



Brussels, 27.11.2013  
COM(2013) 821 final

2013/0407 (COD)

Proposal for a

**DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**on the strengthening of certain aspects of the presumption of innocence and of the right  
to be present at trial in criminal proceedings**

{SWD(2013) 478 final}

{SWD(2013) 479 final}

{SWD(2013) 500 final}

## EXPLANATORY MEMORANDUM

### 1. CONTEXT OF THE PROPOSAL

#### 1.1. INTRODUCTION

1. This proposal for a Directive of the European Parliament and the Council aims to strengthen certain aspects of the right of suspects or accused persons in criminal proceedings throughout the European Union to be presumed innocent until proven guilty by a final judgment and to strengthen the right to be present at one's trial.
2. In the light of Article 82(1) of the Treaty on the Functioning of the European Union ("TFEU"), mutual recognition should be the cornerstone of judicial cooperation, that is, that judicial decisions taken in one Member State should be considered as equivalent to each other wherever that decision is taken, and so enforceable anywhere in the EU. Judicial cooperation needs to be founded on mutual trust and confidence between the different judicial systems and the perception that the rights of suspects or accused persons are not respected in every instance has a disproportionately detrimental effect on mutual trust and, in turn, on judicial cooperation.
3. In this context, the Stockholm Programme<sup>1</sup> put a strong focus on the strengthening of the rights of individuals in criminal proceedings. In its point 2.4, the European Council invited the Commission to put forward proposals, setting out a step by step approach to strengthening the rights of suspects or accused persons by setting common minimum standards on fair trial rights.
4. Three measures have already been adopted: Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings<sup>2</sup>, Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings<sup>3</sup> and 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<sup>4</sup>. Measures on the protection of vulnerable persons suspected or accused in criminal proceedings are presented as a package with the present initiative, together with a Directive on provisional legal aid for suspects or accused persons deprived of liberty and legal aid in European arrest warrant proceedings.
5. Moreover, the Commission published, on 14 June 2011, a Green Paper on the application of EU criminal justice legislation in the field of detention to reflect on ways to strengthen mutual trust and the application of the principle of mutual recognition in the area of detention, in accordance with and within the limits of the EU's competence.
6. The purpose of the whole exercise of the Commission's agenda on procedural rights is to ensure the respect of the right to a fair trial in the European Union. The principle

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<sup>1</sup> OJ C 115, 4.5.2010, p. 1.

<sup>2</sup> OJ L 280, 26.10.2010, p. 1.

<sup>3</sup> OJ L 142, 1.6.2012, p. 1.

<sup>4</sup> OJ L 294, 6.11.2013, p. 1.

of presumption of innocence, together with its related rights, contributes to ensuring the right to a fair trial. Various rights of suspects or accused persons in criminal proceedings established by the above-mentioned EU Directives over the past few years, such as the right to interpretation and translation, the right to information and the right to access to a lawyer are not objectives themselves. They have a wider aim; they are rather tools to materialise the principle of the right to a fair trial. Presumption of innocence and its related rights contribute to it. In case of persistent breach of presumption of innocence in the Member States, the objectives of the procedural right's agenda could not be fully achieved.

7. It is for this reason that, in the Stockholm Programme, the European Council expressly invited the Commission to address the issue of presumption of innocence.
8. The Commission made a thorough examination of the issue in its impact assessment and concluded that a measure on certain aspects of presumption of innocence is needed to strengthen this fundamental right. The overarching objectives of the measures already adopted in the area of procedural rights in criminal proceedings, including its key instrument which is the Directive on the right to access to a lawyer, still require that a certain minimum level of protection of the principle of presumption of innocence is guaranteed in all EU Member States.
9. This proposal is based on Article 82(2) TFEU. That Article provides that, '[t]o the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States.

*They shall concern:*

*(a) mutual admissibility of evidence between Member States;*

***(b) the rights of individuals in criminal procedure;***

*(c) the rights of victims of crime;*

*(d)[...].'*

10. The current proposal will also contribute to strengthening the legal safeguards that protect individuals involved in proceedings conducted by the European Public Prosecutor's Office. The recently presented Proposal for a Council Regulation<sup>5</sup> clarifies that the suspected person has all rights granted by EU legislation as well as other rights which derive directly from the Charter of the Fundamental Rights of the European Union ("the Charter"), to be applied in accordance with applicable national law, and it explicitly refers to the right to be presumed innocent. By introducing strengthened standards on presumption of innocence in the current proposal, the procedural safeguards applying before the European Public Prosecutor's Office are also reinforced.
11. Article 6(3) of the Treaty on European Union ("TEU") provides that fundamental rights, as guaranteed by the European Convention of Human Rights and Fundamental Freedoms ("the ECHR") and as they result from the constitutional traditions common to the Member States, constitute general principles of EU law.

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<sup>5</sup> Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, COM(2013) 534 final, 17.7.2013.

