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**NOTE**

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From:	Presidency
To:	Delegations
No. prev. doc.:	ST 10131/15 DROIPEN 67 COPEN 160 CODEC 905
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 - Examination of revised text

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The third trilogue took place on 1 July 2015, and on 13 July 2015 a technical meeting took place. During both meetings, substantial progress was made, thanks also to the Commission.

The main elements of the current text are set out in the Annex, with some explanations and questions in footnotes.

**At the meeting of the JHA Counsellors on 1 September 2015, the Presidency would in particular like to address the questions indicated with a big "dot" (•).**

The Presidency hopes that Member States can take a positive view on many questions posed, since it sincerely thinks that the text as it currently evolves is good and acceptable.

This being, the Presidency has constantly repeated during the negotiations with EP that all texts are always subject to confirmation by the Council preparatory bodies, and that "*nothing is agreed until everything is agreed*".

NB: Abbreviations used:

GA = Council General Approach (as adopted in December 2014)

CNS = Council

MS = Member States

EP = European Parliament

PRES = Presidency



**CHAPTER 1**  
**Subject matter and Scope**

*Article 1 - Subject matter*  
(Agreement)

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

(Agreement on the second sentence)

This Directive applies to natural persons <sup>1</sup> who are suspected or accused in criminal proceedings. <sup>2</sup> It applies at all stages from the moment when a person is suspected or accused of having committed a criminal offence, or an alleged criminal offence, until the final determination of the question whether the person has committed the offence concerned and that decision has become definitive.

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<sup>1</sup> EP prefers the Directive applying to legal persons as well. PRES, supported by COM, opposed this, given e.g the case law of the ECtHR, which takes a quite different approach regarding the application of the principle of presumption of innocence to legal persons compared to natural persons. In order to find a solution, it is suggested to modify recital 10 as follows:

*(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. **For this reason, this Directive does not apply to legal persons; this is without prejudice to the application of the principle of presumption of innocence, in particular as set out in the ECHR and as interpreted in the case-law of the ECtHR and the CJEU, to such persons.***

- Can MS accept this solution?

<sup>2</sup> EP would like the Directive not only to apply to "criminal proceedings", but also, in the light of the Engel-case law, to "similar proceedings". PRES, supported by COM, opposed this request, for reasons of consistency with the other, already adopted procedural rights Directives, and because it is not necessary, since "criminal proceedings" is an autonomous notion which will be interpreted by the CJEU. In order to find a solution, it is suggested to modify recital 6 as follows:

*(6) This Directive should apply only to criminal proceedings, **as interpreted in the case-law of the Court of Justice of the European Union, and taking account of the case-law of the European Court of Human Rights.** Administrative proceedings, including administrative proceedings that can lead to sanctions, such as proceedings relating to competition, trade, financial services, or tax, including tax surcharge, and investigations by administrative authorities in relation to such proceedings, as well as civil proceedings, are not covered by this Directive.*

- Can MS accept this solution?

## CHAPTER 2

### Right to the presumption of innocence

#### *Article 3*

#### *Presumption of innocence*

#### (Agreement)

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

Article 4

*Public references to guilt before **proven guilty***

1. Member States **shall** take the necessary measures to ensure that, **before suspects or accused persons have been proven guilty according to law**, public statements by public authorities, as well as **judicial decisions, other than those on guilt, do not refer to suspects or accused persons as being guilty. This is without prejudice to acts of the prosecution which aim at proving the guilt of the suspect or accused person.**<sup>3</sup>
2. Member States shall ensure that appropriate measures are **available** in the event of a breach of the **obligation set out in paragraph 1 not to refer to persons as being guilty, in accordance in particular with Article 10.**
3. **The obligation set out in paragraph 1 not to refer to persons as being guilty shall not prevent public authorities from publicly disseminating information on the criminal proceedings when this is necessary for reasons relating to the criminal investigation or for the public interest.**

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<sup>3</sup> The underlined words aim at ensuring that the indictment, as well as other acts of the prosecution which aim at proving the guilt of the suspect or accused person, are not covered by this provision. Accompanying recital 13:

(13) **The presumption of innocence is violated if public statements by public authorities, or judicial decisions, other than those on guilt, refer to the suspect or accused person as being guilty, without those persons having previously been proved guilty according to law. Such statements and judicial decisions should not reflect an opinion that the person is guilty, it being understood that this is without prejudice to acts of the prosecution which aim at proving the guilt of the suspect or accused person, such as the indictment. "Public statements by public authorities" should be understood as any statement whose content is referable to a criminal offence, and which originates either from an authority involved in the criminal proceedings concerning that offence (such as judicial authorities, police and other law enforcement authorities) or from another public authority (such as Ministers and other public officials). It is understood that this does not imply statements made by publicly owned media.**

NB: On request of EP, the reference to immunity rules of MEP's has been deleted.

- MS are invited to indicate if Article 4(1), with the accompanying recital 13, is acceptable.

4. <sup>4</sup> Member States shall inform public authorities about the importance of having due regard to the principle of the presumption of innocence when providing or divulging information to the media. This Directive shall not affect national laws protecting the freedom of press and other media.

*Article 4a* <sup>5</sup>

*Presentation of suspects or accused persons*

1. Member States shall take appropriate measures to ensure that suspects or accused persons are not presented as being guilty, in court or in public, through the use of measures of physical restraint. <sup>6</sup>
2. This shall not prevent Member States from applying measures of physical restraint that are required for case-specific security reasons, to avoid absconding or to prevent the suspect or accused person from either damaging any property or from communicating with third persons.

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<sup>4</sup> This paragraph was initially placed after paragraph 1, but it seems more appropriate at the end of the Article. The paragraph has not yet been discussed with EP; MS who cannot accept it are nevertheless kindly invited to inform PRES thereof.

<sup>5</sup> The current text of this Article seems acceptable to EP, provided the word "case" is inserted before "specific security reasons" in paragraph 2. PRES considers that this is acceptable, in view of the last sentence of recital 14-1, see below.

<sup>6</sup> Accompanying recitals (to be inserted before current recital 14):

*(14 -1) Suspects or accused persons should not be presented as being guilty, in court or in public, through the use of measures of physical restraint, such as handcuffs, glass boxes, cages, and legs iron, unless the use of such measures is required for case-specific security reasons, to avoid absconding or to prevent the suspect or accused person from either damaging any property or from communicating with third persons, such as witnesses. The possibility of applying measures of physical restraint does not imply that the competent authorities should take any formal decision on the use of such measures.*

*(14-2) Where practically possible, the competent authorities should also abstain from presenting suspects or accused persons in court or in public while wearing prison clothes, so as to avoid giving the impression that these persons are guilty.*

- MS are invited to indicate if Article 4a with the accompanying recitals is acceptable.

Article 5

*Burden of proof*

(Agreement on paragraph 1)

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 obligation on the judge or the competent court to seek both inculpatory and exculpatory evidence, and to the right of the defence to submit evidence in accordance with the applicable national rules.**
- 1a. **Member States shall ensure that any doubt as to the question of guilt is to benefit the suspect or accused person, including when the trial-court makes an assessment of the question whether the person concerned should be acquitted.**<sup>7</sup>
2. **Member States may provide for the use, within reasonable limits, of presumptions of facts or law concerning the criminal liability of a person who is suspected or accused of having committed a criminal offence. Such presumptions shall be rebuttable; in any case, they may only be used provided the rights of the defence are respected.**
3. [...]

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<sup>7</sup> EP suggested inserting the following text for a new paragraph 3:  
***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 doubt as to the guilt of that person, the person concerned shall be acquitted.*** COM suggested putting "reasonable doubt". PRES opposed this suggestion, stating that it cannot accept any instruction being given to judges. As compromise, it was agreed adding the underlined text to paragraph 1a.

- MS are invited to indicate if this solution is acceptable.

