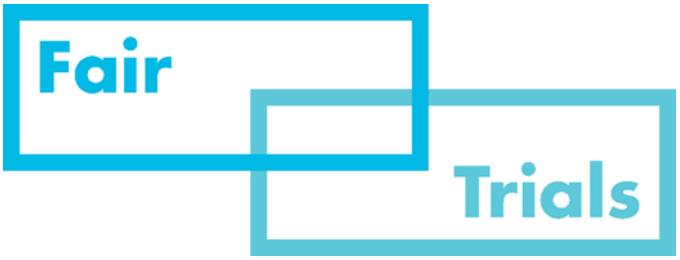

PRACTITIONERS' TOOLS ON EU LAW

PRESUMPTION OF INNOCENCE AND RIGHT TO BE PRESENT AT TRIAL DIRECTIVE

PRESUMPTION OF INNOCENCE

RIGHT TO REMAIN SILENT AND NOT TO INCRIMINATE ONESELF

RIGHT TO BE PRESENT AT THE TRIAL

About Fair Trials

Fair Trials is a global criminal justice watchdog with offices in London, Brussels and Washington, D.C., focused on improving the right to a fair trial in accordance with international standards.

Fair Trials' work is premised on the belief that fair trials are one of the cornerstones of a just society: they prevent lives from being ruined by miscarriages of justice and make societies safer by contributing to transparent and reliable justice systems that maintain public trust. Although universally recognised in principle, in practice the basic human right to a fair trial is being routinely abused.

Our work combines: (a) helping suspects to understand and exercise their rights; (b) building an engaged and informed network of fair trial defenders (including NGOs, lawyers and academics); and (c) fighting the underlying causes of unfair trials through research, litigation, political advocacy and campaigns.

In Europe, we coordinate the Legal Experts Advisory Panel (LEAP) – the leading criminal justice network in Europe consisting of over 200 criminal defence law firms, academic institutions and civil society organizations. More information about this network and its work on the right to a fair trial in Europe can be found at: https://www.fairtrials.org/legal-experts-advisory-panel

This toolkit is created as a part of the "Litigating to Advance Defence Rights in Europe" project funded by the European Union. The Project acknowledges the enormous potential defence lawyers have to drive the use of EU law to challenge fundamental rights' abuses. They operate on the front-line of the justice system, deciding which legal arguments to make and whether to apply EU law. The project aims to strengthen the ability of defence lawyers to engage effectively in litigation at the domestic and EU levels where rights have been violated, and use EU law to tackle abuses of fundamental rights in criminal justice systems across the EU.

fairtrials.org @fairtrials @fairtrials Fair Trials

Contacts

Laure Baudrihaye-Gérard
Legal Director (Europe)
+32 (0)2 894 99 55
laure.baudrihaye@fairtrials.net

Ilze Tralmaka
Legal and Policy Officer
+32 (0) 279 23 958
ilze.tralmaka@fairtrials.net

Fair Trials, October 2020

This document is possible thanks to the financial support of the Justice Programme of the European Union. The contents of this document are the sole responsibility of the author and can in no way be taken to reflect the views of the European Commission.

CONTENTS

INTRODUCTION

A. INTRODUCTION

1. Background

The EU Member States began cooperating closely in the field of criminal justice, principally through the European Arrest Warrant ('**EAW'**). Such systems rely on mutual confidence between judicial authorities that each will respect the rights of those concerned, in particular as guaranteed by the European Convention on Human Rights ('**ECHR' or 'the Convention'**).

However, cooperation was progressively undermined by the fact that these judicial authorities do not, in reality, have full confidence in each other's compliance with these standards. In 2009, in order to strengthen the system, the EU started to regulate certain aspects of criminal procedure by setting minimum standards for the procedural safeguards of suspects and accused persons; this programme is called the '**Stockholm Roadmap**'.[1]

Whilst the original objective of these measures was to ensure mutual trust, the result is a set of directives binding national authorities, courts and tribunals in all criminal proceedings, including those which have no cross-border element. These cover the right to interpretation and translation,[2] the right to information,[3] and the right of access to a lawyer[4], procedural safeguards for children[5], the right to the presumption of innocence and to be present at trial[6] and the right to legal aid[7] (collectively, the '**Roadmap Directives**').

This toolkit focuses on Directive 2016/343 on strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings[8] (the '**Directive**'). The Directive became directly applicable as from the end of the transposition deadline on 1 April 2018.

[1] Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings (OJ 2009 C 295, p. 1).
[2] 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 2010 L 280, p. 1).
[3] 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 2012 L 142, p. 1).
[4] Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty (OJ 2013 L 290, p. 1).
[5] Directive 2016/800 of the European parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects and accused in criminal proceedings (OJ L 132, 21.5.2016, p. 1).
[6] Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings (OJ L 65, 11.3.2016, p. 1).
[7] Directive 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings (OJ L 297, 4.11.2016 p. 1.; corrigendum OJ L91 5.4.2017, p. 40).
[8] See footnote 6 above.

The Directive aims to strengthen certain aspects of the presumption of innocence and the right to be present at trial in criminal proceedings.

2. Purpose of this toolkit

This toolkit is designed to give practical advice, mainly to defence practitioners, on how to use the Directive in criminal proceedings. It is produced as part of Fair Trials' 'Litigating to Advance Defence Rights in Europe' Project (the '**EU Litigation Project**'), which aims to build upon the work of the LEAP network to date in the field of EU criminal law, to strengthen the knowledge and ability of defence practitioners to engage effectively in litigation at the national and European level, and to improve access to justice and enforcement of rights under EU law.

The toolkit is intended to provide practical assistance and to serve as a source of references on the interpretation and application of the key provisions of the Directive. The toolkit compiles the latest relevant developments in the jurisprudence of Court of Justice of the European Union ('**CJEU**') and the European Court of Human Rights (**'ECtHR'**) and identifies the key problems as regards the implementation of the Directive across the EU Member States. This toolkit also suggests arguments that can be used by lawyers in domestic criminal proceedings where national law or practice falls short of the standards set by the Directive.

Please refer to the Using EU law in Criminal Practice Toolkit for a general introduction on how to use EU law in national proceedings. A short overview of the basic principles of EU law is given in Section B of this introduction.

Where questions of EU law are raised in national proceedings, lawyers can ask the national court to make a reference for a preliminary ruling to the CJEU. For further information, please refer to the CJEU Preliminary Reference Toolkit.

Please also feel free to refer to the other materials on EU law produced by Fair Trials, notably:

- The toolkit on the Access to a Lawyer Directive;
- The toolkit on the Right to Interpretation and Translation Directive;
- The toolkit on the Right to Information Directive;
- The toolkit on the Legal Aid Directive;
- The toolkit on the Charter of Fundamental Rights of the European Union;
- The online legal training on pre-trial detention.[9]

3. Scope of this toolkit

This toolkit covers the rights enshrined in the Directive, namely: (I) the presumption of innocence, including public references to guilt, presentation of suspects and accused persons, and burden of

[9] Follow our website on EU law materials for the upcoming and updated toolkits.

proof; (II) the right to remain silent and not to incriminate oneself; and (III) the right to be present at trial.

4. How to use this toolkit

a. Organisation of the content

Each part of this toolkit starts with an introduction to the issue covered in that section. It then details the relevant provisions of the Directive and the related legal arguments before providing specific guidance on how to use them in practice.

As most of the provisions of the Directive leave considerable room for interpretation, we included other legal arguments when presenting the provisions of the Directive. Where possible, we highlighted any guidance on interpretation handed down by the CJEU. However, there are currently only a limited number of CJEU judgments interpreting the Directive.[10] Therefore, where necessary, we sought to fill in the gaps with supplementary sources.

In particular, we include relevant references to the Charter of Fundamental Rights of the European Union ('the **Charter**'),[11] and in particular Article 47 (right to an effective remedy and to a fair trial) and Article 48 (presumption of innocence and right of defence) of the Charter.[12]

We also reviewed the relevant case law of the ECtHR[13] regarding Article 6(2) and 6(3) of the European Convention on Human Rights ('**ECHR**')[14]:

> *2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.*
>
> *3. Everyone charged with a criminal offence has the following minimum rights:*
> *(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;*
> *(b) to have adequate time and facilities for the preparation of his defence;*
> *(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;*

[10] For latest update on these cases see Fair Trials' Mapping CJEU Case Law on EU Criminal Justice Measures tool.
[11] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.
[12] For further information on how to use the Charter, see Fair Trials' Toolkit on Charter of Fundamental Rights of the European Union.
13 For compilation of relevant ECtHR case law, see ECtHR, Guide on Article 6 of ECHR: Right to a fair trial (criminal limb), Section on 'Interpretation: Article 6 para.3(e)': the Guide is regularly updated by the Court and currently available in 16 languages; James Brannan, Case-law of the European Court of Human Rights on the right to language assistance in criminal proceedings, May 2016.
[14] The European Parliament, the Council and the Commission, Charter of Fundamental Rights of the European Union, (OJ C 326, 26.10.2012, p. 391).