Article 6(1) TEU provides that the European Union recognises the rights, freedoms and principles set out in the Charter, which has the same legal value as the TFEU and the TEU. The Charter is addressed to EU institutions and Member States when they implement EU law, such as in the field of judicial cooperation in criminal matters in the European Union.

12. Article 47 of the Charter stipulates the right to a fair trial. Article 48 guarantees the right to be presumed innocent and has the same meaning and scope as the right guaranteed by Article 6(2) of the ECHR<sup>6</sup>. Article 6(2) of the ECHR stipulates that everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. Article 11(1) of the Universal Declaration of Human Rights safeguards this principle by the same wording. Article 14(2) of the International Covenant on Civil and Political Rights ("ICCPR")<sup>7</sup> contains a very similar provision.
13. The European Court of Human Rights (ECtHR) has clarified the scope of Article 6 of the ECHR. The Court has repeatedly held that it applies as well to the pre-trial stage of criminal proceedings<sup>8</sup> and that suspects or accused persons have the rights under Article 6 of the ECHR at the initial stages of police questioning<sup>9</sup>. The Court has also ruled that these guarantees must apply to witnesses whenever they are in reality suspected of a criminal offence, as the formal qualification of the person is immaterial<sup>10</sup>.
14. The principle of presumption of innocence has been developed over the years. The ECtHR has held that Article 6(2) of the ECHR encompasses three key requirements<sup>11</sup>: the right not to be publicly presented as convicted by public authorities before the final judgment<sup>12</sup>, the fact that the burden of proof is on prosecution and that any reasonable doubts on guilt should benefit the accused and the right of the accused to be informed of the accusation. The ECtHR also recognises the existence of a clear link between the presumption of innocence and other fair trial rights, in the sense that when such rights are breached, the presumption of innocence is inevitably also at stake: the right not to incriminate one-self, the right not to cooperate and the right to silence<sup>13</sup> and the right to liberty (and not to be placed in pre-trial detention)<sup>14</sup>.
15. The right to be present at trial is an essential right of defence. The right of the accused person to appear in person at the trial is part of the right to a fair trial provided for in Article 6 of the ECHR, as interpreted by the ECtHR<sup>15</sup>. Strengthening this right will therefore contribute to reinforce the right to a fair trial.

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<sup>6</sup> OJ C 303, 14.12.2007, p. 30. Explanations relating to the Charter of Fundamental Rights.

<sup>7</sup> 999 U.N.T.S. 171. The ICCPR is an international convention on civil and political rights opened for signature by resolution of the United Nations General Assembly on 16 December 1966 which has been ratified by, and is thus binding in international law on, all EU Member States.

<sup>8</sup> *Salduz v Turkey* (judgment of 27.11.2008, application 36391/02, paragraph 50).

<sup>9</sup> *Idem*, paragraph 52.

<sup>10</sup> *Brusco v France* (judgment of 14.10.2010, application 1466/07, paragraph 47).

<sup>11</sup> *Barberà, Messegué and Jabardo v. Spain* (judgment of 6.12.1988, applications 10588/83, 10589/83 and 10590/83). See also *Alenet de Ribemont v. France* (judgment of 10.2.1995, application 15175/89).

<sup>12</sup> *Minelli v. Switzerland* (judgment of 25.3.1983, application 8660/79).

<sup>13</sup> *Funke v. France* (judgment of 25.2.1993, application 10828/84), *Murray v. UK* (judgment of 8.2.1996, application 18731), *Saunders v. UK* (judgment of 17.12.1996, application 19187/91).

<sup>14</sup> Except when the public interest justifies a departure from the principle of the right to liberty - see *Kudla v. Poland* (judgment of 26.10.2010, application 30210/96).

<sup>15</sup> *Colozza v. Italy* (judgment of 12 February 1985, application 9024/80).

16. The right to be informed of the accusation is covered by the Directive 2012/13/EU on the right to information in criminal proceedings and is therefore not covered by this Directive. Pre-trial detention is the subject of separate initiatives<sup>16</sup> and is therefore not addressed in this Directive. All other above-mentioned aspects of the principle of the presumption of innocence or related to it are dealt with in this proposal.
17. This Directive lays down minimum requirements at EU level governing certain aspects of the right of suspects or accused persons to be presumed innocent, in line with the Stockholm Programme and the ECtHR case law. It thus promotes the application of the Charter, and in particular Articles 6, 47 and 48 therein, by building upon Article 6 of the ECHR as interpreted by the ECtHR.

