The Registrar, Section I
European Court of Human Rights
Council of Europe
67075 Strasbourg CEDEX
France

**30 April 2020**

By email only

Dear Ms. Degener,

In accordance with the leave to intervene granted by the President of the First Section and notified to Fair Trials by a letter of 8 April 2021, I have the pleasure of forwarding you our written third-party submissions in the case ***Przemysław LALIK v. Poland*** (**Application no. 47834/19)**.

We remain at your disposal for any further correspondence on this matter.

Sincerely,

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**As our offices are currently closed in line with local Covid-19 related restrictions, we would be grateful if you could send copies of all correspondence by email to: laure.baudrihaye@fairtrials.net.**

**Przemysław LALIK v. Poland App. No 47834/19**
**(First Section)**

**Written submission of Fair Trials**

## BACKGROUND

1. These written comments are submitted by Fair Trials, in accordance with the permission to intervene granted by the President of the First Section and notified to Fair Trials by a letter of 8 April 2021 in accordance with Article 44§3(a) of the Rules of the Court.

2. Fair Trials' work focuses on the right to a fair trial protected by Article 6 of the Convention. We intervene in this case because it raises important questions concerning the right to a lawyer under Article 6§3(c) and the effectiveness of remedies available for such violations within criminal proceedings. In particular, it touches upon questions relating to the practice of "informal questioning", the use of statements made in the absence of a lawyer and the effectiveness of the exclusionary rule as applied in practice by domestic courts.

## INTRODUCTION

3. In this case the applicant, Mr. Lalik, was arrested in relation to setting a fire to a building and the subsequent death of T.B. who was in the building at the time. The arrest was carried out late at night while the applicant was still under the influence of alcohol. According to the statement of facts, the applicant was "informally questioned" (*rozpytanie*) the next morning for almost three hours in the absence of a lawyer during which time he confessed to the killing.

4. In these submissions, we will focus on the importance of access to a lawyer in the early stages of the criminal proceedings. We will draw the Court's attention to the inter-connectedness of all stages of criminal proceedings and how statements gathered as a result of a violation of the defendant's right to be assisted by a lawyer, can influence the outcome of the case even where the statement itself is formally excluded from the criminal case file.

5. We will focus on three points. Firstly, we will elaborate on the scope and importance of the right of access to a lawyer under Article 6(3)(c) of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('**ECHR**' or '**the Convention**') and argue that the practice of 'informal questioning' constitutes a violation of this right. We will also give examples of the widespread practice of informal questioning and questioning in the absence of a lawyer more broadly in Europe. (**Part A**). Secondly, we will address the inter-connectedness of all stages of criminal proceedings and how information gathered in violation of the right to a lawyer can decisively affect the outcome of the case even where evidentiary remedies are applied, e.g., the particular piece of evidence is formally excluded or a statement retracted (**Part B**). Thirdly we will demonstrate the factors assessed as part of the overall fairness test, such as application or exclusionary rule, opportunity to challenge the use of evidence or retraction of statements after consultation with a lawyer are not effective in practice. Therefore, in this assessment the Court should carry out a strict and detailed scrutiny of how exclusionary rules are applied or illegally obtained statements are used in practice. We will argue that such scrutiny is absolutely necessary to ensure respect for the rule of law, uphold the integrity of the criminal proceedings and prevent the systemic use of such practices. (**Part C**).

**PART A – ACCESS TO A LAWYER IN LAW AND PRACTICE**

**1. Access to a lawyer under Article 6(3)(c)**

6. The right to a lawyer, as this Court has recognised, is at the core of the concept of a fair trial.[1] It is a key safeguard to fairness of criminal proceedings and serves to protect suspects against any abusive coercion on the part of the authorities.[2] The lawyer's presence and assistance serves not only to prevent any physical or psychological coercion, but also to balance the pressure stemming from the inherent inequality in terms of power and resources between the defendant and the investigating and prosecuting officers.[3] In *Salduz v. Turkey,* the Court recognised the crucial role that a lawyer plays in the initial stages of criminal proceedings by concluding that "the rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction."[4] The so-called 'Salduz principle' later served as the basis for regional harmonisation of the standards on access to a lawyer and was enshrined in the European Union law, notably in Directive 2013/48/EU.[5]

7. The 'Salduz principle' required strict adherence to defence rights from the beginning of criminal proceedings – investigating authorities were obliged to give proper information about the right to a lawyer and ensure that such access is granted in practice. Otherwise, any incriminating statements made by a suspect as a result of a violation of these vital guarantees would be invalid and their use would, in principle, prejudice the fairness of the entire criminal proceedings.