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

One of the aims of the Directive is to articulate ECtHR standards, as they stood at the time of drafting of the Directive,[15] as standards of EU law binding upon all EU Member States. ECtHR jurisprudence continues to be a relevant source of guidance for the interpretation of the Directive, but only in so far as ECtHR standards do not fall below the scope of rights, and limits of derogations, set in the Directive.

Much of the law laid down by the Directive still remains open to interpretation; therefore, this toolkit inevitably involves our own reading of the Directive standards. Based upon our understanding of the Directive, we made concrete suggestions as to how to use its provisions in a given case. These involve both practical steps (e.g. documenting and challenging violations at the pre-trial stage) and legal steps (e.g. invoking the Directive before a court).

In order to distinguish clearly between these different levels of analysis:

Provisions of European Union law or citations from the case law of the Court of Justice of the European Union appear in green shading, with a double border.

Provisions of the European Convention on Human Rights and citations from case-law of the European Court of Human Rights appear in yellow shading, with a single border. They are presented in italics.

Suggestions by Fair Trials on using the Directive in practice appear in blue shading, with a triple border, to represent your use of the Directive in the local legal context. We try to flag when we are making a suggestion by using the symbol '→' or by entitling it '**Litigation strategy**'.

b. Terminology

In this toolkit, we use the term '**questioning**' to refer to questioning as to the facts of an offence by police, prosecutors and/or investigative judges; this may have the same meaning as the terms '**interview**' and '**interrogation**' in some jurisdictions.

We use '**lawyer**' to refer to any legal professional that is entitled in accordance with national law to provide legal assistance and represent suspects or accused persons at any stage of criminal proceedings; this may have the same meaning as '**defence attorney'** or '**legal counsel**' in some jurisdictions.

[15] See Section C.1. 'Purpose and objectives', *infra*.

A '**suspect**' in the context of this toolkit refers not only to persons who have been recognised as such in accordance with formal procedures under national law, but also covers persons who have not been formally declared suspects but whose 'situation has been substantially affected by actions taken by the authorities as a result of a suspicion against him'.[16]

c. A word of caution

This toolkit is drafted based on certain assumptions. As mentioned above, we have sought to identify these clearly in the body of the text. This is both an acknowledgment of the fact that there may be other points of view, and to ensure you are aware that these are inferences which you will need to be happy to stand by if you are going to rely on them in court.

The toolkit is also drafted with lawyers from all EU Member States in mind. Necessarily, it cannot cater for all individual variations in national criminal procedure in the different EU Member States. It cannot take account of existing professional traditions and deontological rules established by national or regional bars. As such, you will need to adapt our suggestions to work within your own local context.

d. Keep in touch

With those qualifications, we encourage you to follow the steps in this toolkit, to try out the arguments we propose and to let us know how you get on by contacting us via the contact details contained in the preface.

We are keen to hear from you about your experience and to share lessons learned from others. We may also be able to offer support and assistance in individual cases.

B. SHORT OVERVIEW OF BASIC PRINCIPLES OF EU LAW

1. Supremacy of EU law

The starting point of using EU law in practice is to understand its place in the national legal system: EU law stands higher in the hierarchy of legislative acts than domestic law. This is called the 'principle of supremacy' and it means that in case of contradiction between national law and EU law, the latter takes precedence and under certain conditions can be invoked directly by individuals to claim their rights against the state.

[16] See ECtHR, *Simeonovi v. Bulgaria*, App. No.21980/04, Judgment of 12 May 2017, para. 110.

For example, Article 7(5) of the Directive guarantees that the right to remain silent shall not be used against the suspect or the accused person. This article takes precedence over any national law which would allow negative inferences to be drawn from a suspect's decision to stay silent. [17]

2. Direct effect of EU law

EU law works through a system of 'decentralised' enforcement where the national court is the primary driver of compliance. This system has been the *modus operandi* of EU law ever since the seminal judgment *Van Gend en Loos*,[18] in which the European Court of Justice (now the CJEU) established the principle of 'direct effect'. The idea is that when obligations upon Member States exist to provide rights to individuals, the best way of ensuring compliance is to give the individual the ability to invoke the right directly. This principle was originally recognised for primary law (Treaties) when the obligation in question was 'precise, clear and unconditional' and 'does not call for additional measures' by Member States or the EU. It was then extended to regulations, and subsequently to directives.

3. Direct effect of directives

Directives set objectives for Member States, who can decide by what means to reach them. Therefore, Member States need to give effect to directives by adopting national legislation that transposes the directives into national law. However, provisions of directives can have direct effect too, as was originally established by the CJEU in the *Van Duyn*[19] and *Ratti*[20] cases and more recently in *Difesa*:

> '(…)[W]herever the provisions of a directive appear (…) to be unconditional and sufficiently precise, those provisions may be relied upon by an individual against the State (…) A[n EU law] provision is unconditional where it is not subject, in its implementation or effects, to the taking of any measure either by the institutions of the [EU] or by the Member States (...) Moreover, a provision is sufficiently precise to be relied on by an individual and applied by the court where the obligation which it imposes is set out in unequivocal terms (…)'.[21]

[17] At the time of the Impact Assessment of the European Commission, n some Member States, refusal to co-operate with the prosecution could lead to adverse inferences and / or be taken as incriminatory evidence in Belgium, Cyprus, Finland, France, the United Kingdom, Ireland, Latvia, the Netherlands and Sweden. European Commission, Commission Staff Working Document Impact Assessment Accompanying the document Proposal for measures on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings /*SWD/2013/0478 final*/, Document 52013SC0478, 27 November 2013, pp. 23-24. ("Impact Assessment").

[18] CJEU, *Case 26/62 NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration*, Judgment of 5 February 1963, ECLI:EU:C:1963:1.

[19] CJEU, *Case 41/74 Van Duyn*, Judgment of 4 December 1974, ECLI:EU:C:1974:133.

[20] CJEU, *Case 148/78 Ratti*, Judgment of 5 April 1979, ECLI:EU:C:1979:110.

[21] CJEU, *Case C-236/92 Difesa*, Judgment of 23 February 1994, ECLI:EU:C:1994:60, paras. 8-10.

Accordingly, a provision of a directive has direct effect and may be invoked in national courts if:

1) the transposition deadline of the directive has passed but the directive has not been implemented or has been implemented incorrectly, or the national measures implementing the directive are not being correctly applied;[22]

2) it is invoked against a state;

3) it gives rights to an individual; and

4) it is **unconditional and sufficiently precise**, i.e. it does not require further implementation measures by the EU or the Member State and it is set out in unequivocal terms.

Most of the provisions of the Directive fulfil these criteria. For instance, Article 7 recognises the right to remain silent and the right not to incriminate oneself. Article 8 establishes the right for suspects and accused persons to be present at their trial. Although the provisions related to the presumption of innocence are framed in a way that places obligations on states, they also confer in essence a right and, therefore, can be invoked before a national court to claim compliance with the different aspects of the presumption of innocence.

Even if a provision is arguably not 'unconditional and sufficiently precise', because it is phrased in general terms and may require some interpretation, this does not necessarily prevent you from relying on it in national court. The CJEU has recognised that:

> • The fact that a provision needs interpreting does not prevent it having direct effect: its meaning and exact scope may be clarified by national courts or the CJEU.[23]
>
> • The fact that a provision allows for exceptions or derogations from a given obligation in specific circumstances does not make the obligation conditional.[24]
>
> • A provision which 'limits the discretionary power'[25] of the Member State or obliges Member States to 'pursue a particular course of conduct'[26] may also be invoked in national courts. An individual may invoke such a provision to argue that the national authorities, in choosing the methods of implementation, have overstepped the limits of their discretion.[27]

[22] CJEU, *Case C-62/00 Marks & Spencer plc v. Commissioners of Customs & Excise*, Judgment of 11 July 2002, ECLI:EU:C:2002:435, para. 27.
[23] CJEU, *Case 41/74 Van Duyn,* Judgment of 4 December 1974, ECLI:EU:C:1974:133, para. 14.
[24] Ibid., para. 7.
[25] Ibid., para. 13.
[26] CJEU, *Case 51/76 Verbond van Nederlandse Ondernemingen*, Judgment of 1 February 1977, ECLI:EU:C:1977:12, para. 23.
[27] Ibid., para. 24.

4. Duty of conforming interpretation

Regardless of whether a provision has direct effect, national courts must interpret national law, to the extent possible, in light of the wording and the purpose of a directive in order to ensure its full effectiveness.

> 'The principle that national law must be interpreted in conformity with EU law requires national courts to do whatever lies within their jurisdiction, taking the whole body of domestic law into consideration (…), with a view to ensuring that the directive in question is fully effective and achieving an outcome consistent with the objective pursued by it.'[28]

In this toolkit, we occasionally refer to the preamble of the Directive, called the "**recitals**", as an interpretative source. Recitals of directives have no legal binding force. They do not, in and of themselves, contain any enforceable rights or obligations and cannot alter the content of substantive provisions.[29] However, they explain the background and the objectives of each directive. They are, therefore, important for understanding the directive and can be used as an interpretative source.