Article 6

**Right to remain silent and right not to incriminate oneself**<sup>8</sup>

(Agreement on paragraph 2b)

1 **Member States shall ensure that suspects and accused persons have the right to remain silent in relation to the offence that they are suspected or accused of having committed.**

1a. Member States shall ensure that suspects **and** accused persons have the right not to incriminate themselves.<sup>9</sup>

**1b.**<sup>10</sup> **Member States shall provide suspects or accused persons with information on the right to remain silent in accordance with Directive 2012/13/EU. Member States shall also ensure that suspects or accused persons are provided with information concerning the right not to incriminate themselves, as it applies under national law in accordance with this Directive, in order to allow for this right to be exercised effectively. In addition, Member States shall explain the contents of these rights and the consequences of renouncing or invoking them. The information shall be provided promptly after the persons concerned have been made aware that they are suspected or accused of having committed a criminal offence, and in any event before the suspects or accused persons are questioned by the police or by another law enforcement or judicial authority.**<sup>11</sup>

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<sup>8</sup> The order of the right to remain silent and the right not to incriminate oneself have been modified, since the latter right works longer in time.

<sup>9</sup> EP initially also wanted to make a reference to the right not to cooperate, but it now accepts that this right is included in the right not to incriminate oneself.

<sup>10</sup> New paragraphs 1b and 1c have been inserted in the text, in order to respond to the amendment of EP on the right to information. The Presidency considers that the EP request is legitimate: if we acknowledge that suspects and accused persons have the right not to incriminate themselves, they should also be informed that they have this right. It seems also fair that the persons concerned are informed about the consequences of renouncing or invoking these rights, since, contrary to other rights (e.g. interpretation and translation) it can immediately affect their position.

- MS are invited to indicate if these paragraphs are acceptable.

<sup>11</sup> The temporary scope of this provision has been aligned with that of Directive 2012/13/EU.

**1c. Member States shall ensure that, where suspects or accused persons are provided with a Letter of Rights pursuant to Directive 2012/13/EU, such Letter includes the right of suspects or accused persons not to incriminate themselves.**

2. The exercise of the right to remain silent right and of the right not to incriminate oneself shall not prevent gathering evidence which may be **lawfully** obtained through the use of **legal** compulsory powers but which has an existence independent of the will of the suspects or accused persons.

2a. [...] <sup>12</sup>

**2b. Member States may take into account the cooperative behaviour of the suspect or accused person, as a mitigating factor, when deciding the concrete penalty to impose.**

3. The exercise of the **right to remain silent and of the right** not to incriminate oneself shall not be used against a suspect or accused person (...<sup>13</sup>) and shall not be considered as **evidence that the person concerned has committed the offence which he is suspected or accused of having committed.** <sup>14</sup>

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<sup>12</sup> See comments below under paragraph 3.

<sup>13</sup> The words "at a later stage of the proceedings" have been deleted, since they were contested by EP and since they do not seem to have real added value.

<sup>14</sup> EP suggested inserting the following text for a new paragraph 2a:

***2a. Exercise of the right not to incriminate oneself and not to cooperate must never be considered as a corroboration of the facts or as a reason in itself to adopt or maintain measures which restrict liberty before the final decision on the issue of guilt is taken.***

PRES stated that it cannot accept this text in the light of the case-law of the ECtHR (e.g Murray case), but that it would reflect on modifying recital 20b GA so as to avoid the term "corroboration", replacing the words "as an element of corroboration of evidence obtained by other means" by the words "when sentencing". This is likely to satisfy EP. The recital would then read as follows:

**(20b) Member States should ensure that the exercise of the right to remain silent or the right not to incriminate oneself should not be used against a suspect or accused person 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 when sentencing.**

- MS are invited to indicate if this solution is acceptable.

4. [deleted]<sup>15</sup>

5. **In minor offences<sup>16</sup>, and provided this is in conformity with the right to a fair trial, Member States may decide that the right to remain silent shall be without prejudice to the conduct of proceedings, or certain stages thereof, in writing and/or without questioning of the suspect or accused person by the police or other law enforcement or judicial authorities in relation to the offence concerned.<sup>17</sup>**

*Article 7 - Right to remain silent*

[merged into Article 6]

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<sup>15</sup> But see Article 10(3) in EP text.