8. However, the Court's judgment in *Beuze v. Belgium* constituted, in our submission, a departure from the 'Salduz principle'. With its judgment in *Beuze* the Court essentially recognised that denial of access to a lawyer, even if unjustified and arbitrary, and subsequent use of incriminating statements made as a result of such violation can still result in a trial that is considered overall to be fair.[6] With regard to statements made without access to a lawyer, the assessment of the overall fairness takes into account the nature of the statement and whether it was promptly retracted or modified.[7] The Court in *Beuze* listed a number of factors that need to be taken into account as part of this assessment, including the availability of evidentiary remedies, in particular the opportunity to challenge the use or quality of evidence, the legal framework governing the pre-trial proceedings, the admissibility of evidence at trial, and whether it was complied with.[8] Where an exclusionary rule is applied, the Court considers that it is particularly unlikely that the proceedings as a whole would be considered unfair.[9]

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[1] *Salduz v. Turkey*, App. No. 36391/02, 27 November 2008, § 53.
[2] *Ibid*.
[3] *Ibid*.
[4] *Ibid*., § 55.
[5] Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty.
[6] *Beuze v. Belgium*, App. No. 71409/10, 9 November 2018, § 150.
[7] *Ibid*., § 150 (f).
[8] *Ibid*., § 150 (b) and (c).
[9] *Ibid*., § 150 (b).

9. However, as demonstrated by the state practice we will outline in Part B, the factors listed in *Beuze* may not remedy the prejudice caused to the defence. Even where an exclusionary rule is applied by national courts, its application may be ineffective in practice, rendering it incapable to fully remedy the prejudice caused to the defence by the absence of a lawyer in the early stages of the investigation. Even if the exclusionary rule is effective in practice, it fails to incentivise investigating and prosecuting authorities to ensure compliance with essential defence rights protected by Article 6(3)(c) because of the other benefits they may gain from evidence obtained (even if not used directly for a conviction).

### 2. The practice of police questioning in the absence of a lawyer

10. 'Informal questioning' and other forms of questioning in the absence of a lawyer is a frequent practice across Europe despite a clear legal requirement that access to a lawyer should be provided before the first interrogation of a suspect by the police.[10] Informal questioning seeks to bypass the protections guaranteed by Article 6(3)(c) ECHR by creating another 'category' of questioning, not subject to fair trial rights. As a matter of law, this Court has recognised that "any conversation between a detained criminal suspect and the police must be treated as formal contact and cannot be characterised as informal questioning or interview".[11]

11. Despite the Court's clear position on the practice of informal questioning, it remains a widespread practice across Europe. The European Union Agency for Fundamental Rights ('**FRA**') has reported similar practices of 'informal' evidence gathering in the absence of a lawyer or proper information about suspect's rights in multiple EU Member States.[12] According to the FRA, this practice is referred to as "informal intelligence talks" by lawyers in Bulgaria, "the grey zone" in Greece or "informal questionings"[13] in Romania and Poland. "Cell conversations" as they were called by a Finnish lawyer from Fair Trials' Legal Expert Advisory Panel[14] can take place during a break between different parts of the official interrogation.[15] Such practice was also reported in Croatia, Hungary, Cyprus, Belgium and France.[16]

12. Aside from 'informal questioning', other law enforcement practices lead to suspects being questioned in the absence of a lawyer. Police may fail to inform or to adequately inform suspects

[10] *A.T. v. Luxembourg*, App. No. 30460/13, 9 April 2015, § 63; Article 3(2) of the Directive 2013/48/EC of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty requires that presence of a lawyer be ensured even before the questioning by the police or by another law enforcement or judicial authority.

[11] *Ayetullah Ay v. Turkey*, App. Nos. 29084/07 and 1191/08, 27 October 2020, § 137.

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

[13] *Ibid*., p. 23.

[14] Fair Trials constantly gathers evidence of state practice through our Legal Expert Advisory Panel (LEAP), a Europe-wide network of criminal law experts (defence lawyers, academics, and non-governmental organisations).

[15] An answer to Fair Trials' query to its LEAP network on the practice of 'informal questioning', unpublished.