C. OVERVIEW OF THE DIRECTIVE

1. Purpose and objectives

As with the other EU directives on procedural safeguards, the Directive builds upon the standards already established in the ECHR and the case law of the ECtHR and consolidates them as EU law:

> '(47) This Directive upholds the fundamental rights and principles recognised by the Charter and by the ECHR, including the prohibition of torture and inhuman or 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, the 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 (TEU), according to which the Union recognises 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, are to constitute general principles of Union law.

[28] CJEU, *Case C-69/10 Samba Diouf*, Judgment of 28 July 2011, ECLI:EU:C:2011:54, para. 60.
[29] The CJEU ruled that the preamble to an EU act has no binding legal force and cannot be validly relied on as a ground for derogating from the actual provisions of the act in question or for interpreting those provisions in a manner clearly contrary to their wording. CJEU, *Case C-134/08 Hauptzollamt Bremen v. J.E. Tyson Parketthandel GmbH hanse j.*, Judgment of 2 April 2009, ECLI:EU:C:2009:229, para. 16.

> (48) As this Directive establishes minimum rules, Member States should be able to extend the rights laid down in this Directive in order to provide a higher level of protection. The level of protection provided for by Member States should never fall below the standards provided for by the Charter or by the ECHR, as interpreted by the Court of Justice and by the European Court of Human Rights.'

These recitals make clear that the Directive is intended to facilitate the application of rights which already exist under the Charter and ECHR.

The Charter has the same legal strength as the Treaties and is directly applicable. However, while the Charter cannot be used on its own to invoke rights, it may be used to support the interpretation and application of other EU law such as the Directive. Article 47 (the right to an effective remedy and to a fair trial) and Article 48 (the presumption of innocence and right of defence) will be particularly useful to refer to in arguments based on the Directive before national authorities. For more information on how to use the Charter to support your arguments, see Fair Trials' Toolkit on Charter of Fundamental Rights.

The recitals also refer to the fundamental rights and principles recognised in the ECHR as interpreted by the ECtHR. This means that, when making legal arguments, you can refer to ECtHR case law to support an argument as to how the provision of the Directive should be interpreted. This is why, in this toolkit, in addition to the interpretation provided by the CJEU, we also highlight the relevant principles of ECtHR case law. However, compared to the ECtHR case law, the Directive is clearer and it also provides more robust protection than the ECtHR. Therefore, we encourage you to base your arguments on the Directive itself as a rule.

2. Overview of the Directive's provisions

Provision	What it covers	Particular aspects
Article 1	Subject matter	• Lays down common minimum rules concerning certain aspects of the presumption of innocence in criminal proceedings and the right to be present at the trial in criminal proceedings.
Article 2 & Recitals 12-15	Scope	• Applies to natural persons who are suspects or accused persons in criminal proceedings. Legal persons are not covered by the Directive. Where minor offences are sanctioned administratively and only the appeal is before a court, the Directive applies only to proceedings before the court. • The Directive applies at all stages of the criminal proceedings, from the moment a person is suspected or accused of having committed a criminal offence until the final decision on the determination of guilt has been reached. • This Directive has broader temporal scope than the previous Roadmap Directives which only operate from when the

		suspect/accused is informed that they are suspected or accused.
Article 3	The general principle of presumption of innocence	• The right to be presumed innocent until proved guilty according to law.
Article 4 & Recitals 16-19	Public references to guilt	• Public authorities shall refrain from making public statements referring to the suspect or accused person as being guilty until guilt has been proved according to the law (1). This obligation is without prejudice to the acts of the prosecution which aim to prove the guilt of the suspect or the accused person, and to preliminary procedural decisions taken by competent authorities on the basis of incriminating evidence (1). • Authorities shall be able to disseminate information on the criminal proceedings to the public only where strictly necessary for the purpose of the criminal investigation or in the public interest (3). • Remedies shall be available for breaches of the obligation not to refer to suspects or accused persons as being guilty (2).
Article 5 & Recitals 20-21	Presentation of suspects and accused persons	• Suspects or accused persons shall not be presented in court or in public as being guilty through the use of measures of physical restraints (1). • Measures of physical restraint could be applied when so required for case-specific reasons, relating to security or to the prevention of suspects or accused persons from absconding or from having contact with third persons (2).
Article 6 & Recitals 22-23	The burden of proof	• The burden of proof for establishing the guilt of suspects and accused persons is on the prosecution, notwithstanding any obligation of the judge or the court to seek both inculpatory and exculpatory evidence, and to the right of the defence to submit evidence (1). • Any doubts as to the question of guilt is to benefit the suspect or accused person ('*in dubio pro reo*') (2).
Article 7 & Recitals 24-31	Right to remain silent and not to incriminate oneself	• Suspects or accused persons have the right to remain silent and not to incriminate themselves (1) (2). • This shall not prevent the authorities from gathering, through legal powers of compulsion, evidence which has an existence independent of the will of the suspects or accused persons (3). • Cooperative behaviour of the accused person should be taken

		into account at sentencing (4). • The exercise of this right shall not be used against suspects or accused persons and shall not be considered as evidence that they have committed the offence alleged (5). • With regard to minor offences, Member States may decide that the proceedings, in part or in whole, shall take place in writing or without questioning of the suspect or accused person, provided that this complies with the right to a fair trial (6).
Article 8 & Recitals 34-41	Right to be present at trial	• Suspects and accused persons have the right to be present at their trial (1). • Member States may decide that a trial can be held in the absence of a suspect or accused person if they have been duly informed of the trial and the consequences of failure to appear or if they have been duly informed about the trial and are represented by a mandated retained lawyer or state-appointed lawyer (2). • A decision that has been taken in the absence of suspect or accused person, in accordance with (2), may be enforced against them (3). • If it is not possible to comply with the conditions of (2), because the suspect or accused person objectively cannot be located, a decision can be taken in his/her absence. They have to be duly informed of the right to challenge the decision and right to a new trial (Article 9) when they are apprehended (4). • This article does not prohibit temporary exclusion from trial under national law in the interest of securing the proper conduct of criminal proceedings if the exclusion does not prejudice the suspect or accused person's rights (5). • This article does not prohibit Member States from conducting certain proceedings or stages of proceedings in writing in accordance with national law, where this complies with the right to a fair trial (6).
Article 9 & Recital 42	Right to a new trial	• A suspect or accused person who was not present at their trial or where an accused person was not appropriately informed and represented in accordance with Article 8(2), they have the right to a new trial or another legal remedy. • This new trial, or other equivalent legal remedy, must allow for fresh determination of the merits of the case, including examination of new evidence, and must be able to lead to the original decision being reversed.

	• Suspects and accused persons have the right to be present, to participate effectively in accordance with national law and to exercise the rights of defence.
Article 10 Remedies & Recitals 44-45	• Suspects and accused persons shall have an effective remedy if their rights under this Directive are violated (1). • Without prejudice to national rules and systems on the admissibility of evidence, the rights of the defence and the fairness of the proceedings must be respected when assessing statements made by suspects or accused persons or of evidence obtained in breach of the right to remain silent or the right not to incriminate oneself (2).

3. Implementation of the Directive

The Directive became directly applicable as from the end of the transposition deadline on 1 April 2018. The Directive is applicable in 25 Member States only. The United Kingdom and Ireland have opted out of the Directive, whilst Denmark has a blanket opt-out for justice and home affairs legislation.

The European Commission is currently reviewing the implementation of the Directive. The EU Fundamental Rights Agency (FRA) is also preparing a report on presumption of innocence and procedural rights in criminal proceedings.

I – PRESUMPTION OF INNOCENCE

A. THE ISSUE

The presumption of innocence is crucial to ensuring a fair trial in individual cases, to protecting the integrity of the justice system, and to respecting the human dignity of people who are accused of committing crimes. It is recognised as a key element at the heart of fair trial rights protection under Article 6 of the ECHR and Article 48 of the Charter.

> *"The presumption of innocence, as a procedural right, serves mainly to guarantee the rights of the defence and at the same time helps to preserve the honour and dignity of the accused."*[30]

Despite this clear standard, the European Commission recognised that "there is insufficient protection of certain aspects of the principle of presumption of innocence of suspects and accused persons across the EU"; this led to the adoption of the Directive.[31] Not all the Member States have enacted the necessary reforms to align their national legislation with the standards set by the Directive. Even where national legal frameworks contain provisions that mirror those of the Directive, violations of these norms are common and their incoherent application across Member States raises cause for concern.[32] Public appetite for sensation, real-crime, real-time stories provides frequent incentives for public authorities and the media to violate the presumption of innocence. The presumption of innocence also has to be balanced against other aspects of the right to a fair trial (such as the principle of open justice) and other human rights (such as free speech).