## **1.2. RESULTS OF CONSULTATIONS WITH THE INTERESTED PARTIES AND IMPACT ASSESSMENT**

18. Stakeholders were consulted on several occasions.
19. In 2006 the Commission published a Green Paper<sup>17</sup> on the presumption of innocence. At that time, 11 Member States replied to the consultation and independent experts and practitioners took this opportunity to point out an erosion of the principle of presumption of innocence and to underline, in particular as regards investigations against non-nationals or non-residents, that a principle of "presumption of guilt" seems to be more and more tolerated in national systems.
20. The Commission has also had contact with major stakeholders and has benefitted from consultations on the other initiatives attached to this package.
21. In the meeting of the Expert Group on EU Criminal Policy of 23 January 2013, the Commission gathered views from academics, practitioners, judges, defence lawyers and prosecutors on the topic.
22. Moreover, a meeting with Representatives of Ministries of Justice of Member States and Croatia specifically devoted to the presumption of innocence was held on 19 February 2013.
23. In addition to this, in the framework of the study carried out for the preparation of the Impact Assessment accompanying this proposal, an on-line survey was launched on 27 February 2013 and published on the DG Justice and EJM website. All major stakeholders were informed about this survey via e-mail and more than 100 responses were received. The survey focused not only on the legal situation as regards the protection of the right to be presumed innocent in the Member States, but above all on its functioning in practice. The findings of this survey were included in the Annex III of the Impact Assessment accompanying this Proposal. The Impact Assessment is available at [<http://ec.europa.eu/governance>]. It has shown that the level of safeguards in Member States' legislation is, in a general way, acceptable and there does not seem to be any systemic problem in this area. However, there still

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<sup>16</sup> COM(2011) 327 final, 14.6.2011. The themes of the Green Paper were pre-trial detention and mutual recognition of custodial and non-custodial decisions. The Commission received 81 replies from Member States, civil society and NGOs. A summary of the replies has been published on the website of the Commission. [http://ec.europa.eu/justice/newsroom/criminal/opinion/110614\\_en.htm](http://ec.europa.eu/justice/newsroom/criminal/opinion/110614_en.htm). See also Framework Decision 2009/829/JHA of 23 October 2009 on the application of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention (OJ L 294, 11.11.2009, p. 20).

<sup>17</sup> COM(2006) 174 final, 26.4.2006.

exist points in which legal safeguards should be improved. Moreover, breaches of presumption of innocence do still occur too often across the EU.

## **2. LEGAL ELEMENTS OF THE PROPOSAL**

### **2.1. SPECIFIC PROVISIONS**

#### **Article 1 — Subject matter**

24. The objective of the Directive is to lay down minimum rules concerning certain aspects of the right of suspects or accused persons to be presumed innocent until proved guilty by a final judgment. This Directive covers the following rights: the right not to be presented as guilty by public authorities before the final judgment, the fact that the burden of proof is on prosecution and that any reasonable doubts on the guilt should benefit the accused, the right not to incriminate one-self, the right not to cooperate and the right to remain silent. The right to be present at one's trial is also addressed by this Directive.

#### **Article 2 — Scope**

25. The Directive applies to suspects or accused persons in criminal proceedings from the very start of the criminal proceedings, even before the time when the suspects are made aware by the competent authorities of the fact that they are suspected or accused of having committed a criminal offence. It applies until the conclusion of such proceedings, i.e. until the final judgement is delivered.

26. The right to be presumed innocent encompasses different needs and degrees of protection regarding natural persons and legal persons, as recognised in the case law of the Court of Justice on the right not to incriminate one-self<sup>18</sup>. This Directive takes into account these differences and therefore only applies to natural persons.

27. Protection of the right of legal persons to be presumed innocent is nevertheless ensured by the existing safeguards of national and Union legislation, as interpreted by national courts and by the Court of Justice, and by the ECHR as interpreted by the ECtHR.

28. The "step-by-step" approach of intervention of Union law, in particular in the area of rights of individuals in criminal procedure, is therefore kept and respected. Future initiatives in this field will be considered depending on the evolution of national legislation and of the case law.

#### **Article 3 – Presumption of innocence**

29. This provision lays down the right to the presumption of innocence.

#### **Article 4 — Public references to guilt before conviction**

30. The ECtHR established as one of the basic aspects of the principle of presumption of innocence the fact that a court or public official may not publicly present the suspects or accused persons as if they were guilty of an offence if they have not been tried and convicted of it by a final judgment<sup>19</sup>. This principle should furthermore apply, following the ECtHR case law, to all public authorities<sup>20</sup>. Both situations might

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<sup>18</sup> See, *inter alia*, Case C-301/04 P Commission v SGL Carbon [2006] ECR I-5915; Case T-112/98 Mannesmannröhren-Werke v Commission [2001] ECR II-732.

<sup>19</sup> See *Minelli v. Switzerland*.

<sup>20</sup> See *Allenet de Ribemont v. France*.

encourage the public to believe that person is guilty and prejudice the assessment of the facts by the judicial authority.

31. This principle should be without prejudice to the possibility of publication, according to national law, of decisions imposing sanctions following administrative proceedings.