[16] Answers to and informal discussions regarding to Fair Trials' query to its LEAP network on the practice of 'informal questioning', unpublished.

of their right to a lawyer.[17] They may discourage suspects from exercising their right to a lawyer, for example, by telling them "that the case is simple and that there is no need for the presence of a lawyer; or that proceedings are just beginning, and lawyers are not needed at the initial stage"[18] or that asking for a lawyer will be costly[19] or will prolong their detention.[20] The police may also fail to call a lawyer even when a suspect has asked to be assisted.[21] These practices generally result in suspects purportedly "waiving" their right to a lawyer.[22]

13. Informal questioning and other practices leading to suspects' questioning without a lawyer take place, in part, because many law enforcement authorities still perceive the presence of lawyers in police stations as disruptive to their work and to the investigation. In a context where criminal justice systems across Europe are under increasing pressure to deal with criminal cases as cost-effectively and quickly as possible, the police still heavily rely on confessions as a key piece of evidence.[23] As highlighted by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (**'CPT'**), "[i]t is self-evident that a criminal justice system which places a premium on confession evidence creates incentives for officials involved in the investigation of crime - and often under pressure to obtain results - to use physical or psychological coercion."[24] Aside from the use of deceptive and coercive interrogation techniques, the inherent coerciveness of police custody and the vulnerability of suspects in police custody is used to obtain statements. As this Court made clear, lawyers' presence should strive to rebalance the power dynamic at this early stage of the criminal justice process and play an active role in ensuring that the fair trial rights of the person, including the right to silence, are respected.[25]

14. It is well known that confessions as evidence carry a high risk of being unreliable as false confessions can be made under pressure. Research shows that the primary reason driving persons to make false confession is the use of psychologically coercive methods by the questioning authorities.[26] The UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment reported that "irrefutable evidence from the criminal justice system demonstrates that coercive methods of questioning, even when not amounting to torture,

[17] European Union Agency for Fundamental Rights, *Rights in practice: access to a lawyer and procedural rights in criminal and European arrest warrant proceedings*, Luxembourg: Publications Office of the European Union, 2019, pp 27-28, 42.
[18] *Ibid*., p.37
[19] *Ibid*., p.47
[20] *Ibid*., p.53
[21] *Ibid*., p.46
[22] See generally, European Union Agency for Fundamental Rights, *Rights in practice: access to a lawyer and procedural rights in criminal and European arrest warrant proceedings*, Luxembourg: Publications Office of the European Union, 2019, p. 37 and *Inside police custody 2*, An empirical study of suspects' rights at the investigative stage of the criminal process in nine EU countries, December 2018, pp. 53-54.
[23] United Nations Office of the High Commissioner for Human Rights (OHCHR), *Set universal standards for interviewing detainees without coercion,* A/71/298, § 10 ("In many countries, detainees are mistreated during investigations of common crimes. Pressure from politicians, supervisors, judges and prosecutors to solve high volumes of cases and inadequate measures of police performance, including systems of appraisal focusing only on the number of crimes "solved" or convictions, create perverse incentives for arrests and mistreatment").
[24] CPT, Extract from the 12th General Report of the CPT published in 2002, *Developments concerning CPT standards in respect of police custody,* § 35; OHCHR, *Set universal standards for interviewing detainees without coercion,* A/71/298, § 11.
[25] *Salduz v. Turkey*, App. No. 36391/02, 27 November 2008, § 53.
[26] CPT, Extract from the 12th General Report of the CPT published in 2002, *Developments concerning CPT standards in respect of police custody,* § 35.

produce false confessions."[27] Police coercion is limited by the presence of a lawyer.[28] Given the risk that people make false or incomplete statements, and the weight given to first statements on the conduct of the investigation and on judicial decision making,[29] these practices may lead to miscarriages of justice.[30]

15. Although most EU Member States are considered to have implemented EU law on the right of access to a lawyer in their national laws,[31] in practice today, the vast majority of suspects are still facing police questioning alone. The approach adopted in *Beuze* does not create an incentive for law enforcement authorities to respect and guarantee the rights of suspects to be assisted by a lawyer during questioning. Even though, in practice, an unjustified restriction to the right to a lawyer decisively impacts the outcome of proceedings, under the overall fairness test, it will not be remedied, as explained in the next section.

**PART B – THE USE OF STATEMENTS GATHERED IN THE ABSENCE OF A LAWYER IN PRACTICE**

16. The overall fairness test places an emphasis on evidentiary remedies. According to the Court in *Beuze*, "where an exclusionary rule is applied, it is particularly unlikely that the proceedings as a whole would be considered unfair."[32] However, as illustrated in this section, unlawfully obtained statements in the absence of a lawyer may be used by investigating and prosecuting authorities, even where exclusionary rules exist and are applied.

