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#### **NOTE**

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From:	Presidency
To:	Working Party on Substantive Criminal Law
No. Cion doc.:	17621/13 DROIPEN 158 COPEN 235 CODEC 2929
Subject:	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 - Revised text following the meeting on 15 July 2014

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#### **Introduction**

1. On 15 July, the Working Party on Substantive Criminal Law examined the proposed Directive for the first time. During the discussions, the Working Party took account of the results of the orientation debate on the proposal in the meeting of CATS on 2 July 2014.<sup>1</sup>

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<sup>1</sup> See doc. 11632/14.

2. As in CATS, the NL delegation, supported by the DK, IE and UK delegations,<sup>2</sup> voiced concerns regarding the added value of the proposed Directive. The NL delegation felt, *inter alia*, that the impact assessment had not made clear that the Directive was necessary, that the presumption of innocence is already well established in the national laws of the Member States and that the application of this principle is supervised both by national courts and by the European Court of Human Rights (ECtHR), that the ECtHR had considered in 26 cases only that there was an infringement of the presumption of innocence, and that it would be unwise to try to legislate the issue of the presumption of innocence at this point in time, since the case-law of the ECtHR would still be in full development and any legislation could impede a dynamic development of this case-law.
3. All other delegations, however, expressed their support for the proposal and welcomed - or could at least accept - starting working on it. Some delegations, though, indicated that certain elements of the proposal posed problems to them.
4. The Commission welcomed the general support of the Member States for the proposal and offered NL to come to its Parliament in order to give explanations about the Directive and its added value.
5. As in CATS, the Presidency concluded that a very large majority of delegations supported laying down minimum rules to enhance the presumption of innocence and other aspects related thereto, and that the proposal, as submitted by the Commission, constituted in this regard a good basis for discussions. The Presidency then invited delegations to start with an article-by-article examination of the proposal, so as to allow Member States to highlight the most problematic aspects of every single provision and to suggest possible ways to address them.

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<sup>2</sup> IE and UK decided not to make use of the possibility to "opt-in" in the adoption of the proposed Directive, as referred to in Article 3 of Protocol (nr. 21) to Treaties; DK does not participate in accordance with Article 1 of Protocol (nr. 22) to the Treaties.

6. During the meeting, Chapters 1, 2 and 3 were discussed, comprising Articles 1 to 9. The results of the discussions is set out below; in the Annex, possible drafting solutions are set out in a revised text of the proposal.

### **Article-by-Article examination**

#### Article 1: Subject matter

7. No substantial changes were suggested in respect of Article 1; however, a suggestion was made for an editorial change. The text of the Article has hence been slightly redrafted.

#### Article 2: Scope

8. There was general support for the Commission's view that the Directive should only apply to **natural persons**. However, in view of the wording of the other procedural rights Directives, the suggestion was made to specify in the recitals only that the Directive applies to natural persons, and not to state this explicitly in Article 2. This suggestion was favourably welcomed by other delegations.
9. As regards the **temporal scope**, some delegations indicated, as in CATS, that they would prefer aligning the wording of this Directive with the wording of the other Directives that have already been adopted on the basis of the Roadmap, so that the Directive would apply when suspects or accused persons are *made aware* that they are suspected or accused of having committed a criminal offence. They felt that, at least, the kick-off moment should be made clearer.
10. A large majority of delegations, however, considered that the Directive should apply *ab initio* to all suspects and accused persons. The delegations referred to the particular nature of the proposal, which sets principles that should *always* apply.
11. There was general support for the Presidency suggestion to further clarify the concept of the "conclusion of the proceedings", in line with the previous Directives.

