should not be stuck behind bars on account of administrative failures and underfunding. It is essential that urgent action is taken to increase funding for the courts, and increase their capacity to cope with increasing caseloads. At the same time, the authorities should take the current COVID-19 context as an historical opportunity to end over-reliance on pre-trial detention and to reconsider their approach to incarceration. The need for EU standards on pre-trial detention is more urgent than ever. These standards should notably establish a minimum sentence necessary before imposing pre-trial detention so that minor offenders are exempt from the possibility of pre-trial detention. Individuals should not be serving their entire sentence on remand.

ANNEXE - QUESTIONNAIRE

Basic survey questions which were adapted to reflect the law in the relevant surveyed countries.

Background

Fair Trials (www.fairtrials.org) is a human rights charity working to protect fair trial rights in criminal cases. Fair Trials and its international partners, including members of the [Legal Experts Advisory Panel \(LEAP\)](#) of criminal defence lawyers, civil society and academic organisations from across Europe, have been monitoring the impact of responses to the COVID-19 crisis on criminal justice systems across the globe: <https://www.fairtrials.org/covid19justice>.

We are concerned about the impact of COVID-19 on the human rights of suspects and defendants in criminal cases. Are suspects getting effective access to a lawyer in police custody? Are people being held in pre-trial detention for longer and with less effective oversight? What impact are delays and remote hearings having on defendants' rights?

We are now conducting a survey in different European countries to gather experiences and insights from criminal justice experts on the impact of the COVID-19 pandemic on their practice. [Name of organisation] is conducting the survey in [name of country].

The survey is short, and we would be very grateful if you could take approximately 15 minutes to answer on the basis of your experience and expertise. This survey is anonymous, but you can also choose to provide your name and contact details for the purpose of taking part in a short follow-up interview. If a question is not relevant to your experience or you do not wish to answer it, do skip it.

If you have any problems completing the survey, please contact [name and email address].

Thank you for your time.

Questions

1. Which of the following best describes you?
 - a. Defence lawyer
 - b. Accredited defence representative
 - c. Prosecutor
 - d. Police officer/staff
 - e. Appropriate adult
 - f. Other (please specify)

2. How would you describe the impact of COVID-19 and the lockdown on suspects' access to the following rights in the police station?
 - a. Clear explanation by police of their rights
 - b. Prompt in-person consultation with a defence lawyer or accredited defence representative
 - c. Access to specialist services and support if needed, such as interpreter, medical support

- d. Defence representation during police interview
 - e. Access to an appropriate adult (for minors and vulnerable adults)
3. If you are a defence lawyer (or an accredited legal representative), how has the COVID-19 pandemic affected your ability to defend your client's rights in police custody?
4. How have you received any access to case materials remotely?
5. How would you describe the impact of COVID-19 on conditions in police custody?
6. Looking at how the use of pre-trial detention (remand to custody) has changed during the lockdown:
 - a. What is the likelihood of suspects being detained pre-trial?
 - b. If detained, is the amount of time they spend in detention likely to be:
 - i. Much higher
 - ii. Higher
 - iii. About the same
 - iv. Lower
 - v. Much lower
7. Have you been involved in interrogations and/or hearings involving the appearance by remote technology (such as video-link or telephone) of any of the parties, that would otherwise have taken place with all parties present in the police station/court?
8. What kind of impact, if any, do you think remote hearings are having on:
 - a. The ability of the defendant and their lawyers to obtain information to challenge pre-trial detention
 - b. The likelihood of the defendants being released on bail
 - c. The ability of the defendant and their lawyers to obtain, present, and challenge evidence
 - d. The defendant's ability to participate in the proceedings
 - e. The ability of defendants and their lawyers to communicate before and during the hearing
 - f. The overall fairness of the hearings
 - g. The outcomes of hearings (for the defendant)
9. If you are involved in any criminal cases where the trial has been delayed as a result of COVID-19, please describe the case where the delay has had the most significant impact on the defendant.
10. Do you have any other concerns or suggestions about the impact of COVID-19 (and the response to it) on the right to a fair trial?