17. Questioning of suspects without the presence of a lawyer can offer multiple direct and indirect advantages for the prosecution's case even where the statements made by the suspect are not recorded or are formally excluded from the criminal case file. These can be very difficult or almost impossible to challenge and remedy effectively before or at trial.

18. Firstly, self-incriminating statements made by suspects during informal or formal interviews unlawfully conducted in the absence of a lawyer can be used directly as evidence at trial. The exclusionary rule does not apply and there are no restrictions on use of such evidence in trial in France, Greece, Poland, Romania and other states.[33]

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[27] OHCHR, *Set universal standards for interviewing detainees without coercion,* A/71/298, §§ 16-22.

[28] CPT, Extract from the 12th General Report of the CPT published in 2002, *Developments concerning CPT standards in respect of police custody,* § 41; Verhoeven W-J and Stevens L., "The Lawyer in the Dutch Interrogation Room: Influence on Police and Suspect." *in Journal of Investigative Psychology and Offender Profiling,* 2012.

[29] *Imbrioscia v. Switzerland*, App. No. 13972/88, 24 November 1993, §§ 39-44 ; *Salduz v. Turkey*, App. No. 36391/02, 27 November 2008, §§ 52, 56-62; *Dayanan v. Turkey*, App. No. 7377/03, 13 October 2009, §§ 31-43; *Pishchalnikov v. Russia*, App. No. 7025/04, 24 September 2009, §§ 72-9 ; *Ruşen Bayar v. Turkey*, App. No. 25253/08, 19 February 2019, § 134.

[30] OHCHR, *Set universal standards for interviewing detainees without coercion,* A/71/298, p.6.

[31] European Commission, *Report from the Commission to the European Parliament and the Council on the implementation of Directive 2013/48/ EU*, COM(2019) 560 final, p.3.

[32] *Beuze v. Belgium*, App. No. 71409/10, 9 November 2018, § 150 (b).

[33] European Union Agency for Fundamental Rights, *Rights in practice: access to a lawyer and procedural rights in criminal and European arrest warrant proceedings*, Luxembourg: Publications Office of the European Union, 2019, p. 54, see also *Shabelnik v. Ukraine*, App. No. 16404/03, 19 February 2009, § 59 and Anneli Soo (*Effective) Remedies for a Violation of the Right to Counsel during Criminal Proceedings in the European Union: An Empirical Study,* Utrecht Law Review, Vol. 14, Issue 1, 2018, pp. 30-31, Figure 1.

19. Even where the possibility to challenge the use of such statements and to exclude them exists under national law, such challenges may not be effective in practice. In many civil law systems, the assessment on admissibility of evidence is done during the trial on the merits and is carried out by the same judge(s) who will also make the final ruling on the guilt or innocence.[34] Therefore the content of statements obtained unlawfully, even where they are formally challenged and excluded from the evidence, are well known to the trial judges and will likely influence their decision making.[35]

20. In practice exclusion of evidence often means that judges are prohibited from relying on this evidence in the reasons of their written decisions, however the evidence may not be physically excluded from the case file and may be handed further to the judges deciding on subsequent appeals. Thus even where the exclusionary rule is applied it cannot be assumed that the negative consequences of questioning suspects in the absence of a lawyer is fully remedied and *status quo ante* restored, at least in civil law systems where there are no separate procedural stages dealing with the admissibility of evidence such as *voir dire* hearings.[36] A recent study on effective remedies for a violation of the right to a lawyer also confirms that in an overwhelming majority (15 out of 23) of states that apply the exclusionary rule in the EU, the impugned evidence will be brought to the attention of trial judges.[37]

21. Secondly, unrecorded or excluded statements obtained unlawfully from suspects in the absence of a lawyer can be admitted as evidence indirectly through unofficial memos, notes or even witness testimony about statements being made to police officers.[38] These statements, because they are typically made first, are sometimes given even more weight and considered more reliable than those made after consulting a lawyer.