#### **Article 5 – Burden of proof and standard of proof required**

32. Presumption of innocence presupposes that the burden of proof is on the prosecution and any doubt on the guilt should benefit the suspects or accused persons (*in dubio pro reo*). This presupposes that a court's judgment must be based on evidence as put before it and not on mere allegations or assumptions. This is without prejudice to the independence of the judiciary when assessing the suspect or accused's guilt. Furthermore, the ECtHR has admitted that in specific and limited cases the burden of proof can be shifted to the defence. This Article reflects the ECtHR principle<sup>21</sup>, which is considered as a correct balance between the public interest (the needs of prosecution) and the right of the defence. This Directive is without prejudice to the possibilities for the defence to present evidence in accordance with the applicable national rules.

#### **Article 6 and Article 7 – Right not to incriminate one-self and not to cooperate, right to remain silent**

33. These two Articles establish the right not to incriminate oneself and not to cooperate and the right to remain silent. The right not to be compelled to testify against oneself and not to confess guilt and not to cooperate and the right to remain silent are generally recognised international standards which lie at the heart of the notion of a fair trial under Article 6 of the ECHR<sup>22</sup>. Their rationale lies, *inter alia*, in the protection of the accused against improper compulsion by the authorities, thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of Article 6 of the ECHR. The "degree of compulsion" imposed on suspects or accused persons with a view to compel them to provide information relating to charges against them cannot destroy, even for reasons of security and public order, the very essence of their right not to incriminate one-self and their right to remain silent<sup>23</sup>. Article 3 ECHR, on the prohibition of torture, as interpreted by the ECtHR, should in any case be respected.
34. The right not to incriminate one-self is primarily concerned with respecting the will of suspects or accused persons to remain silent and, in particular, presupposes that the prosecution in a criminal case seeks to prove the case against the suspects or accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the suspects or accused. Moreover, the scope of the right is not confined to cases where duress has been brought to bear on the accused or where the will of the accused has been directly overborne in some way<sup>24</sup>. In this sense, according to the ECtHR, the right in question is closely linked to the presumption of innocence contained in Article 6(2) of the ECHR.

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<sup>21</sup> See, *inter alia*, ECtHR cases *Salabiaku v. France* (judgment of 7.10.1988, application 10519/83), *Barberà, Messegué and Jabardo v. Spain*, *Telfner v. Austria* (judgment of 20.3.2001, application 33501/96).

<sup>22</sup> See, *inter alia*, ECtHR cases *Funke v. France*, *Murray v. UK*, *Saunders v. UK*, *Heaney and McGuinness v. Ireland* (judgment of 21.12.2000, application 34720/97), *Jalloh v. Germany* (judgment of 11.7.2006, application 54810/00).

<sup>23</sup> See *Heaney and McGuinness v. Ireland*, paragraphs 55 and 58.

<sup>24</sup> See *Allan v. UK* (judgment of 5.11.1992, application 48539/99, paragraph 50).

35. Suspects or accused persons should be promptly informed of their right to remain silent, as according to Directive 2012/13/EU. Such information should also refer to the content of the right to remain silent and of the consequences of renouncing to it and of invoking it.
36. Any inferences drawn from the fact that suspects or accused persons make use of these rights should be excluded. Without this, the right would be merely illusory if the suspects or accused had to fear that their non-cooperation or their silence will be used against them later in the criminal proceedings. This is the sole way to ensure the effective exercise of these rights by suspects or accused persons without a fear that such exercise can be used against them at a later stage. Therefore, the Directive also provides a specific and immediate remedy that any use of evidence obtained in breach of these rights is not allowed, save in those very exceptional cases where the use of such evidence will not prejudice the overall fairness of the proceedings<sup>25</sup>.
37. The fact that no inferences should be drawn from the exercise of these rights and that the exercise of these rights should not be used against suspects or accused persons at a later stage of the criminal proceedings should not prevent Member States from taking into account cooperative behaviour when deciding the concrete sanction to impose.

#### **Article 8 and Article 9 – Right to be present at one's trial**

38. If a person is not present during the trial, his right of defence is at stake. The defendant is in such case neither able to give his version of the facts to the Court, nor is able to present evidence accordingly. He might therefore be found guilty without having had the opportunity to rebut the grounds for such a conviction.
39. The right to be present at trial, or being able to waive such right after having been informed of it, is indispensable for the exercise of the rights of defence.
40. Article 8 provides that Member States must ensure that the right to be present applies to any trial aiming at assessing the question of the guilt of the accused person (both conviction and acquittal decisions). The presence of the suspects or accused at this moment in the criminal proceedings is of particular importance given the consequences that moment could have.
41. Article 8 stipulates the right established by the ECtHR of an accused to be present at the trial and also establishes limited exceptions to this right, in line with the Charter, the ECHR and EU law<sup>26</sup>. Provided that the conditions laid down in Article 8 are respected, nothing prevents Member States to make use of "simplified procedures" for the most common minor offences. Article 9 establishes that a remedy (as established by the ECtHR) in cases where the right to be present at trial has not been observed is an obligation to provide for a re-trial<sup>27</sup>.