12. As in CATS, a majority of delegations said that the Directive should not contain an exception for **minor offences**, in view of the particular nature of the Directive, which contains "principles" that should apply in respect of all offences.
13. Some delegations, however, stated that they would favour the insertion in this Directive of an exception for minor offences, on the same line as provided for in the other measures. They underlined that the exclusion of certain minor offences from the scope of this Directive would not mean that the principle of presumption of innocence would not apply to minor offences; it would only mean that this Directive does not deal with those offences. According to the delegations concerned, this could be made clear in a recital.
14. Most delegations showed flexibility to work on a commonly acceptable solution.
15. The Presidency considers that it could give a confusing impression to the outside world to state that the principle of innocence doesn't apply in respect of minor offences. It therefore considers that it is not advisable to insert a general exclusion for minor offences in the Directive.
16. Since in particular a full application of Article 5(1) of the Directive, regarding the burden of proof, can cause problems in respect of minor offences (for example minor traffic offences), the Presidency suggests finding a solution in that context and leaving the text of Article 2 on this point unchanged.
17. In view of the above, the Presidency made the following changes in Article 2 and recital 8:
  - the reference to "natural persons" has been transferred from Article 2 to the recitals (see recitals 8, 9 and 10);
  - the idea that the Directive should apply "ab initio" is maintained, but in the Article the kick-off point has been made clearer; it is now said that the Directive applies from the "start of the criminal proceedings", and this concept has been explained in recital 8;
  - the notion of "conclusion of the proceedings" has been made clearer, in line with the previous Directives (standard text).

### Article 3 : Presumption of innocence

18. Although some delegations wondered how this Article should be implemented by Member States, the wording of the Article itself was not put into question. A clarification has however been introduced, by modifying "according to national law" into "in accordance with a conviction by a competent court having jurisdiction in criminal matters". This modification aims also at promoting the establishment of minimum rules across the Member States.

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

19. Member States observed that the title and the Article were not perfectly in line. Member States also expressed misgivings on the concepts used in this Article, notably "public statements", "official decisions" and "public authorities". The meaning of these concepts would not be clear, and it was observed that the concepts used in Article 4 and in the accompanying recital 13 were not the same, thus creating confusion.
20. It was requested to clarify the use of the term "appropriate measures"; which measures would be envisaged?
21. Some Member States also stated that it should be possible to make derogations to the principle that the presumption of innocence should not be violated. This could, for example, be useful when a presumed paedophile is arrested, and the parents of the school where the person concerned worked should be informed. Also, it should be possible to correct erroneous information that, in any way whatsoever, has been made public.
22. In defence of the current text, the Commission referred to the judgment of the ECtHR in the case *Poncelet v. Belgium* (judgment of 30 March 2010, in particular points 49-52).<sup>3</sup>

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<sup>3</sup> Point 51 of the judgment contains the following rule: "*La présomption d'innocence se trouve atteinte par des déclarations ou des décisions qui reflètent le sentiment que la personne est coupable, qui incitent le public à croire en sa culpabilité ou qui préjugent de l'appréciation des faits par le juge compétent.*"

23. The Commission also clarified that when a person has been convicted by a "lower" court but the decision concerned is subject to appeal, public statements referring to the guilt of the person concerned may be made, but only on condition that it is mentioned that the decision concerned is subject to such appeal.
24. In view of the comments by the Member States and the clarifications provided by the Commission, the Presidency has made some changes to Article 4 and recital 13 and it has added new recitals 13a and 13b. The main changes are the following:
- the title and the Article now both refer to "guilt";
  - it is clarified that "public authorities" are those authorities "who are involved in the criminal proceedings";
  - it is left to the Member States to define the concepts of "public statements" and of "authorities involved in the criminal proceedings", it being understood that some parameters are provided;
  - "official decision" has been replaced by "judicial decision", in line with the ECtHR case-law (see e.g. case of *Vulakh and others v. Russia*, 10 January 2012, point 32);
  - it is stated that "appropriate measures" should be taken "in accordance with national law"; if necessary, some examples could be provided in a recital;
  - the clarification by the Commission regarding statements concerning decisions of lower courts has been set out in recital 13a;
  - a possibility for making derogations has been added; this has been clarified in new recital 13b.

#### Article 5 : Burden of proof and standard of proof required

25. Various Member States expressed misgivings on the term "sufficient importance", which would be vague and difficult to apply.
26. The use of the term "reasonable doubt" was also put in question: shouldn't every doubt regarding the guilt of the suspect or accused person be sufficient to rebut a reversal of the burden of proof? Reference was made to the *adagium* "*in dubio pro reo*".