22. Thirdly, even where the questioning of suspects in the absence of a lawyer is not in itself considered by the trial court or judge, the information gathered by investigating authorities during such interview may be used and indeed become a building block for the case against the suspect in the following ways:

    - Statements obtained in the absence of a lawyer may be used to directly or indirectly pressure the suspect to make the same declarations in a subsequent, officially recorded interview in the presence of a lawyer. The FRA report highlights a practice reported in Romania whereby "police question former witnesses again, this time as suspects, and ask

[34] For example, in Sweden and Lithuania the principle of 'free evidence' gives judges very broad discretion to decide whether to admit or reject any evidence presented in the trial. This assessment is done as a part of the trial on merits. Draft domestic report on evidentiary remedies in Sweden and Lithuania, to be published in Autumn 2021.

[35] Concurring opinion of judge Župančič in *Dvorski v. Croatia*, App. No. 25703/11, 20 October 2015, §§ 11-12.

[36] E.g., *Doyle v. Ireland*, App. No. 51979/17, 23 May 2019.

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

[38] *Inside police custody 2*, An empirical study of suspects' rights at the investigative stage of the criminal process in nine EU countries, December 2018, p. 44, European Union Agency for Fundamental Rights, *Rights in practice: access to a lawyer and procedural rights in criminal and European arrest warrant proceedings*, Luxembourg: Publications Office of the European Union, 2019, p. 41.

them if they stand by their previous statements".[39] Lawyers from Hungary note that information collected during informal questioning can be used to lead the conversation during an official interrogation or to phrase questions in a way that the suspect admits guilt.[40] Even where suspects may be informed that their previous statements may not legally be taken into account, in reality it is difficult or even impossible for them to create an artificial barrier between different stages of the proceedings or the different statuses under which people are questioned. Moreover, suspects are known to be likely to repeat their previous statements as they are aware that this information is already known to the officers conducting the investigation.[41] Even if the suspects choose to revoke or change their previous statements, this choice can still be used against them to undermine their credibility.[42]

- The information given by the suspects in the absence of a lawyer can be used to seek further evidence.[43] Lawyers in Hungary explain that unlawfully obtained statements which under national law will not be admissible at trial, may be used to question co-defendants, in the presence of lawyers, to obtain the same information or to force co-defendants to confess and implicate others.[44] The exclusionary rule is not applicable to derivative evidence in most EU Member States.[45] Thus, where the doctrine of 'fruit of poisonous tree'[46] is not applied to the evidence gathered on the basis of information given by a suspect in the absence of a lawyer, the benefits of this practice can be built into the prosecution's case and remain unchallenged. In this scenario, proving that unlawfully obtained statements, often not recorded in the criminal file, were used to obtain further evidence may be extremely challenging, if not impossible. Relying on exclusionary rules to remedy a restriction to the right to a lawyer in such cases is illusory.

23. Finally, the application of exclusionary rules often relies on a request to exclude evidence by the accused person, either before or during the trial. However, unlawfully obtained statements may lead the person to enter into a plea agreement or to agree to another form of trial waiver mechanism. There is increasing recourse to these mechanisms, with an overwhelming majority of cases in some states being resolved without a full criminal trial.[47] In these instances, where there

[39] European Union Agency for Fundamental Rights, *Rights in practice: access to a lawyer and procedural rights in criminal and European arrest warrant proceedings*, Luxembourg: Publications Office of the European Union, 2019, p. 32.
[40] An answer to Fair Trials' query to its LEAP network on the practice of 'informal questioning', unpublished.
[41] E.g., *Mehmet Zeki Çelebi v. Turkey*, App. No. 27582/07, 28 January 2020, §§ 66 and 70, see also *The forensic confirmation bias: Problems, perspectives, and proposed solutions,* Saul M. Kassina, Itiel E. Drorb, Jeff Kukuckaa, Journal of Applied Research in Memory and Cognition 2 (2013), section 4.5.
[42] See e.g. *Ibrahim and Others v. the United Kingdom*, App. Nos. 50541/08, 50571/08, 50573/08 and 40351/09, 13 September 2016, § 129 and *Farrugia v. Malta*, App. No. 63041/13, 4 June 2019, § 118.
[43] See e.g. information gathering examined by the Court in *Pishchalnikov v. Russia*, App. No. 7025/04, 24 September 2009, § 86.
[44] An answer to Fair Trials' query to its LEAP network on the practice of 'informal questioning', unpublished.
[45] Anneli Soo (*Effective) Remedies for a Violation of the Right to Counsel during Criminal Proceedings in the European Union: An Empirical Study,* Utrecht Law Review, Vol. 14, Issue 1, 2018, p. 28, Table 4.
[46] 'Fruit of the poisonous tree' doctrine is derived from the exclusionary rule. Under this doctrine evidence, which is obtained through, or stems from, illegally obtained evidence, such as an illegally obtained confession, must also be excluded from the trial.
[47] In Georgia, for example, 87,8% of cases are resolved through trial waiver systems; 70% in England & Wales; 85% in Scotland; 64% in Estonia, 64% in the Russian Federation; 43% in Poland; and 45,7% in Spain. See Fair Trials, *The Disappearing Trial: Towards a rights-based approach to trial waiver systems*, Report, 2017, pp. 23-34.