#### **Article 10 – Remedies**

42. The ECtHR has consistently held that the most appropriate form of redress for a violation of the right to a fair trial in Article 6(2) ECHR would be to ensure that

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<sup>25</sup> See *Allan v. UK*, paragraph 42.

<sup>26</sup> See Council Framework Decision 2009/299/JHA of 26 February 2009 (OJ L 81, 27.3.2009, p. 24).

<sup>27</sup> *Colozza v. Italy*.

suspects or accused persons, as far as possible, are put in the position in which they would have been had their rights not been disregarded<sup>28</sup>.

#### **Article 11 – Data collection**

43. In order to monitor and evaluate the effectiveness and efficiency of this Directive, there is a need for collection of data by the Member States with regard to the exercise of the rights set out in this Directive. Relevant data include data recorded by the judicial authorities and by law enforcement authorities regarding which remedy is applied whenever there has been a breach of presumption of innocence and of the right to present at trial.

#### **Article 12 – Non-regression clause**

44. The purpose of this Article is to ensure that setting common minimum standards in accordance with this Directive does not have the effect of lowering standards in certain Member States and that the standards set in the Charter and in the ECHR are maintained. Since this Directive provides for minimum rules, in line with Article 82 TFEU, Member States remain free to set standards higher than those agreed in this Directive.

#### **Article 13 – Transposition**

45. This Article requires that Member States must implement the Directive by xx/xx/201x and, by the same date, transmit the text of the provisions transposing it into national law to the Commission. Given the simplicity of the transposition measures to be implemented, the Commission does not require explanatory documents to carry out its task of overseeing the transposition of the Directive. The individual transposition measures to be notified should be sufficiently self-explanatory.

#### **Article 14 – Entry into force**

46. This Article provides that the Directive will enter into force on the twentieth day following its publication in the *Official Journal of the European Union*.

### **2.2. SUBSIDIARITY PRINCIPLE**

47. There is a significant variation in the legislation of the Member States on the right to be presumed innocent and to all its aspects. Case law of the ECtHR shows that violations of presumption of innocence and its related fair trial rights have steadily taken place. This leads to the lack of mutual trust between judicial authorities of different EU Member States. As a result, judicial authorities are reluctant to cooperate with each other. The impact assessment attached to this proposal shows that the ECtHR alone does not ensure a full protection of presumption of innocence: some aspects of presumption of innocence have not been recently or extensively considered by the ECtHR, and the redress procedure at the ECtHR intervenes only ex post, after exhaustion of all internal remedies. This Directive will complement the safeguards provided for by the ECtHR and ensure that presumption of innocence is protected from the start of the criminal proceedings, including the possibility of recourse to EU redress mechanisms.

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<sup>28</sup> See *Teteriny v. Russia* (judgment of 30.6.2005, application 11931/03, paragraph 56), *Jeličić v. Bosnia and Herzegovina* (judgment of 31.10.2006, application 41183/02, paragraph 53), and *Mehmet and Suna Yiğit v. Turkey* (judgment of 17.7.2007, application 52658/99, paragraph 47), *Salduz v Turkey*, paragraph 72.

48. The objective of the proposal cannot be sufficiently achieved by Member States alone as the aim of the proposal is to promote mutual trust; it has to be action taken by the European Union, which will establish consistent common minimum standards that apply throughout the whole of the European Union. This has been confirmed by the Stockholm Programme, in which the European Council invited the Commission to address the issue of presumption of innocence. The proposal will approximate Member States' procedural rules regarding certain aspects of the right to be presumed innocent and regarding the right to be present at one's trial in criminal proceedings, the aim being to enhance mutual trust. The proposal therefore complies with the subsidiarity principle.

### **2.3. PROPORTIONALITY PRINCIPLE**

49. The proposal complies with the proportionality principle in that it does not go beyond the minimum required in order to achieve the stated objective at European level and what is necessary for that purpose. The proposal only deals with certain aspects of presumption of innocence, that are more directly linked to the functioning of mutual recognition instruments and to police and judicial cooperation in criminal matters. Furthermore, it is limited to natural persons. This is in line with the "step-by-step" approach of EU intervention in the area of procedural rights in criminal matters and the need for proportionate action.

### **3. BUDGETARY IMPLICATIONS**

50. This proposal does not have any impact on the EU budget.

Proposal for a

**DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 82(2) (b) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national Parliaments,

Having regard to the opinion of the European Economic and Social Committee<sup>29</sup>,

Having regard to the opinion of the Committee of the Regions<sup>30</sup>,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) The purpose of this Directive is to enhance the right to a fair trial in criminal proceedings by laying down minimum rules concerning certain aspects of the presumption of innocence and the right to be present at the trial.
- (2) By establishing minimum rules on the protection of procedural rights of suspects or accused persons, this Directive should strengthen the trust of Member States in the criminal justice systems of other Member States and can thus help to facilitate mutual recognition of decisions in criminal matters. Such common minimum rules should also remove obstacles to the free movement of citizens throughout the territory of the Member States.
- (3) The Stockholm Programme<sup>31</sup> put a strong focus on the strengthening of the rights of individuals in criminal proceedings. In its point 2.4, the European Council invited the Commission to put forward proposals setting out a step by step approach to strengthening the rights of suspects or accused persons. The EU agenda on procedural rights is designed to operate as a whole, only when all its components are implemented will its benefits be felt in full.
- (4) In the Stockholm Programme the European Council invited the Commission to examine further elements of minimum procedural rights for suspects or accused persons, and to assess whether other issues, for instance the presumption of innocence, need to be addressed, in order to promote better cooperation in that area.