27. It was observed that a reversal of the burden of proof should not only be possible in the case of minor offences, but also in the case of certain other types of offences, e.g. in the case of economic crime or in the case of certain drugs-related crime (e.g. when a person who in the past has been convicted for drugs trafficking "suddenly" has an inexplicable wealth; it may then be presumed that he is active again in drugs trafficking).
28. Various Member States opposed paragraph 3, since it would be contrary to the principle of free assessment of evidence by judges.
29. The importance of recital 15 was highlighted by several Member States.
30. In view of the above comments, the Presidency has made some changes to Article 5 and has added recitals 15a and 15b; recital 15 is maintained. The main changes are the following:
- former paragraph 2 with the notion of "sufficient importance" has been deleted;
  - instead, a new paragraph 2 has been inserted, providing the possibility to derogate from the rule that the burden of proof is on the prosecution, in two situations:
    - a) in case of certain minor offences, notably traffic offences (see recital 15a);
    - b) in case of certain other types of offences, when two conditions have been complied with:
      - i) the shifting of the burden of proof must be strictly necessary in the interest of the criminal proceedings; and
      - ii) the shifting of the burden of proof must be justified to override the principle that the burden of proof is on the prosecution (see also recital 15b);
  - former paragraph 3 has been deleted.

Articles 6 and 7: Right not to incriminate oneself and not to cooperate and Right to remain silent

31. Many Member States suggested merging Articles 6 and 7, since they are closely linked.

32. Misgivings were expressed on the reference to the "right not to cooperate", which would not have a basis in the European Convention on Human Rights (ECHR). According to the Member States, the insertion of such a right could easily be misinterpreted. The reference by the Commission to the Funke case (Funke v. France, 25 February 1993, in particular point 44) was not considered to be conclusive.
33. Almost all Member States considered that paragraph 4 of both Articles was not acceptable, since it would go against the principle of free assessment of evidence. It was suggested to delete this paragraph, and insert instead alternative wording in a recital. Reference was made to recital 50 of Directive 2013/48/EU on the right of access to a lawyer.
34. Paragraph 3, of both Articles 6 and 7, was also considered problematic by some Member States, since in certain circumstances it should be possible to take account of the silence of a suspect or accused person as a collaboration of other evidence.
35. Paragraph 2 of Article 7 was considered to be redundant in the light of Article 3(1) under e) of Directive 2012/13/EU on the right to information in criminal proceedings.
36. In view of these comments, the Presidency has made some changes to Articles 6 and 7, and in the recitals. The main changes are the following:
- Articles 6 and 7 have been merged;
  - References to the "right not to cooperate" have been deleted, also in the recitals;
  - Paragraph 3 has been modified; it now refers to evidence. In recital 20b it has been clarified that the silence of a person may under circumstances be used as corroboration of other evidence;
  - Former paragraph 4 has been deleted; a new recital 20c has been inserted, based on recital 50 of Directive 2013/48/EU;
  - Paragraph 2 of Article 7 has been deleted, since it is redundant in the light of Article 3(1) under e) of Directive 2012/13/EU.

Articles 8 and 9: Right to be present at one's trial and Right to a retrial

37. The Commission defended **Article 8**, stating that it should remain exactly as it is.
38. Some delegations supported the line of the Commission. Various other delegations, however, felt that the wording of Article 8, which is a copy-paste of Framework Decision 2009/299/JHA on trials in absentia,<sup>4</sup> was too complicated and that it didn't fit in a legislative measure aimed at establishing minimum rules across the Member States.
39. It was also observed that in certain circumstances, it should be possible to make a temporary exception to the right of the suspect or accused person to be present at his trial (e.g. when a suspect or accused person disturbs the hearing and must be escorted out on order of the judge).
40. There was considerable support for the suggestion of the Presidency<sup>5</sup> to delete paragraphs 2 and 3, and retain only paragraph 1, while adding a provision allowing Member States to make a (temporary) exception to the right of the suspect or accused person to be present at his trial in some specific cases. The Presidency wonders indeed if paragraphs 2 and 3 are really needed in this instrument, since it doesn't aim at providing optional grounds for refusal - as does Framework Decision 2009/299/JHA on trials in absentia - but aims at establishing minimum rules.
41. In any case, there was almost perfect consensus on the fact that the text of paragraphs 2 and 3 should not be modified: they should either be accepted as such, or be deleted.