This broad principle includes a range of elements discussed in the following sections, including public statements made by public authorities before the outcome of the case (Section B), the presentation of the suspect and the use of physical restraints in courtrooms or public settings (such as at the time of arrest) (Section C), as well as the burden of proof on the prosecution (Section D).

B. PUBLIC REFERENCES TO GUILT

1. The issue

Statements from a public authority implying the guilt of a suspect before a finding of guilt by a court clearly violate the presumption of innocence. There are varying underlying rationales for this protection, which differ between legal systems: securing the integrity of the justice system, the fairness of the trial, and the dignity of the accused. It is, for example, clear that it could undermine public trust in the justice system (and that of the defendant and victims) if a trial judge were to

[30] ECtHR, *Konstas v. Greece*, App. no. 53466/07, Judgement of 24 May 2011, para. 32.
[31] Impact Assessment, n17, p. 13.
[32] Fair Trials, Innocent until proven guilty? The presentation of suspects in criminal proceedings, May 2019; Collective of Bulgarian Lawyers, Complaint on the Infringement of Directive EU 2016/343, 23 July 2020; LEAP, Defence Rights in Europe: The Road Ahead, 2016, p 11.

opine, before hearing the evidence, that they believe a person to be guilty of the crime for which they are being tried. Similarly, public statements by influential political figures could affect the testimony placed on witnesses or influence decision-makers (juries and judges).[33] Fair Trials' research shows that public statements made in violation of the presumption of innocence occur most frequently when the alleged offence is particularly violent or shocking (and has generated a considerable public response); where it is illustrative of an issue of broader public concern (such as corruption); or where the suspect is a public figure.[34] These statements can be made in various contexts, such as press conference, press interview or in the court settings. One of challenges posed by statements made to the press is the difficulty of identifying which public authority made them, given the right to anonymity of media sources.[35]

2. Prohibition of certain public statements

Article 4 of the Directive prohibits public authorities from making public statements which refer to a person as guilty unless or until guilt is proven according to law. Such statements would violate the presumption of innocence (Recital 16 of the Directive).

> '1. Member States shall take the necessary measures to ensure that, for as long as a suspect or an accused person has not been proved guilty according to law, public statements made by public authorities, and judicial decisions, other than those on guilt, do not refer to that person as being guilty. […]'

The jurisprudence of the ECtHR is in line with the text of the Directive and equally prohibits such statements.

> *The Court recalls that the presumption of innocence enshrined in Article 6 § 2 of the Convention is one of the elements of a fair criminal trial required by Article 6 § 1. It will be violated if a* ***statement of a public official concerning*** *a person charged with a criminal offence reflects an opinion that he is guilty before he has been proved so according to law. It suffices,* ***even in the absence of any formal finding,*** *that there is some reasoning to suggest that the official regards the accused as guilty.*[36]

a. The notion of 'public statement made by public authorities'

Recital 17 of the Directive defines the term "public statements made by public authorities":

> '17. The term "public statements made by public authorities" should be understood to be **any statement which refers to a criminal offence** and which emanates from an

[33] Fair Trials, Innocent until proven guilty ? The presentation of suspects in criminal proceedings, Report, 2019, p. 13.
[34] Ibid., p. 14.
[35] Ibid., p. 16.
[36] ECtHR, *Daktaras v. Lithuania*, App. no. 42095/98, Judgment of 10 October 2000, para. 41; ECtHR, *Allenet de Ribemont v. France*, App. no. 15175/89, Judgment of 10 February 1995, para. 35.

> authority involved in the criminal proceedings concerning that criminal offence, such as **judicial authorities, police and other law enforcement authorities**, or from **another public authority, such as ministers and other public officials**.'

The notion of 'public authorities' thus covers a wide range of bodies, including police, prosecutors, judges and elected officials. This is in line with the jurisprudence of the ECtHR which indicates that the presumption of innocence may be infringed not only by a judge or court but also by other public authorities[37] and in particular:

- *Police officials;*[38]
- *The President of the Republic*[39]*, the Prime Minister or the Minister of the Interior*[40]*, the Minister of Justice* [41]*;*
- *The President of the Parliament;*[42]
- *Prosecutors*[43] *and other prosecution officials, such as an investigator;*[44]
- *A candidate for the post of Governor of a region who was a retired army general, an important figure in the society having held various senior positions and a well-known politician.*[45]

On the other hand, statements made by the chairman of a political party which was legally and financially independent from the State in the context of a heated political climate could not be considered the statements of a public official acting in the public interest under Article 6 § 2.[46]

b. Assessing the statements in practice

As mentioned in the introduction, there are currently a limited number of CJEU judgments interpreting the Directive.[47] More guidance can be found in the case law of the ECtHR.

For the ECtHR, it suffices, even in the absence of any formal finding, that there is some reasoning to suggest that the official regards the accused as guilty. [48] The ECtHR drew **a fundamental distinction between a statement that someone is merely suspected** of having committed a crime **and a clear**

[37] ECtHR, *Allenet de Ribemont v. France*, App. no. 15175/89, Judgment of 10 February 1995, para. 36; ECtHR, *Daktaras v. Lithuania*, App. no. 42095/98, Judgment of 10 October 2000, para. 42; ECtHR, *Petyo Petkov v. Bulgaria*, App. no. 32130/03, Judgment of 7 January 2010, para. 91.
[38] ECtHR, *Allenet de Ribemont v. France*, App. no. 15175/89, Judgment of 10 February 1995, paras. 37 and 41.
[39] ECtHR, *Peša v. Croatia*, App. no. 40523/08, Judgment of 8 April 2010, para. 149
[40] ECtHR, *Gutsanovi v. Bulgaria*, App. no. 34529/10, Judgment of 15 October 2013, paras. 194-198.
[41] ECtHR, *Konstas v. Greece*, App. no. 53466/07, Judgement of 24 May 2011, paras. 43 and 45.
[42] ECtHR, *Butkevičius v. Lithuania*, App. no. 48297/99, Judgment of 26 March 2002, para. 53.
[43] ECtHR, *Daktaras v. Lithuania*, App. no. 42095/98, Judgment of 10 October 2000, para. 42.
[44] ECtHR, *Khuzhin and Others v. Russia*, App. no. 13470/02, Judgment of 23 October 2008, para. 96
[45] ECtHR, Kuzmin v. Russia, App. no. 58939/00, Judgment of 18 March 2010, para 62.
[46] ECtHR, *Mulosmani v. Albania*, App. no. 29864/03, Judgment of 8 October 2013, para. 141.
[47] For latest update on these cases see Fair Trials' Mapping CJEU Case Law on EU Criminal Justice Measures tool.
[48] ECtHR, *Daktaras v. Lithuania*, App. no. 42095/98, Judgment of 10 October 2000, para. 41; ECtHR, *Allenet de Ribemont v. France*, App. no. 15175/89, Judgment of 10 February 1995,. 35.

judicial declaration, in the absence of a final conviction, that an individual has committed the crime in question. The latter infringes the presumption of innocence, whereas the former has been regarded as unobjectionable in various situations examined by the Court.[49]

In order to distinguish between the two, the Court indicated that **the particular circumstances** in which the impugned statement was made is central.[50] In the Court's view, it is necessary to look at **the nature and context of the particular proceedings** to determine whether the use of some unfortunate language violates the presumption of innocence.[51] The Court also emphasised **the importance of the choice of words** by public officials in their statements.[52]

In addition, the Court held that voicing suspicions regarding an accused's innocence is conceivable as long as the conclusion of criminal proceedings has not resulted in a decision on the merits of the accusation.[53] However, once an acquittal has become final, the voicing of any suspicions of guilt is incompatible with the presumption of innocence.[54]

ECtHR case law makes clear that the fact that the applicant is ultimately found guilty cannot negate their initial right to be presumed innocent until proved guilty according to law.[55]

The case law of ECtHR on the issue is abundant but is fact specific and we invite you to refer to the ECtHR guide on Article 6 for further illustrations.[56]

Here is a short selection of examples from ECtHR case law where a violation of the presumption of innocence occurred:

- *ECtHR, Minelli v Switzerland, 25 March 1983:* The Swiss Court had discontinued the proceedings against Mr Minelli due to the expiration of time limitations to prosecute the offence. However, it held that Mr Minelli should bear two-thirds of the cost of the proceedings because in the absence of such time limitation, the existing evidence would *"very probably have led to the conviction"* of Mr Minelli. In its reasoning, the Swiss Court treated the conduct denounced by the

[49] ECtHR, *Ismoilov and Others v. Russia*, App. no. 2947/06, Judgment of 24 April 2008, para. 166; ECtHR, *Nešťák v. Slovakia*, App. no. 65559/01, Judgment of 27 February 2007, para. 89; ECtHR, *Garycki v. Poland*, App. no. 14348/02, Judgment of 6 February 2007, para. 67.

