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From:	Presidency
To:	Permanent Representatives Committee/Council
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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 on Article 5 ("burden of proof")

Introduction

1. The Council on 30 November 2009 adopted a Roadmap for strengthening procedural rights of suspects and accused persons in criminal proceedings ('Roadmap').¹
2. On 10 December 2009, the European Council welcomed the Roadmap and made it part of the Stockholm programme. 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.

¹ OJ C 295, 4.12.2009, p. 1.

3. So far, three measures have been adopted on the basis of the Roadmap: Directive 2010/64/EU on the right to interpretation and translation,² Directive 2012/13/EU on the right to information,³ and Directive 2013/48/EU on the right of access to a lawyer.⁴
4. On 27 November 2013, the Commission submitted a package consisting of three legislative proposals in order to complete the roll-out of the Roadmap, as integrated in the Stockholm programme:
 - a proposal for a Directive on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings;⁵
 - a proposal for a Directive on procedural safeguards for children suspected or accused in criminal proceedings;⁶ and
 - a proposal for a Directive on provisional legal aid for suspects or accused persons deprived of liberty and legal aid in European arrest warrant proceedings.⁷

The last two proposals are accompanied by Commission recommendations.⁸

5. Last June, the JHA Council reached a general approach on the proposal for a Directive on procedural safeguards for children.⁹
6. The Italian Presidency started the work on the remaining two proposals: the Directive on the presumption of innocence and the Directive on legal aid. This note is concerned with the proposal on the presumption of innocence.

² OJ L 280, 26.10.2010, p. 1.

³ OJ L 142, 1.6.2012, p. 1.

⁴ OJ L 294, 6.11.2013, p. 1.

⁵ 17621/13 + ADD 1 + ADD 2 + ADD 3.

⁶ 17633/13 + ADD 1 + ADD 2 + ADD 3.

⁷ 17635/13 + ADD 1 + ADD 2 + ADD 3.

⁸ 17642/13 + 17643/13.

⁹ 10065/14.

Work in the Council preparatory bodies on the proposed Directive on presumption of innocence

7. On 2 July and on 16 September 2014, CATS held an orientation debate on the proposal for a Directive on the presumption of innocence. The Working Party discussed the proposal on 15 July, 4/5 September and 29 September.
8. During the work in CATS and in the Working Party, substantial progress has been made with a view to reaching a text that could be acceptable to all Member States, at least to a qualified majority of them.
9. The Presidency's intention is to reach a general approach on the text at the JHA Council in December this year.

The issue of the "burden of proof"

10. In order to facilitate work in the Working Party, it would be useful if the Council could give guidance on Article 5, regarding the "burden of proof".
11. In the Commission proposal, the text of this Article reads as follows:

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.

12. In the course of the meetings of the Working Party, some of the issues that were discussed regarding Article 5 were the following:

- In respect of paragraph 1, some Member States requested to take account of their legal systems, in which not only the prosecution but also judges are charged with seeking both inculpatory and exculpatory evidence. It was suggested that these requests might be addressed by a text according to which the task of proving the facts and any other elements allowing to establish the guilt of suspects or accused persons is on the prosecution *or on the competent court*.
- In respect of paragraph 2, the concept of the shift of the burden of proof was subject of substantial discussions. These discussions identified that presumptions of fact or law concerning the criminal liability of a person who is suspected or accused of having committed a criminal offence are a tool which most Member States are familiar with. It emerged during the debate in the Working Party that such presumptions work in the way that a fact is considered proven by a reasoning that infers the existence of an unknown fact from a known fact. Therefore, it was suggested that the concept of presumptions is used, instead of the shifting of the burden of proof. ¹⁰
- Paragraph 3 was deleted. ¹¹

¹⁰ The Working Party also discussed the question whether it should be stated that presumptions should be rebuttable, and if so, whether, as regards minor road traffic offences, which cannot give rise to a criminal record, Member States may decide that presumptions are not rebuttable. In the context of this discussion, reference was made to the Falk-case of the European Court of Human Rights (Decision of 19 October 2004, Second Section). This question is however not put to the Council, but will be further examined in the Working Party.

¹¹ Paragraph 3 was deleted because there was almost perfect consensus among Member States that this provision would be too intrusive. As a consequence, in the title the words "and standard of proof required" have also been deleted.

13. The Council is invited to confirm that the following elements should be at the basis of Article 5, it being understood that the other constituting elements will be further discussed in the Working Party :
- a) The text should take account of the fact that in some Member States not only the prosecution but also judges are charged with seeking both inculpatory and exculpatory evidence;
 - b) Reference should be made to the possibility of using presumptions of facts or law, while clearly stating that the rights of the defence should always be respected.
14. In the light of the discussions in the Council, the Council' preparatory bodies will be invited to continue the work on the draft Directive, with a view to reaching a general approach on the text at the meeting of the JHA Council in December 2014.
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