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<sup>29</sup> OJ C , , p. .

<sup>30</sup> OJ C , , p. .

<sup>31</sup> OJ C 115, 4.5.2010, p. 1.

- (5) Three measures have already been adopted: Directive 2010/64/EU of the European Parliament and of the Council<sup>32</sup>, Directive 2012/13/EU of the European Parliament and of the Council<sup>33</sup> and Directive 2013/48/EU of the European Parliament and of the Council<sup>34</sup>.
- (6) This Directive should apply only to criminal proceedings. Administrative proceedings leading to sanctions such as competition, trade, tax, financial services proceedings and other investigations by administrative authorities in relation to these proceedings, and also civil proceedings are not covered by this Directive.
- (7) This Directive should facilitate the practical application of the right to be presumed innocent and all its different aspects and also of the right to be present at one's trial, with a view to safeguarding the right to a fair trial.
- (8) This Directive should apply to natural persons who are suspected or accused of having committed a criminal offence. It should apply at any stage of the proceedings, even before those persons are made aware by the competent authorities of a Member State, by official notification or otherwise, that they are suspected or accused of having committed a criminal offence, until the conclusion of such proceedings.
- (9) This Directive acknowledges the different needs and levels of protection of certain aspects of the right to be presumed innocent as regards natural persons and legal persons. Such protection as regards natural persons is reflected in abundant case law of the European Court of Human Rights. The Court of Justice of the European Union has, however, recognised that the rights flowing from the presumption of innocence do not accrue to legal persons in the same way as to natural persons.
- (10) In the current state of development of national legislations and of case law at national level and at the level of the Court of Justice it is premature to legislate at Union level on the right to be presumed innocent of legal persons.
- (11) Protection of the right of legal persons to be presumed innocent should be ensured by the existing legislative safeguards and case law, the evolution of which in the future should determine an assessment of the need for Union action.
- (12) "Law enforcement or judicial authorities" for the purposes of this Directive refers to public authorities which, according to national law, exercise powers in the realm of criminal proceedings.
- (13) The presumption of innocence is violated if, without the accused's having previously been proved guilty according to law, a judicial decision or a public statement by judicial or other public authorities presents the suspects or accused persons as if they were convicted.
- (14) The burden of proof is on the prosecution, and any doubt should benefit the accused. Thus, the presumption of innocence will be infringed where the burden of proof is shifted from the prosecution to the defence, without prejudice to any possible *ex*

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<sup>32</sup> Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings (OJ L 280, 26.10.2010, p. 1).

<sup>33</sup> Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings (OJ L 142, 1.6.2012, p. 1).

<sup>34</sup> 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 (OJ L 294, 6.11.2013, p. 1).

*officio* fact findings powers of the court and without prejudice to the independence of the judiciary when assessing the suspect's or accused's guilt.

- (15) However, in some cases shifting the burden of proof to the defence should not be incompatible with the presumption of innocence as long as certain safeguards are guaranteed: it should be ensured that presumptions of fact or law are confined within reasonable limits, which take into account the importance of what is at stake, and that they are rebuttable, for example by means of new evidence on extenuating circumstances or on a case of *force majeure*.
- (16) The right not to incriminate oneself and not to cooperate is an important aspect of the presumption of innocence. Suspect or accused persons should not be forced, when asked to make a statement or answer questions, to produce evidence or documents or to provide information which may lead to incriminate themselves.
- (17) Any compulsion used to compel the suspect or accused person to provide information should be limited. To determine whether the compulsion did not violate those rights, the following should be taken into account, in the light of all circumstances of the case: the nature and degree of compulsion to obtain the evidence, the weight of the public interest in the investigation and punishment of the offense at issue, the existence of any relevant safeguards in the procedure and the use to which any material so obtained is put. However, the degree of compulsion imposed on suspects or accused persons with a view to compelling them to provide information relating to charges against them should not destroy the very essence of their right not to incriminate one-self and their right to remain silent, even for reasons of security and public order.
- (18) The right not to incriminate oneself and not to cooperate should not extend to the use in criminal proceedings of material which may be obtained from the suspect or accused person through the use of lawful compulsory powers but which has an existence independent of the will of the suspects or accused persons, such as material acquired pursuant to a warrant, material in respect of which there is a legal obligation of retention and production upon request, breath, blood and urine samples and bodily tissue for the purpose of DNA testing.
- (19) The right to remain silent is an important aspect of the presumption of innocence. It should serve as protection from self-incrimination.
- (20) The right not to incriminate oneself and not to cooperate and the right to remain silent should apply as regards questions material to the offence that someone is suspected or accused of having committed and not, for example, as regards questions relating to the personal identification of a suspect or accused person.
- (21) The right to a fair trial is one of the basic principles in a democratic society. The right of an accused person to be present at the trial is based on that right and should be guaranteed throughout the Union.
- (22) However, the right of the accused person to be present at the trial is not absolute. Under certain conditions the accused person may, expressly or tacitly but unequivocally, waive that right.
- (23) Under certain well defined conditions which ensure effective compliance with the right to a fair trial, it should be possible for a trial resulting in the decision on guilt or innocence to take place in the absence of the suspect or accused person.