[50] ECtHR, *Daktaras v. Lithuania*, App. no. 42095/98, Judgment of 10 October 2000, para. 42; ECtHR, *A.L. v. Germany*, App. no. 72758/01, Judgement of 28 April 2005, para. 31.

[51] ECtHR, *Allen v. the United Kingdom*, App. no. 25424/09, Judgment of 12 July 2013, para. 126; ECtHR, *Lähteenmäki v. Estonia*, App. no. 53172/10, Judgment of 21 June 2016, para. 45.

[52] ECtHR, *Daktaras v. Lithuania*, App. no. 42095/98, Judgment of 10 October 2000, para. 41; ECtHR, *Arrigo and Vella v. Malta*, App. no. 6569/04, Decision as to the admissibility of 10 May 2005; ECtHR, *Khuzhin and Others v. Russia*, App. no. 13470/02, Judgment of 23 October 2008, para. 94.

[53] ECtHR, *Sekanina v. Austria*, App. no. 13126/87, Judgment of 25 August 1993, para. 30.

[54] ECtHR, *Asan Rushiti v. Austria*, App. no. 28389/95, Judgment of 21 March 2000, para. 31; ECtHR, *O. v. Norway*, App. no. 29327/95, Judgment of 11 February 2003, para. 39; ECtHR, *Geerings v. the Netherlands*, App. no.30810/03, Judgment of 1 March 2007, para. 49; ECtHR, *Paraponiaris v. Greece*, App. no. 42132/06, Judgment of 25 September 2008, par. 32.

[55] ECtHR, *Matijašević v. Serbia*, App. no. 23037/04, Judgment of 19 September 2006, para. 49; ECtHR, *Nešťák v. Slovakia*, App. no. 65559/01, Judgment of 27 February 2007, para. 90.

[56] ECtHR, Guide on Article 6 of ECHR: Right to a fair trial (criminal limb): the Guide is regularly updated by the Court and currently available in 16 languages

prosecutors as having been proved. The ECtHR ruled that "n*otwithstanding the absence of a formal finding and despite the use of certain cautious phraseology ("in all probability", "very probably"), the Chamber proceeded to make appraisals that were incompatible with respect for the presumption of innocence."*[57]

- *ECtHR, Allenet de Ribemont v. France, 10 February 1995:* At a press conference, the Minister of the Interior, the Director of the Paris Criminal Investigation Department, and the Head of the Crime Squad referred to an inquiry that was underway. The Director of the Paris Criminal Investigation Department notably said "*Mr De Varga, and hisacolyte, Mr de Ribemont, were the instigators of the murder. The organiser was Detective Sergeant Simonéand the murderer was Mr Frèche*." The Court held that *"some of the highest-ranking officers in the French police referred to Mr Allenet de Ribemont, without any qualification or reservation, as one of the instigators of a murder and thus an accomplice in that murder (see paragraph 11 above). This was clearly a declaration of the applicant's guilt which, firstly, encouraged the public to believe him guilty and, secondly, prejudged the assessment of the facts by the competent judicial authority. There has therefore been a breach of Article 6 para. 2 (art. 6-2).*[58]

- *ECtHR, Lavents v. Latvia, 28 November 2002:* The President of the Regional Court stated that she did not yet know "*whether the judgment would result in conviction or partial acquittal*", ruling out the possibility of total acquittal. The government argued that the President never formally said that the applicant was guilty but the Court stated that "*what is important in the application of the provision of Article 6 § 2 is the true meaning of the statements in question, not their literal form."* In the Court's view, such an assertion made it clear that the judge was already convinced of the applicant's guilt.*[59]*

- *ECtHR, Matijašević v. Serbia, 19 September 2006:* In the course of reviewing detention on remand, the District Court stated the suspect had "*committed the criminal offences which are the subject of this prosecution*". The ECtHR found the District Court *"did pronounce the applicant's guilt before it was proved according to law".*[60]

- *ECtHR, Nešťák v Slovakia, 27 February 2007:* The suspect was arrested and questioned over a crime of robbery. During questioning the suspect confessed to planning and preparing the robbery to pay off a financial debt but denied having taken part in the commission of the actual robbery. The court ordered his pre-trial detention on the basis of a strong suspicion that, if released, the accused would commit another offence in order to obtain money to pay his debt. The accused appealed the decision. The Regional Court dismissed his appeal stating

[57] ECtHR, *Minelli v Switzerland*, App. no. 8660/79, Judgement of 25 March 1983, paras. 37-38.
[58] ECtHR, *Allenet de Ribemont v. France*, App. no. 15175/89, Judgment of 10 February 1995, paras. 11 and 41.
[59] ECtHR, *Lavents v. Latvia*, App. no. 58442/00, Judgement of 28 November 2002, paras. 126-127.
[60] ECtHR, *Matijašević v. Serbia*, App. no. 23037/04, Judgment of 19 September 2006, paras. 40-51.

that *"[t]he accused was indicted for complicity in robbery ... The evidence which has been taken so far has proved that the accused Nešťák committed that offence as he needed money to pay off his debts … The way in which the offence was committed also indicates the extent to which the accused is corrupt. This confirms the conclusion that he could commit further offences".* The ECtHR considered *"the statements impugned in the present case implied the applicant's guilt before it was proved according to law".* [61]

- *ECtHR, Turyev v. Russia, 11 October 2016:* Sergey Turyev was arrested on charges of murder and arson. After his arrest, a local newspaper published an interview with the deputy town prosecutor who identified Mr. Turyev as "the murderer" of one victim and "complicit" in the murder of another victim. Mr. Turyev requested the disqualification of the prosecutor from his case due to the prejudicial statements. The court refused, and Mr. Turyev was found guilty and sentenced to 20 years' imprisonment. The ECtHR found that the statement of the prosecutor was *"more than […] mere facts found by the investigation, this is an unqualified declaration of guilt. […] The prosecutor's outspoken comments were clearly a declaration of the applicant's guilt which, firstly, encouraged the public to believe him guilty and, secondly, prejudged the assessment of the facts by the competent judicial authority. […] There has therefore been a violation of Article 6 § 2."* [62]

In the following cases, the ECtHR found no violation of the presumption of innocence.

- *ECtHR, Lutz v. Germany, 25 August 1987:* The German court had discontinued the proceedings against the defendant but refused to reimburse him his own costs and expenses (i.e. not the costs of the proceedings). The German court held that *"the reasons for the order as to costs in the impugned decisions are [...] rightly confined to the finding that the defendant would most probably have been found guilty".* However, the ECtHR found no violation of Article 6(2) ECHR: *"The German courts thereby meant to indicate, as they were required to do for the purposes of the decision, that there were still strong suspicions concerning Mr. Lutz. Even if the terms used may appear ambiguous and unsatisfactory, the courts confined themselves in substance to noting the existence of "reasonable suspicion" that the defendant had "committed an offence" (Article 5 § 1 (c) of the Convention) (art. 5-1-c). On the basis of the evidence, in particular the applicant's earlier statements (see paragraphs 12, 16 and 17 above) [admitting the facts], the decisions described a "state of suspicion" and did not contain any finding of guilt."* [63]

- *Allen v the United Kingdom, 12 July 2013:* Ms Allen had been convicted of manslaughter of her child. Based on new evidence, the Court of Appeal Criminal Division (CACD) subsequently quashed the conviction and held that it would be for a jury to assess the new evidence to decide whether guilt had been

[61] ECtHR, *Nešťák v. Slovakia*, App. no. 65559/01, Judgment of 27 February 2007, para. 22 and paras. 88-91.
[62] ECtHR, *Turyev v. Russia*, App. no. 20758/04, Judgment of 11 October 2016.
[63] ECtHR, *Lutz v. Germany*, App. no. 9912/82, Judgment of 25 August 1987, para. 62.

established beyond reasonable doubt. However, no retrial was ordered as the applicant had already served her sentence of imprisonment by the time her conviction. As the quashing of the applicant's conviction resulted in a verdict of acquittal, Ms Allen applied for compensation for a miscarriage of justice. The Court refused because her innocence had not been established beyond reasonable doubt. For the ECtHR, *"the applicant's acquittal was not […] an acquittal "on the merits" in a true sense (…) although formally an acquittal, the termination of the criminal proceedings against the applicant might be considered to share more of the features present in cases where criminal proceedings have been discontinued"*[64]*. "In assessing whether a "miscarriage of justice" had arisen, the courts did not comment on whether, on the basis of the evidence as it stood at the appeal, the applicant should be, or would likely be, acquitted or convicted. Equally, they did not comment on whether the evidence was indicative of the applicant's guilt or innocence. They merely acknowledged the conclusions of the CACD* […] *They consistently repeated that it would have been for a jury to assess the new evidence had a retrial been ordered".*[65] Accordingly, the ECtHR found that the judgment "*did not demonstrate a lack of respect for the presumption of innocence which she enjoys in respect of the criminal charge of manslaughter of which she has been acquitted."*[66]