is no trial, such violations are likely to go unremedied,[48] because evidentiary remedies are not applicable outside a trial setting, or are *de facto* not applied because the accused person does not have an incentive to challenge the lawfulness of the evidence. Ultimately, even where the person has the opportunity to challenge the authenticity of the evidence and oppose its use, they may be incentivised not to use that opportunity in the context of a trial waiver system.

24. The imprint left by first statements in a criminal investigations and proceedings is often indelible. Statements obtained in the absence of a lawyer may be considered, directly or indirectly, by investigative authorities and judges, even where the exclusionary rule applies.

**PART C – THE NEED FOR A STRICT SCRUTINY OF THE PRACTICAL EFFECTIVENESS OF REMEDIES**

25. Fair Trials raised in its intervention in *Beuze v. Belgium* that the immediate consequence of the overall fairness test defined in *Ibrahim and Others v. United Kingdom* was to "legitimise the situation (…) whereby national remedies will tolerate reliance upon evidence obtained in the absence of a lawyer, and forestall continuation of the positive trajectory seen since *Salduz* (…)".[49] The current practice of states across Europe illustrates how the right has been watered down by the absence of effective remedial actions when it is violated. In fact, the overall fairness test gives a "possibility for argument as to the inclusion of evidence obtained in breach of the right of access to a lawyer will encourage investigations to proceed on the basis of such evidence, e.g., through the collection of other incriminating evidence rendering the confession unnecessary even if it is later excluded, circumventing the Article 6(3)(c) guarantee."[50]

26. The Court's case-law should not encourage such regression in the effectiveness of protection of fundamental rights. Fair Trials reiterates its position in *Beuze v. Belgium*: the Court should go back to the 'Salduz principle' according to which an unjustified denial of access to a lawyer and subsequent use of the statements made will result in an unfair trial.[51]

27. However, where the Court makes an assessment under the overall fairness test, Fair Trials submits that a robust and detailed examination of the legal framework and state practice governing the admissibility and the exclusion of evidence is necessary. Where an exclusionary rule is applied, the Court should not consider it "unlikely that the proceedings as a whole" have been unfair[52] before carrying out an in-depth analysis of the application of the exclusionary rule in practice. State practices described in Part B show that even when formally excluded from the body of evidence, unlawfully obtained statements can still remain in the court's case file or otherwise influence judge's decision making. Ineffective remedial actions inevitably lead law enforcement and prosecution authorities to keep violating the right to a lawyer, by resorting the practice illustrated in Part A.

28. Fair Trials is well aware that rules concerning the admissibility of evidence are a matter that this Court has to date left to the discretion of the Contracting States.[53] However, as the Court made

[48] Fair Trials, *The Disappearing Trial: Towards a rights-based approach to trial waiver systems*, Report, 2017, pp. 23-34.
[49] Fair Trials' intervention in *Beuze v. Belgium* (App. No. 71409/10), letter of 20 October 2017, p. 9.
[50] *Ibid.*, pp. 9-10.
[51] *Ibid*.
[52] *Beuze v. Belgium*, App. No. 71409/10, 9 November 2018, § 150 (b).
[53] See, inter alia, *Schenk v. Switzerland* App. No. 10862/84, 12 July 1988, §§ 74-75.

clear, rules of admissibility determine the availability and effectiveness of remedies for violations of defence rights protected by the Convention, and as such, whether the proceedings were overall fair.

29. Fair Trials submits that the factors listed in *Beuze* under the overall fairness test in fact require the Court to analyse national rules on admissibility and exclusion, and how they are practically and effectively applied to a specific case. Given the diverse and generally problematic practice of states regarding exclusionary rules, and in the absence of a bright line rule in line with the 'Salduz principle', it is the responsibility of the Court to apply a strict and thorough assessment of national rules on admissibility and exclusion, and to set clear standards to limit state practice outlined in Part A.