<sup>16</sup> EP would like to know which kind of minor offences are concerned. Are these only traffic offences, or also other type of offences concerned? (environmental crime?)

- MS are invited to give examples of the minor offences that are referred to in this provision.

<sup>17</sup> EP considered that this paragraph seems to double paragraph 5(2) on the use of presumptions. For this reason, and because it is a "may" provision and concerns only minor offences, EP and COM requested putting this paragraph in the recitals. PRES promised to verify this request with MS. A recital could read along the following lines:

*"In minor offences, and provided this is in conformity with the right to a fair trial, Member States are able to decide that the right to remain silent is without prejudice to the conduct of proceedings, or certain stages thereof, in writing and/or without questioning of the suspect or accused person by the police or other law enforcement or judicial authorities in relation to the offence concerned."*

- Could MS accept deleting paragraph 6(5) and replacing it with such a recital?
- If MS cannot accept such replacement, they are kindly invited to state the reasons therefore and explain in what manner this paragraph differs from paragraph 5(2) on the use of presumptions.

## CHAPTER 3

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

#### *Article 8*<sup>18</sup>

#### *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 that a trial, which can result in a decision on guilt or innocence of the suspect or accused person, can be held in the absence of the latter, provided that:**
  - a) **the suspect or accused person has been informed in due time of the trial and of the consequences of a non-appearance; or**<sup>19</sup>
  
  - b) **the suspect or accused person, having been informed of the trial, is represented by a mandated lawyer, who was appointed either by the suspect or accused person, or by the State.**

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<sup>18</sup> There is no agreement yet on Article 8. PRES has indicated that it will be very difficult for CNS to accept a modification of this Article, which constitutes a delicate compromise.

NB: See accompanying recitals 21-22e GA. Revised recital 22c GA reads as follows:

**Under certain circumstances, a decision on the guilt or innocence of the suspect or the accused person can be handed down even if the person concerned is not present at the trial. This might be the case when the suspect or accused person has been informed in due time of the trial and of the consequences of a non-appearance, but the person nevertheless doesn't appear. The fact that the suspect or accused person has been informed of the trial should be understood to mean that this person has either been summoned in person or has by other means received official information of the scheduled date and place of that trial in such a manner that the person was in a position to be aware of the scheduled trial. The fact that the suspect or accused person has been informed of the consequences of a non-appearance, should be understood to mean notably that the person has been informed that a decision might be handed down if he or she does not appear at the trial.**

<sup>19</sup> EP prefers putting "and", but PRES, supported by COM, stated that this is totally inconceivable. EP would reflect.

3. **Member States may provide that a decision, which has been taken following the absence of the suspect or accused person at the trial, can be enforced, even though the conditions of paragraph 2 have not been met. In that case, Member States shall ensure that when suspects or accused persons are informed of such a decision, they shall also be informed about the possibility to contest the decision and to request a new trial, or another legal remedy<sup>20</sup>, in accordance with Article 9.**
  
4. **This Article is without prejudice to national rules according to which Member States may provide that the judge or the competent court can temporarily exclude a suspect or accused person from the trial when this is necessary in the interest of securing (...<sup>21</sup>) the proper course of the criminal proceedings, provided that the rights of the defence are respected.<sup>22</sup>**
  
5. **This Article is without prejudice to national rules according to which proceedings, or certain stages thereof, are conducted in writing, provided this is in conformity with the right to a fair trial.<sup>23</sup>**

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<sup>20</sup> EP asked substituting "another legal remedy" with another expression. PRES reflected, but could not find any satisfactory text; "appeal" seems not sufficient, since "legal remedy" can for example also be "opposition", but it might be good if this can be confirmed.

- Can MS confirm if "appeal" is not sufficient to replace legal remedy?

- Do MS have an idea for an expression that could substitute "other legal remedy"?

<sup>21</sup> The words "the smooth operation or" have been deleted following a request from EP.