Interestingly, according to ECtHR case law, statements by judges are subject to stricter scrutiny than those by investigative authorities such as the police or prosecutor.[67] As explained, the ECtHR assesses the choice of words by public officials in their statements in the context of the particular circumstances in which the impugned statement was made. This includes also the functions and the power of the authority concerned. For instance, in *Daktaras v. Lithuania*, the Court found it relevant to note that "the impugned statements were made by a prosecutor not in a context independent of the criminal proceedings themselves, as for instance in a press conference, but in the course of a reasoned decision at a preliminary stage of those proceedings, rejecting the applicant's request to discontinue the prosecution."[68]

c. The specific case of parallel proceedings

One area where the CJEU has started to clarify the scope of the Directive relates to statements made against a third party involved in parallel criminal proceedings. In *AH and others*, CJEU held that guilty plea agreement may refer to third parties as joint perpetrators provided that two conditions are met:

1. that reference is necessary for the categorisation of the legal liability of the person who entered into the agreement; and

[64] ECtHR, *Allen v. the United Kingdom*, App. no. 25424/09, Judgment of 12 July 2013, par. 127.
[65] Ibid. para. 134.
[66] Ibid. para. 136.
[67] ECtHR, *Pandy v. Belgium*, App. no. 13583/02, Judgment of 21 September 2006, para. 43.
[68] ECtHR, *Daktaras v. Lithuania*, App. no. 42095/98, Judgment of 10 October 2000, para. 44.

2. the plea agreement makes it clear that the third parties are being prosecuted in separate criminal proceedings and that their guilt has not been legally established.

> 'Article 4(1) of Directive 2016/343 must be interpreted as meaning that it **does not preclude** that an agreement in which the accused person recognises his guilt in exchange for a reduction in sentencing, which must be approved by a national court, expressly **mentions as joint perpetrators** of the criminal offence in question not only that person, but also **other accused persons**, who have not recognised their guilt and are being prosecuted in separate criminal proceedings, **on the condition that, first, that reference is necessary** for the categorisation of the legal liability of the person who entered into the agreement a**nd, second, that that same agreement makes it clear that** those other persons are being prosecuted in separate criminal proceedings and that **their guilt has not been legally established**.'[69]

In this case, the suspect was accused of participation in a criminal organisation. Under Bulgarian law, this crime requires the participation of at least three people. The first condition imposed by the CJEU was thus met. However, the agreement in question did not clearly spell out that the other persons were being prosecuted in the context of separate criminal proceedings and that their guilt had not been legally established – as required by the second condition. Following CJEU's decision, the Bulgarian Court amended the agreement which originally contained references to the full names and identification numbers of the other persons involved. The Court ruled that, for the purposes of the legal characterisation of the incriminating act and the examination of the criminal responsibility of the person being prosecuted, it was sufficient to refer to the other persons involved as 'third persons' without identifying them by their full name or their identification number, in so far as their guilt has not been legally established.[70]

The CJEU confirmed its approach in the recent case of *UL and VM*:

> Articles 3 and 4 (1) of Directive 2016/343, read in conjunction with Recital 16 of the directive, as well as Article 47(2) and Article 48 of the Charter of Fundamental Rights of the European Union, must be interpreted in the sense that they do not prevent that, in the context of criminal proceedings brought against two persons, a national court accepts, first, by way of an order, the guilty plea of the first person for the offences mentioned in the indictment allegedly committed in association with the second person who did not plead guilty and then rules, after producing evidence relating to the charges alleged against this second person, on the culpability of this person, on the condition that **on the one hand, the mention of the second person** as a co-perpetrator of the alleged offences **is necessary** for the qualification of the legal responsibility of the person who pleaded guilty and, **on the other hand, that this same order and/or indictment to which it refers clearly indicates that the guilt of this**

[69] CJEU, *AH and others*, Case C-377/18, Judgment of 5 September 2019, ECLI:EU:C:2019:670, para. 50.
[70] CJEU, Research and Documentation Directorate, Monitoring of preliminary rulings – Overview of September and October 2019, Flash News 5/19.

> **second person has not been legally established** and will be subject to separate evidence and judgment.[71]

The decisions of the CJEU expressly refer to ECtHR case law on this issue. The ECtHR also recognises that even though statements made in parallel proceedings are not binding for a third party, they may nonetheless have a prejudicial effect on the proceedings pending against that person and violate their presumption of innocence.[72] Accordingly, the ECtHR stated that courts are obliged to **refrain from any statements that may have a prejudicial effect on parallel pending proceedings against a third party**, even if they are not binding for that person. It also calls for **joining cases** if one set of proceedings would impact the assessment of the legal responsibility of a third party.

> *[I]n complex criminal proceedings involving several persons who cannot be tried together, references by the trial court to the participation of third parties, who may later be tried separately, may be indispensable for the assessment of the guilt of those on trial.. […] if such facts [related to the involvement of third parties] have to be introduced, the court should **avoid giving more information than necessary** for the assessment of the legal responsibility of those accused in the trial before it. Even if the law expressly states that no inferences about the guilt of a person can be drawn from criminal proceedings in which he or she has not participated, **judicial decisions must be worded so as to avoid any potential pre-judgment about the third party's guilt** in order not to jeopardise the fair examination of the charges in the separate proceedings.[…] If the nature of the charges makes it unavoidable for the involvement of third parties to be established in one set of proceedings, and those findings would be consequential on the assessment of the legal responsibility of the third parties tried separately, this should be considered as **a serious obstacle for disjoining the cases**. Any decision to examine cases with such strong factual ties in separate criminal proceedings must be based on a careful assessment of all countervailing interests, and the co-accused must be given an opportunity to object to the cases being separated.[73]*

d. Prejudicial statements by media

The Directive does not expressly cover the impact of statements made by media on the right to be presumed innocent.[74]

For the ECtHR, when **the statements are made by private entities**, such as newspapers, and do not constitute a verbatim or paraphrased quotation of official information provided by the authorities, there is no violation of the presumption of innocence attributable to the State under Article 6(2) of

[71] CJEU, *UL and VM*, Case C-709/18, Judgment of 28 May 2020, ECLI:EU:C:2020:411, para 45.
[72] ECtHR, *Karaman v. Germany*, App. no. 17103/10, Judgment of 27 February 2014, para. 353; ECtHR, *Bauras v. Lithuania*, App. no. 56795/13, Judgment of 31 October 2017, para. 52.
[73] ECtHR, *Navalnyy and Ofitserov v. Russia*, App. nos. 46632/13 and 28671/14, Judgment of 23 February 2016, para. 104.
[74] See Recital 19 of the Directive regarding information provided to the media by the authorities, analysed in the next section of this Toolkit "Authorised public statements".

the ECHR. [75] In practice, the right to anonymity of media sources makes it very challenging to know whether public authorities have made statements to the press. Adverse statements made by private entities may raise an issue regarding the **positive obligation of State to protect the "private life" of persons** subject to ongoing criminal proceedings under Article 8 of the ECHR.[76]

The ECtHR recognised that a **virulent press campaign** can adversely affect the **fairness of a trial** by influencing public opinion and affect an applicant's right to be presumed innocent.[77] In this respect, the Court has held that the press must not overstep certain bounds, regarding in particular the protection of **the right to privacy** of accused persons in criminal proceedings and **the presumption of innocence**.[78]

The ECtHR also considered that a virulent press campaign may impact the **impartiality of the court** as guaranteed by Article 6(1) of the ECHR. In assessing the impact of such a campaign on the fairness of a trial, the ECtHR assessed the time elapsed between the press campaign and the commencement of the trial, and in particular the determination of the trial court's composition; whether the impugned publications were attributable to, or informed by, the authorities; whether the court is entirely compose of professional judges or members of a jury; and whether the publications influenced the judges or the jury and thus prejudiced the outcome of the proceedings.[79]

For further analysis, we invite you to refer to Fair Trials' reports on press coverage and the presumption of innocence:

- Fair Trials, The Importance of appearances: How suspects and accused persons are presented in the courtroom, in public and in the media (SIR), French National Media Report, May 2019; and
- Fair Trials, Innocent until proven guilty? The presentation of suspects in criminal proceedings, May 2019.