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<sup>4</sup> OJ L 81, 27.3.2009, p. 24.

<sup>5</sup> See doc 11632/14, point 13.

42. As regards **Article 9**, which is closely linked to Article 8, there was considerable support for the suggestion of the Presidency <sup>6</sup> to adopt a text along the line of Article 16(2) of the general approach in the children Directive.<sup>7</sup> It was agreed however that this Article can only be finalised once there is consensus on the text of Article 8.
43. In view of these comments, the Presidency has made some changes to Articles 8 and 9, and in the recitals. The main changes are the following:
- In Article 8 a new paragraph 1a has been inserted allowing temporary exceptions to the right of the suspect or accused person to be present at his trial (see also recital 22a);
  - Paragraphs 2 and 3 have been put into brackets. Member States are invited to reflect if these paragraphs should be maintained in this instrument;
  - An alternative text has been provided for Article 9; the original text has been put into brackets; Member States are invited to reflect which solution would be preferable.

## **Conclusion**

44. Member States are invited to consider the revised text of the Presidency in view of the next meeting of the Working Party, which is scheduled to take place on 4 September 2014.
45. Delegations who have drafting suggestions are kindly invited to submit these in due time to the Presidency (olimpia.monaco@giustizia.it) and to the General Secretariat (steven.cras@consilium.europa.eu).

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<sup>6</sup> See doc 11632/14, point 14.

<sup>7</sup> See doc. 10065/14.

(draft)

**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>8</sup>

Having consulted the Committee of the Regions,<sup>9</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.

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<sup>8</sup> Opinion of 25 March 2014 (SOC 498).

<sup>9</sup> See renunciation letter of 14 April 2014.

- (3) Although the Member States are parties to the European Convention for the Protection of Human Rights and Fundamental Freedoms and the International Covenant on Civil and Political Rights, experience has shown that this in itself does not always provide a sufficient degree of trust in the criminal justice systems of other Member States.<sup>10</sup>**
- (3a) On 30 November 2009, the Council adopted a Resolution on a Roadmap for strengthening the procedural rights of suspected or accused persons in criminal proceedings ('the Roadmap').<sup>11</sup> Taking a step-by-step approach, the Roadmap calls for the adoption of measures regarding the right to translation and interpretation (measure A), the right to information on rights and information about the charges (measure B), the right to legal advice and legal aid (measure C), the right to communicate with relatives, employers and consular authorities (measure D), and special safeguards for suspects or accused persons who are vulnerable (measure E).**
- (3b) On 11 December 2009, the European Council welcomed the Roadmap and made it part of the Stockholm programme — An open and secure Europe serving and protecting citizens (point 2.4).<sup>12</sup> The European Council underlined the non-exhaustive character of the Roadmap, by inviting the Commission to examine further elements of minimum procedural rights for suspects and 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.**
- (4) [...] 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. [...]**

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<sup>10</sup> Recitals 3, 3a and 3b have been inspired by the text of Directive 2013/48/EU on the right of access to a lawyer. It seems appropriate to mention the Roadmap also in this instrument.

<sup>11</sup> OJ C 295, 4.12.2009, p. 1.

<sup>12</sup> OJ C 115, 4.5.2010, p.1.

- (5) Three measures have been adopted to date, namely Directive 2010/64/EU of the European Parliament and of the Council <sup>13</sup>, Directive 2012/13/EU of the European Parliament and of the Council <sup>14</sup> and Directive 2013/48/EU of the European Parliament and the Council <sup>15</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 **from the start of the criminal proceedings, which, for the purposes of this Directive, is considered to be the moment when the public authorities have become aware that the offence concerned has been committed. The Directive should therefore apply** even before suspects or accused 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. **The Directive should apply at any stage of the criminal proceedings, until the conclusion of those proceedings, which is understood to mean the final determination of the question whether the suspect or accused person has committed the offence, including, where applicable, sentencing and the resolution of any appeal.**

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<sup>13</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>14</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>15</sup> Directive 2013/48/EU of the European Parliament and the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and 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 (OJ L 294, 6.11.2013, p. 1).