<sup>22</sup> EP and COM requested putting this text in the recitals, since it would concern a practical arrangement, which often is put in the recitals. PRES cautiously takes a positive view to this request. A recital could read along the following lines:

*"The right to be present at one's trial is without prejudice to national rules according to which Member States may provide that the judge or the competent court can temporarily exclude a suspect or accused person from the trial when this is necessary in the interest of securing the smooth operation or the proper course of the criminal proceedings, provided that the rights of the defence are respected."*

- Could MS accept deleting paragraph 8(4) and replacing it with such a recital?

<sup>23</sup> EP and COM requested putting this paragraph in the recitals. PRES promised to verify this request with MS. A recital could read along the following lines:

*"The right to be present at one's trial is without prejudice to national rules according to which proceedings, or certain stages thereof, are conducted in writing, provided this is in conformity with the right to a fair trial."*

- Could MS accept deleting paragraph 8(5) and replacing it with such a recital?

## Article 9

### Right to request a new trial

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) were not met, the persons concerned have the right to a new trial, **or other legal remedy**<sup>24</sup>, 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.

## Article 9a

### Vulnerable persons

(Replaced by a recital)<sup>25</sup>

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<sup>24</sup> See footnote 20 page 13.

<sup>25</sup> New recital:

**(23 or 23a) Member States should ensure that in the implementation of this Directive, in particular Articles 8 and 9 thereof, the particular needs of vulnerable suspects or accused persons are taken into account [ , in the light also of the Commission Recommendation of 27 November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings ]**

There seems to be agreement *ad referendum* on the first part of the recital. COM asked to add the words in brackets in order to make a reference to its recommendation (17642/13). PRES takes a cautious view, since this recommendation was unilaterally adopted by COM. On the other hand, it concerns "only" a recital.

- Can MS accept the recital, including the reference to the COM recommendation?

**CHAPTER 4**  
**General and final provisions**

*Article 10*  
*Remedies*

(Agreement on the current text / paragraph 1)

1. Member States shall ensure that suspects or accused persons have an effective remedy if their rights under this Directive are breached.

[...] <sup>26</sup>

[...] <sup>27</sup>

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<sup>26</sup> EP/COM suggest adding the following paragraph 2:  
*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.*

PRES stated that this paragraph is not acceptable to CNS.

<sup>27</sup> EP suggested adding the following paragraph 3:

*3. Any evidence obtained in violation of Articles 6 shall be inadmissible.*

COM, who prefers putting this paragraph in Article 6, suggested the following text:

*3. Any evidence obtained in breach of Article 6 shall not be admissible, unless the use of such evidence would not prejudice the overall fairness of the proceedings.*

PRES invites MS to reflect on the following alternative text, inspired by Article 12(2) of Directive 2013/48/EU (A2L):

*3. Without prejudice to national rules and systems on the admissibility of evidence, Member States shall ensure that, in criminal proceedings, in the assessment of statements made by suspects or accused persons or of evidence obtained in breach of their right to remain silent or their right not to incriminate themselves, the rights of the defence and the fairness of the proceedings are respected.*

- MS are invited to indicate if the text of COM and/or PRES is acceptable.

*Article 11*

*Data collection*

Member States shall by [ ...] and every three years thereafter, send to the Commission [available]<sup>28</sup> data showing how the rights set out in this Directive have been implemented.

**Article 11a**

**Report**

(Agreement)

**The Commission shall, by [3 years after the deadline for transposition], submit a report to the European Parliament and to the Council on the implementation of this Directive.**

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<sup>28</sup> PRES has made it crystal-clear why adding "available" is necessary, in particular in this Directive. EP currently reflects.

*Article 12*  
*Non-regression clause*

(Agreement)

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.<sup>29</sup>

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<sup>29</sup> Agreed accompanying recital:

(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. ***Regard should be had in particular to Article 6 of the Treaty on European Union, according to which the Union recognizes the rights, freedoms and principles set out in the Charter, and according to which fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.***

*Article 13*

Transposition

(Agreement, except on the transposition period,  
which is to be discussed at the end of the negotiations)

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by [18-36 months after publication of this Directive]. They shall **immediately inform the Commission thereof**.

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*

(Agreement)

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*  
(Agreement)

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*

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