3. Authorised public statements

However, as with other aspects of the right to the presumption of innocence, this right is not absolute. The Directive makes two explicit reservations.

a. Prosecution acts and procedural decisions

Article 4(1) of the Directive ensures that the obligation not to make statements relating to guilt does not impede the ability of the state to adduce evidence relating to guilt during the trial or in relation

[75] ECtHR, *Mityanin and Leonov v. Russia*, App. nos. 11436/06 and 22912/06, Judgment of 7 May 2019, paras. 102 and 105.
[76] Ibid., paras. 102 and 105.
[77] ECtHR, *Ninn-Hansen v. Denmark*, App. no. 28972/95, Decision as to the admissibility of 18 May 1999, ; ECtHR, *Anguelov v. Bulgaria*, App. no. 45963/99, Decision as to the admissibility of 14 December 2004.
[78] ECtHR, *Bédat v. Switzerland*, App. no. 56925/08, Judgment of 29 March 2016, para. 51.
[79] ECtHR, *Beggs v. the United Kingdom*, App. no. 15499/10, Decision of 16 October 2012, para. 124; ECtHR, *Abdulla Ali v. the United Kingdom*, App. no. 30971/12, Judgment of 30 June 2015, pras. 87-91; ECtHR, *Paulikas v. Lithuania*, App. no. 57435/09, Judgment of 24 January 2017, para. 59; ECtHR, *Craxi v. Italy (no. 1)*, App. no. 34896/97, Judgment of 5 December 2002, para. 104; ECtHR, *Mircea v. Romania*, App. no. 41250/02, Judgment of 29 March 2007, para. 75.

to pre-trial hearings, for example, when seeking to establish a reasonable suspicion of guilt as a justification for pre-trial detention.

> '1. […] This shall be without prejudice to acts of the prosecution which aim to prove the guilt of the suspect or accused person, and to preliminary decisions of a procedural nature, which are taken by judicial or other competent authorities and which are based on suspicion or incriminating evidence.'

Recital 16 of the Directive notably refers to indictment or decisions on pre-trial detention but re-iterates that while the authority might verify elements of incriminating evidence, **they should never refer to the person as being guilty**. Accordingly, statements made about a decision to order pre-trial detention or to revoke pre-trial release, which portray the accused as guilty or rely upon an assumption that the accused has committed the offence in ways that trespass beyond facts established by evidence and despite the absence of a final conviction, would violate the presumption of innocence.

> 'This should be without prejudice to acts of the prosecution which aim to prove the guilt of the suspect or accused person, such as the **indictment**, and without prejudice to judicial decisions as a result of which a suspended sentence takes effect, provided that the rights of the defence are respected. This should also be without prejudice to preliminary decisions of a procedural nature, which are taken by judicial or other competent authorities and are based on suspicion or on elements of incriminating evidence, such as decisions on **pre-trial detention**, **provided that such decisions do not refer to the suspect or accused person as being guilty**. Before taking a preliminary decision of a procedural nature the competent authority might first have to verify that there are sufficient **elements of incriminating evidence** against the suspect or accused person to justify the decision concerned, and the decision could contain reference to those elements.'

The CJEU restated this principle in *Milev*. It added that the Directive does not regulate the degree of certainty that the relevant national court must have concerning the perpetrator of the offence, the rules governing examination of evidence, and the statement of reasons (i.e. the judicial reasoning) for confirming or maintaining pre-trial detention.

> 'Article 3 and Article 4(1) of Directive 2016/343 must be interpreted as not precluding the adoption of preliminary decisions of a procedural nature, such as a decision taken by a judicial authority that **pre-trial detention** should continue, which are based on suspicion or on incriminating evidence, **provided that such decisions do not refer to the person in custody as being guilty.** However, that directive does not govern the circumstances in which decisions on pre-trial detention may be adopted.' (emphasis added)[80]

In *RH*, the referring Bulgarian Specialised Criminal Court struggled to identify reasonable grounds for upholding the pre-trial detention of RH while respecting the Directive's obligation not to present ta

[80] CJEU, *Case C-310/18 PPU – Milev*, Judgment of 19 September 2018, ECLI:EU:C:2018:732, para. 49.

person as guilty. The CJEU widely exempted pre-trial detention from its scope, while restating that such a decision may not present the person detained as being guilty.

> 'Articles 4 and 6 of Directive 2016/343, read together with recital 16 thereof, must be interpreted as meaning that the requirements deriving from the presumption of innocence do not preclude, where the competent court examines the reasonable grounds for believing that the suspect or the accused person has committed the offence with which he is charged, in order to give a ruling on the legality of a pre-trial detention decision, that court from **comparing the elements of incriminating and exculpatory evidence** presented to it and **giving reasons for its decision**, not only stating the evidence relied on, but also **ruling on the objections of the defence counsel** of the person concerned, **provided that that decision does not present the person detained as being guilty**.' (emphasis added)[81]

b. Public statements made for reasons related to the investigation or to the public interest

Article 4(3) of the Directive also allows public authorities to make public statements where strictly necessary for reasons relating to the criminal investigation or to the public interest.

> '3. The obligation laid down in paragraph 1 not to refer to suspects or accused persons as being guilty shall not prevent public authorities from publicly disseminating information on the criminal proceedings **where strictly necessary** for reasons relating to the criminal investigation or to the public interest.'

Recital 18 of the Directive provides further illustration of these situations such as identification of the suspect for safety reasons. However, it clearly limits the release of information where this is "**reasonable and proportionate**" and provided that it does **"not create the impression that the person is guilty** before he or she has been proved guilty according to law".

> '(18) The obligation not to refer to suspects or accused persons as being guilty should not prevent public authorities from publicly disseminating information on the criminal proceedings where this is strictly necessary for reasons relating to the criminal investigation, such as when **video material is released and the public is asked to help in identifying the alleged perpetrato**r of the criminal offence, or to the public interest, such as when, **for safety reasons**, information is provided to the inhabitants of an area affected by an alleged environmental crime or when the prosecution or another competent authority provides objective information on the state of criminal proceedings in order **to prevent a public order disturbance**. The use of such reasons should be confined to situations in which this would be **reasonable and proportionate**, taking all interests into account. In any event, the manner and context in which the information is disseminated **should not create the impression that the person is guilty** before he or she has been proved guilty according to law.' (emphasis added)

[81] CJEU, *Case C-8/19 PPU – RH,* Judgement of 12 February 2019, ECLI:EU:C:2019:110, para 60.

These requirements reflect the standards already established by the ECtHR. The ECtHR also requires the authorities to exercise caution in their **choice of words** and to show **circumspection and discretion** when describing pending criminal proceedings.[82]

> *'Freedom of expression, guaranteed by Article 10 (art. 10) of the Convention, includes the freedom to receive and impart information. Article 6 para. 2 (art. 6-2) cannot therefore prevent the authorities from informing the public about criminal investigations in progress, but it requires that they do so with all the discretion and circumspection necessary if the presumption of innocence is to be respected.'*[83]
>
> *'Given that those officials held high positions in the town and regional prosecuting authorities, they should have exercised particular caution in their choice of words for describing pending criminal proceedings against the applicants.'*[84]

In spite of this background, Recital 19 of the Directive suggests that Member States inform public authorities of the importance of having due regard to the presumption of innocence when providing information to the media. While recitals do not in themselves contain any enforceable obligations, they can be used as an interpretative source.

> (19) Member States should take appropriate measures to ensure that, when they provide information to the media, public authorities do not refer to suspects or accused persons as being guilty for as long as such persons have not been proved guilty according to law. To that end, **Member States should inform public authorities of the importance of having due regard to the presumption of innocence** when **providing or divulging information to the media**. This should be without prejudice to national law protecting the freedom of press and other media.

4. Remedies

Article 4(2) of the Directive requires that Member States provide remedies where it is found that public officials have made public statements implying the guilt of a suspect.

> '2. Member States shall ensure that **appropriate measures** are available in the event of a breach of the obligation laid down in paragraph 1 of this Article not to refer to suspects or accused persons as being guilty, **in accordance** with this Directive and, in particular, with **Article 10.'**

Article 10 of the Directive states that

[82] ECtHR, *Daktaras v. Lithuania*, App. no. 42095/98, Judgment of 10 October 2000, para. 41; ECtHR, *Arrigo and Vella v. Malta*, App. no. 6569/04, Decision as to the admissibility of 10 May 2005; ECtHR, *Khuzhin and Others v. Russia*, App. no. 13470/02, Judgment of 23 October 2008, para. 94.
[83] ECtHR, *Allenet de Ribemont v. France*, App. no. 15175/89, Judgment of 10 February 1995, para. 38; ECtHR, *Fatullayev v. Azerbaijan*, App. no. 40984/07, Judgment of 22 April 2010, para. 159; ECtHR, *Garycki v. Poland*, App. no. 14348/02, Judgment of 6 February 2007, para. 69.
[84] ECtHR, *Khuzhin and Others v. Russia*, App. no. 13470/02, Judgment of 23 October 2008, para. 96.

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

As violations of different rights under the Directive could require different remedies, Article 10 of the Directive leaves some **discretion to the Member States** to choose an appropriate remedy provided that it is effective. Any remedy should seek to ensure that the suspect or accused person is able to receive a fair trial.[85] For example, a violation of presumption of innocence though a statement in press is unlikely to be remedied in the criminal proceedings on merits of the case. On the other hand, a violation of right to be present in trial in the first instance can be remedied in appeal proceedings.