- (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 **suspects or accused persons** having previously been proved guilty **in accordance with a conviction by a court having jurisdiction in criminal matters, judicial decisions and public statements by authorities who are involved in the criminal proceedings** refer to those persons as if they were **guilty**. **The Member States may decide which types of public statements are concerned by this provision, it being understood that this Directive does not apply to statements made by media which fall outside the control of the State. Member States should determine which are the authorities who are involved in criminal proceedings, on condition that these should at least include judicial authorities, the police and other law enforcement authorities, persons that are politically responsible for these authorities, as well as the spokespersons of these authorities.**

- (13a) When a person has been convicted by a court having jurisdiction in criminal matters but the decision concerned is subject to appeal in a higher court, public statements may only refer to the person concerned as being guilty on condition that it is mentioned that the decision concerned is subject to appeal.**
- (13b) In exceptional circumstances, derogations are allowed from the principle that judicial decisions and public statements should not refer to suspects or accused persons as if they were guilty before they have been convicted by a competent court having jurisdiction in criminal matters. This may, for example, be the case when authorities want to inform parents of children attending a school that a person working or having worked at that school is suspected of having committed the offence of sexual abuse of children. Another example is when the authorities want to correct certain erroneous information that, in one way or another, has been made public concerning a suspect or accused person.**
- (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 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*.

- (15a) It should, in particular, be possible to shift the burden of proof from the prosecution to the defence in respect of certain minor offences, notably traffic offences, for example when an offence has been committed with a vehicle and the owner of the vehicle is presumed guilty unless he can demonstrate that someone else drove his car at the time when the offence was committed.**
- (15b) It should also be possible to shift the burden of proof from the prosecution to the defence in respect of certain other types of offences, when shifting the burden of proof is strictly necessary in the interest of the criminal proceedings and is justified to override the principle that the burden of proof is on the prosecution. This can for example be the case in relation to certain economic crime or drugs offences. Member States should make a restricted use of this possibility of shifting the burden of proof.**
- (16) The right not to incriminate oneself ~~and not to cooperate~~ is an important aspect of the presumption of innocence. Suspects 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) (transferred to recital 20a)
- (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.
- (20a) ~~Any compulsion used to compel the suspect or accused person to provide information should be limited.~~ **In order to determine whether compulsion, which was used to compel the suspect or accused person to provide information, violated the right not to incriminate oneself or the right to remain silent,** 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.
- (20b) Member States should ensure that the exercise of the right not to incriminate oneself or the right to remain silent should not be used against a suspect or accused person at a later stage of the proceedings and should not be considered as evidence that the person concerned has committed the offence concerned. This should be without prejudice to national rules or systems which allow a court or a judge to take account of the silence of the suspect or accused person as a collaboration of evidence obtained by other means.**

- (20c) Member States should ensure that in the assessment of statements made by suspects or accused persons or of evidence obtained in breach of the right not to incriminate oneself or the right to remain silent, the rights of the defence and the fairness of the proceedings are respected. This should be without prejudice to the use of statements for other purposes permitted under national law, such as the need to execute urgent investigative acts to avoid the perpetration of other offences or serious adverse consequences for any person or related to an urgent need to prevent substantial jeopardy to criminal proceedings where access to a lawyer or delaying the investigation would irretrievably prejudice the ongoing investigations regarding a serious crime. Further, this should be without prejudice to national rules or systems regarding admissibility of evidence, and should not prevent Member States from maintaining a system whereby all existing evidence can be adduced before a court or a judge, without there being any separate or prior assessment as to admissibility of such evidence.**
- (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.
- (22a) Competent authorities in the Member States should also be allowed to temporarily exclude a suspect or accused person from the trial when this is necessary in the interest of the criminal proceedings. This could, for example, be the case when a suspect or accused person disturbs the hearing and must be escorted out on order of the judge, or when it appears that the presence of a suspect or accused person prevents the proper hearing of a witness.**

- [ (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 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.
- (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, **and certain aspects related thereto**;
- (b) the right to be present at trial in criminal proceedings.