- (24) This Directive should not regulate the forms and methods, including procedural requirements, that are used to achieve the results specified as regards the right to be present at one's trial, which are a matter for the national laws of the Member States.
- (25) When considering whether the way in which the information is provided is sufficient to ensure the person's awareness of the trial, particular attention could, where appropriate, also be paid to the diligence exercised by the person concerned in order to receive information addressed to him or her.
- (26) The principle of effectiveness of Union law requires that Member States put in place adequate and effective remedies in the event of a breach of a right conferred upon individuals by Union law. An effective remedy available in the event of a breach of any of the principles laid down in this Directive should have, as far as possible, the effect of placing the suspects or accused persons in the same position in which they would have found themselves had the breach not occurred.
- (27) In order to monitor and evaluate the effectiveness of this Directive, Member States should collect data with regard to the implementation of the rights set out in this Directive. Such data should include data recorded by law enforcement and judicial authorities as regards the remedy applied where there has been a breach of any of the aspects of the right to presumption of innocence covered by this Directive and a breach of the right to be present at one's trial.
- (28) This Directive upholds the fundamental rights and principles recognised by the Charter of Fundamental Rights of the European Union and the European Convention for the Protection of Human Rights and Fundamental Freedoms, including the prohibition of torture and inhuman and degrading treatment, the right to liberty and security, respect for private and family life, the right to the integrity of the person, the rights of the child, integration of persons with disabilities, the right to an effective remedy and the right to a fair trial, the presumption of innocence and the rights of the defence.
- (29) As this Directive establishes minimum rules, Member States may extend the rights set out in this Directive in order to provide a higher level of protection. Such higher level of protection should not constitute an obstacle to the mutual recognition of judicial decisions that those minimum rules are designed to facilitate. The level of protection should never fall below the standards provided by the Charter of Fundamental Rights of the European Union or the European Convention for the Protection of Human Rights and Fundamental Freedoms, as interpreted in the case law of the Court of Justice and of the European Court of Human Rights.
- (30) Since the objectives of this Directive, namely setting common minimum rules for certain aspects of the right to presumption of innocence and for the right to be present at trial in criminal proceedings, cannot be sufficiently achieved by the Member States but can rather, by reason of the scale of the measure, be better achieved at Union level, the Union may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.
- (31) [In accordance with Article 3 of Protocol No 21 on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, those Member States have notified their wish to participate in the adoption and

application of this Directive] OR [In accordance with Articles 1 and 2 of Protocol 21 on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union and without prejudice to Article 4 of that Protocol, those Member States are not taking part in the adoption of this Directive and are not bound by it or subject to its application]<sup>35</sup>.

- (32) In accordance with Articles 1 and 2 of Protocol No 22 on the position of Denmark, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, Denmark is not taking part in the adoption of this Directive, and is not bound by it or subject to its application,

HAVE ADOPTED THIS DIRECTIVE:

## **CHAPTER 1**

### **Subject matter and Scope**

#### *Article 1* *Subject matter*

This Directive lays down minimum rules concerning:

- (a) certain aspects of the right to the presumption of innocence in criminal proceedings;
- (b) the right to be present at trial in criminal proceedings.

#### *Article 2* *Scope*

This Directive applies to natural persons suspected or accused in criminal proceedings until the final conclusion of those proceedings.

## **CHAPTER 2**

### **Right to the presumption of innocence**

#### *Article 3* *Presumption of innocence*

Member States shall ensure that suspects or accused persons are presumed innocent until proven guilty according to law.

#### *Article 4* *Public references to guilt before conviction*

Member States shall ensure that, before a final conviction, public statements and official decisions from public authorities do not refer to the suspects or accused persons as if they were convicted.

Member States shall ensure that appropriate measures are taken in the event of a breach of that requirement.

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<sup>35</sup> The final wording of this recital in the Directive will depend on the position of the United Kingdom and Ireland taken in accordance with the provisions of protocol (No 21).

