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NOTE

From:	Presidency
To:	CATS
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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 - Orientation debate / Request for guidance on Article 8

Introduction

1. On 2 July 2014, CATS held a orientation debate on the proposal for a Directive on the presumption of innocence. One of the questions submitted to CATS related to Article 8 (and 9), on the right to be present at one's trial. ¹
2. While a majority of delegations in CATS confirmed that they would in principle favour maintaining a provision in the Directive on the right to be present at one's trial, many Member States stated that Article 8 as currently drafted was not acceptable to them. ²

¹ See question 3 in doc. 11235/14, points 15-18.

² See point 12 in 11632/14.

One point of view: paragraphs 2 and 3 should be deleted

3. Following CATS, the Working Party discussed the drafting of Article 8. It appeared that a majority of Member States would be in favour of deleting paragraphs 2 and 3 of this Article as set out in the Commission proposal ³.
4. The Member States observed that paragraphs 2 and 3, which are almost a copy-paste of wording in Framework Decision 2009/299/JHA on trials in absentia ⁴, were very detailed and prescriptive. It was reminded that the Framework Decision was concluded in another legal context (with unanimity voting) and that it had another aim than the present draft Directive (mutual recognition versus establishing minimum rules). Hence, it would not be desirable to transpose the text of the Framework Decision into the draft Directive.

³ Paragraphs 2 and 3 read as follows:

"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."

⁴ OJ L 81, 27.3.2009, p. 24.

5. The Member States stated that they favoured deleting paragraphs 2 and 3, retain paragraph 1, and add a provision allowing Member States to make a (temporary) derogation to the right of the suspect or accused person to be present at his trial in some specific cases⁵. Moreover, during the Working Party meeting of 4/5 September, the suggestion was made to add a recital stating that Member States may provide that, under certain circumstances, a decision on guilt or innocence may be taken following a trial in absentia, and that Member States should define the applicable conditions in accordance with relevant European and international law, including Council Framework Decision 2009/299/JHA on trials in absentia.

Another point of view: paragraphs 2 and 3 should be maintained

6. The Commission objected to this view of the Member States. According to the Commission, the rules that apply in case of the absence of a person at his or her trial are intrinsically linked to the right of that person to be present at the trial. This right and the criteria to judge suspects or accused persons in their absence would be two sides of the same coin.
7. The Commission noted that Council Framework Decision 2009/299/JHA on trials in absentia sets out standards according to which a Member State can refuse to recognise and to execute judicial decisions issued by another Member State for the mere reason that the suspect or accused person was not present at his or her trial. Therefore, mutual recognition of criminal decisions can be refused and they will not circulate when the standards related to the judgment of suspects or accused persons in their absence in the issuing Member State do not comply with those set out in the Framework Decision.

⁵ The wording for such additional paragraph 1a currently reads as follows:
"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." In recital 22a, some examples are mentioned of when this paragraph can come into play: 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.

8. According to the Commission, the Framework Decision does not set out common minimum standards, but only an "indirect harmonisation" by defining, ex-post, certain grounds for refusal of mutual recognition of decisions; it does not oblige Member States to respect the common minimum standards in all national proceedings. The respect of the right to be present at trial therefore still very much depends on national law, which present an important degree of variety.
9. The Commission concluded that the Framework Decision is not sufficient to fully ensure the respect for the right to be present at one's trial on a European level and to secure mutual recognition. Article 8 of the proposed Directive should therefore lay down - as the proposed paragraphs 2 and 3 do - minimum rules by using the exact same criteria Member States agreed on in the Framework Decision for trials in absentia, but which are to be applied ex-ante to all cases by national courts.
10. The Commission insisted that the provisions on the right to be present at one's trial and on the situation in case of the absence of the suspects and accused persons should not differ from the formulation used in the Framework Decision, since this would create different sets of rules for one single right; one regarding the national law level, the other regarding the mutual recognition of judicial decisions issued by another Member State.
11. As to the latter point, the **Presidency** observes that there seems consensus among the table that the text of paragraphs 2 and 3 should not be changed; either they are accepted and maintained as such, or they are deleted (possibly substituted by a recital).

Question for CATS as regards Article 8

12. CATS is invited to consider the two points of view indicated above and to give guidance to the Working Party on this issue.