#### *Article 2*<sup>16</sup> *Scope*

This Directive applies to ~~natural persons~~ suspects and accused **persons** in criminal proceedings. **It applies from the start of the criminal proceedings** and until the final conclusion of the proceedings, **which is understood to mean the final determination of the question whether the suspect or accused person has committed the offence, including, where applicable, sentencing and the resolution of any appeal.**

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<sup>16</sup> Reference is made to the accompanying recital 8, which has been redrafted.

## CHAPTER 2

### Right to the presumption of innocence

#### *Article 3*

#### *Presumption of innocence*

Member States shall ensure that suspects and accused persons are presumed innocent until proven guilty **in accordance with a conviction by a competent court having jurisdiction in criminal matters.** ~~according to law.~~

#### *Article 4*

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

1. Member States shall ensure that, before a ~~final~~ conviction **by a competent court having jurisdiction in criminal matters, judicial decisions and public statements by authorities who are involved in the criminal proceedings** do not refer to the suspects or accused persons as if they were ~~convicted~~ **guilty.** <sup>17</sup>
2. Member States shall ensure that appropriate measures are taken, **in accordance with national law,** in the event of a breach of the requirement **set out in paragraph 1.**
3. **In exceptional circumstances, derogations from the requirement set out in paragraph 1 are allowed when this is strictly necessary in the public interest.** <sup>18</sup>

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<sup>17</sup> See accompanying recital 13 (redrafted).

<sup>18</sup> See accompanying recital 13a (new).

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. **As an exception to paragraph 1, and on condition that the overall fairness of the proceedings is not prejudiced, the burden of proof may be shifted to suspects or accused persons in the following situations:**
  - a) **in respect of certain minor offences;**<sup>19</sup>
  - b) **in respect of certain other types of offences, when shifting the burden of proof is both strictly necessary in the interest of the criminal proceedings and justified to override the principle that the burden of proof is on the prosecution.**<sup>20</sup>

**In both situations, the reversal of the burden of proof shall be rebuttable. To that end, it suffices that the defence adduces enough evidence as to raise a doubt regarding the guilt of the suspect or accused person.**

- ~~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.~~

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<sup>19</sup> See accompanying recital 15a.

<sup>20</sup> See accompanying recital 15b.

*Article 6*

*Right not to incriminate oneself and to remain silent*

1. Member States shall ensure that suspects **and** accused persons have the right not to incriminate themselves ~~and to cooperate in any criminal proceeding.~~
- 1a **Member States shall ensure that suspects and 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. **The right for suspects and accused persons not to incriminate themselves** shall not extend to the use in criminal proceedings of **evidence material** which may be obtained from ~~them 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 to remain silent** shall not be used against a suspect or accused person at a later stage of the proceedings and shall not be considered **as evidence that the person concerned has committed the offence concerned a corroboration of the facts.** <sup>21</sup>
- ~~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.~~ <sup>22</sup>

*Article 7*

*Right to remain silent*

[merged into Article 6]

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<sup>21</sup> See recital 20b (new).

<sup>22</sup> See recital 20c (new).

## 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.
  
- 1a. **Paragraph 1 is without prejudice to provisions in national law which allow competent authorities to temporarily exclude a suspect or accused person from the trial when this is necessary in the interest of the criminal proceedings.** <sup>23</sup>
  
- [ 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.

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<sup>23</sup> See also accompanying recital 22a.

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 determine in their national law the conditions under which suspects and accused persons, who were not present at their trial, have the right to a new trial or another legal remedy at which they can 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.**

[ 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 <sup>24</sup>

### 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 set out 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.

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<sup>24</sup> Chapter 4 (Articles 10 - 15) has not yet been discussed.

*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*