*Article 5*  
*Burden of proof and standard of proof required*

1. Member States shall ensure that the burden of proof in establishing the guilt of suspects or accused persons is on the prosecution. This is without prejudice to any *ex officio* fact finding powers of the trial court.
2. Member States shall ensure that any presumption, which shifts the burden of proof to the suspects or accused persons, is of sufficient importance to justify overriding that principle and is rebuttable.

In order to rebut such a presumption it suffices that the defence adduces enough evidence as to raise a reasonable doubt regarding the suspect or accused person's guilt.

3. Member States shall ensure that where the trial court makes an assessment as to the guilt of a suspect or accused person and there is reasonable doubt as to the guilt of that person, the person concerned shall be acquitted.

*Article 6*  
*Right not to incriminate oneself and not to cooperate*

1. Member States shall ensure that suspects or accused persons have the right not to incriminate themselves and not to cooperate in any criminal proceeding.
2. The right referred to in paragraph 1 shall not extend to the use in criminal proceedings of material which may be obtained from the suspects or accused persons through the use of lawful compulsory powers but which has an existence independent of the will of the suspects or accused persons.
3. Exercise of the right not to incriminate oneself or of the right not to cooperate shall not be used against a suspect or accused person at a later stage of the proceedings and shall not be considered as a corroboration of facts.
4. Any evidence obtained in breach of this Article shall not be admissible, unless the use of such evidence would not prejudice the overall fairness of the proceedings.

*Article 7*  
*Right to remain silent*

1. Member States shall ensure that suspects or accused persons have the right to remain silent when questioned, by the police or other law enforcement or judicial authorities, in relation to the offence that they are suspected or accused of having committed.
2. Member States shall promptly inform the suspect or accused persons of their right to remain silent, and explain the content of this right and the consequences of renouncing or invoking it.
3. Exercise of the right to remain silent shall not be used against a suspect or accused person at a later stage in the proceedings and shall not be considered as a corroboration of facts.
4. Any evidence obtained in breach of this Article shall not be admissible, unless the use of such evidence would not prejudice the overall fairness of the proceedings.

## **CHAPTER 3**

### **Right to be present at one's trial**

#### *Article 8*

##### *Right to be present at one's trial*

1. Member States shall ensure that suspects or accused persons have the right to be present at their trial.
2. Member States may provide for a possibility under which the trial court may decide on the guilt in the absence of the suspect or the accused person, provided that the suspect or accused person:
  - (a) in due time:
    - (i) either was summoned in person and thereby informed of the scheduled date and place of the trial, or by other means actually received official information of the scheduled date and place of that trial in such a manner that it was unequivocally established that he or she was aware of the scheduled trial;
  - and
  - (ii) was informed that a decision may be handed down if he or she does not appear for the trial; or
  - (b) being aware of the scheduled trial, had given a mandate to a legal counsellor, who was either appointed by the person concerned or by the State, to defend him or her at the trial, and was indeed defended by that counsellor at the trial.
3. If the conditions of paragraph 2 have not been met, a Member State can proceed to execution of a decision intended in that paragraph if, after being served with the decision and being expressly informed about the right to a retrial, or an appeal, in which the person has the right to participate and which allows a fresh determination of the merits of the case, including examination of new evidence, and which may lead to the original decision to be reversed, the person:
  - (a) expressly states that he or she does not contest the decision;
  - or
  - (b) does not request a retrial or appeal within a reasonable time frame.

#### *Article 9*

##### *Right to a retrial*

Member States shall ensure that where the suspects or accused persons were not present at the trial referred to in Article 8(1) and the conditions laid down in Article 8(2) and (3) are not met, the person concerned has the right to a new trial at which they have the right to be present and which allows a fresh determination of the merits of the case, including examination of new evidence, and which may lead to the original decision to be reversed.

## **CHAPTER 4**

### **General and final provisions**

#### *Article 10* *Remedies*

1. Member States shall ensure that suspects or accused persons have an effective remedy if their rights under this Directive are breached.
2. The remedy shall have, as far as possible, the effect of placing suspects or accused persons in the same position in which they would have found themselves had the breach not occurred, with a view to preserving the right to a fair trial and the right to defence.

#### *Article 11* *Data collection*

Member States shall, by [...] and every three years thereafter, send to the Commission data showing how the rights under in this Directive have been implemented.

#### *Article 12* *Non-regression clause*

Nothing in this Directive shall be construed as limiting or derogating from any of the rights and procedural safeguards that are ensured under the Charter of Fundamental Rights of the European Union, the European Convention for the Protection of Human Rights and Fundamental Freedoms, or other relevant provisions of international law or the law of any Member State which provides a higher level of protection.

#### *Article 13* *Transposition*

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by [18 months after publication of this Directive]. They shall forthwith communicate to the Commission the text of those provisions.

When Member States adopt those measures, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

#### *Article 14* *Entry into force*

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

*Article 15*  
*Addressees*

This Directive is addressed to the Member States in accordance with the Treaties.

Done at Brussels,

*For the European Parliament*  
*The President*

*For the Council*  
*The President*