The Impact Assessment conducted by the European Commission, before the adoption of the Directive, found that only five Member States had special rules providing for a remedy for violations of the prohibition to make public references of guilt in their national legal system. The other Member States did not have specific remedies but all provided for some form of redress through a right to appeal or to financial compensation.[86]

Recital 44 of the Directive and ECtHR case law indicate that the most appropriate form of redress for a violation of the right to a fair trial should, as far as possible, have the effect of placing the suspect or accused person in the position in which they would have been had their right not been disregarded.[87] ECtHR case law further stresses that there is not one-fit-for-all remedy and that the type of remedy will vary depending on the **nature and the context in which the violation took place, including the stage of the proceedings at which the violation was identified and complained about**. The protection of Article 6(2) of the Convention comes into play even before the conviction of the accused and may extend beyond the end of the criminal proceedings in the event of acquittal or discontinuance of the proceedings.[88]

In particularly severe cases, violations of the presumption of innocence threaten the suspect's opportunity to receive a fair trial, or undermine the integrity of the justice system. In such cases, it may be appropriate to **drop criminal charges, quash a conviction, remove certain personnel (whether judicial or prosecutorial) from the case, order a retrial or the re-location of the trial**.

In many countries, the presumption of innocence is linked more to protecting the privacy and dignity of the accused person. **Criminal action based on defamation laws** is one of the key examples.

The prejudice caused by the reference to the suspect or accused person as guilty could also be rectified by **remedies outside the scope of the criminal proceedings**. The ECtHR has accepted that a

---

[85] See see Fair Trials' Toolkit on Charter of Fundamental Rights of the European Union, Article 47 – right to an effective remedy.

[86] European Commission, Commission Staff Working Document Impact Assessment Accompanying the document Proposal for measures on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings /*SWD/2013/0478 final*/, Document 52013SC0478, 27 November 2013, p.20. ("Impact Assessment"). The European Commission is currently reviewing the implementation of the Directive.

[87] ECtHR, *Salduz v. Turkey*, App. no. 36391/02, Judgment of 27 November 2008, para. 72 in relation to violation of Article 6(1).

[88] ECtHR, *Gutsanovi v. Bulgaria*, App. no. 34529/10, Judgment of 15 October 2013, para. 176.

remedy under civil law can, in principle, be considered effective against alleged violations of the presumption of innocence.[89] This includes payment of a compensation for the damage caused to the reputation/honour/dignity of the suspect or the accused person. In addition to financial compensation, other remedies designed to protect the reputation or dignity of the person affected by breaches of the presumption of innocence could be considered such as the publication of a correction of the public statement, a public apology to victims, the right to publish an answer in the publication responsible for the media coverage which undermined the presumption of innocence and removal of articles from any online newspaper.[90] In several cases, the ECtHR found remedies under civil law, offering the possibility of obtaining **monetary compensation together with various other procedures for acknowledgment of or putting an end to the infringement of the presumption of innocence**, to be an effective remedy.[91] In a case where the proceedings were still pending, the Court found that an action for damages could not provide full redress for the alleged breach of the right to be presumed innocent, in its procedural aspect:

> *'The Court reiterates that the principle of the presumption of innocence is above all a procedural safeguard, and one of the elements of a fair criminal trial required by Article 6 of the Convention […] The Court notes that in the present case the Government did not refer to any remedy that would have enabled the applicant to invite the criminal court concerned to find a violation of the presumption innocence from the procedural standpoint. That being so, the claim for damages based on Article 57 of the Civil Code to which the Government referred could only be related to the alleged violation and sufficient in part; it could not fully remedy the alleged infringement of the presumption of innocence. The Court accordingly dismisses the Government's preliminary objection.'*[92]

Disciplinary sanctions may also be possible in certain jurisdictions. In Italy, for instance, judicial authorities (including judicial police) who make public statements or interviews related to people involved in ongoing proceedings may face disciplinary proceedings which can result in suspension for up to six months.[93]

C. PRESENTATION OF SUSPECTS AND ACCUSED PERSONS

1. The issue

It is well-established as a matter of human rights law that the way in which suspects are presented in court or in public can undermine the presumption of innocence.[94] This includes a requirement to

[89] Ibid., para. 178.
[90] Fair Trials, Innocent until proven guilty? The presentation of suspects in criminal proceedings, Report, 2019, p. 48.
[91] ECtHR, *Babjak and Others v. Slovakia*, App. no. 73693/01, Decision as to the admissibility of 30 March 2004; ECtHR, *Marchiani v. France*, App. no. 30392/03, Decision as to the admissibility of 27 May 2008; ECtHR, *Ringwald v. Croatia*, App.s nos. 14590/15 and 25405/15, paras. 54-56, Decisions of 22 January 2019; ECtHR, *Januškevičienė v. Lithuania*, App. no. 69717/14, Judgment of 3 September 2019, paras. 60-63 and 69.
[92] ECtHR, *Konstas v. Greece*, App. no. 53466/07, Judgement of 24 May 2011, paras. 28-29 and 56-57.
[93] Article 8 and 9, Italian Journalists Code of Professional Ethics.
[94] ECtHR, *Ramishvili and Kokhreidze v. Georgia*, App. no. 1704/06, Judgment of 27 January 2009, para. 100.

wear handcuffs or other restraints in court; court architecture which places a defendant in a 'dock', cage or glass box; the presence of security in court; clothing which identifies a suspect as a detainee; and parading a suspected person in public and before the media at the time of arrest or on the way into court or a police station.[95] Research on the use of different forms of restraints at the time of arrest and transportation or the use of the dock demonstrate that the way suspects are presented in public and in court can affect perceptions of guilt. This is clearly contrary to the underlying principles of justice, which require that "[i]n the determination of […] any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law" (Article 6 of the ECHR). The rule of law requires impartial decisions to be made as to guilt and innocence based on the law and on the facts that are presented. Any such assessment must not be influenced by bias in the mind of the decision-maker(s) created by how suspects have been presented in court.[96]

2. The use of physical restraints during arrest or in court

a. Prohibition of the use of physical restraint

According to Article 5 of the Directive, **measures of physical restraint should always be avoided** unless exceptionally authorised in three limited instances (see section b *infra*).

> '1. Member States shall take appropriate measures to ensure that suspects and accused persons are **not presented as being guilty**, **in court or in public, through the use of measures of physical restraint**.'

Article 5 encompasses presentation **both in court and in public**, i.e. during the proceedings but also at the time of arrest and transportation. Fair Trials' research indicates that it is common practice to quickly remove any restraints worn when the suspect enters the court. Even if restraints are ordered to be removed by the court once the hearing starts, this may already damage the presumption of innocence, both in terms of the perception of the judge (who sees the defendant enter in handcuffs and sometimes shackles) but in terms of the fact that the public has already seen (either directly or in media reports) the defendant in restraints while being escorted or waiting in the corridors of the court house.[97]

Article 5 only regulates the use of "**measures of physical restraints**" (see *infra* Section 3 on '*Other aspects of the suspect presentation*' regarding other aspects related to the suspect's presentation which may jeopardise the presumption of innocence). Recital 20 of the Directive notes that this includes '**handcuffs, glass boxes, cages and leg irons'**.

Such prohibition is also apparent in **ECtHR case law** though it has traditionally been based on the right to be free from **degrading treatment under Article 3 of ECHR**. For instance, in *Erdogan Yagiz v Turkey*, the ECtHR found that the obligation to wear **handcuffs** at the suspect's place of work and in front of his family and neighbours at the time of his arrest and during the searches had constituted

[95] Fair Trials, Innocent until proven guilty ? The presentation of suspects in criminal proceedings, Report, 2019, p. 29.
[96] Ibid. p. 43.
[97] Ibid., p. 32.

degrading treatment in violation of Article 3 of the ECHR.[98] The ECtHR also found that handcuffing a suspect in a private setting gave rise to a violation of Article 3 of the Convention in a situation where no serious risks to security could be proved to exist:[99] "even in the absence of publicity, a given treatment may still be degrading if the victim could be humiliated in his or her own eyes".[100] Similarly in *Svinarenko and Slyadnev v. Russia*, the ECtHR explicitly recognised that the fact that the suspects had been displayed to the **public in a cage** in the courtroom amounted to degrading treatment prohibited by Article 3 of the ECHR. It also noted that such practice undermined the presumption of innocence of the suspects and raised other fair trials concerns (such as the rights to participate effectively in the proceedings and to receive practical and effective legal assistance).[101] In each case, the Court assessed the particular circumstances of the case and the absence of risk of the person absconding or causing injury or damage.

Additionally, the ECtHR has found that the **use of docks, glass boxes and cages** are in breach of **Articles 6(1) (right to a fair trial) and 6(3) (defence's rights) of ECHR** inasmuch as they act as physical barriers that undermine the ability of the accused to **participate in the hearing** and represent an interference with **their right to receive effective legal assistance**.[102] In its reasoning, the Court made it clear that those violations can occur independently of a violation of Article 3.

In *Yaroslav Belousov v Russia*, the Court found that the degrading treatment of the defendant during the judicial proceedings was incompatible with the right to a fair trial, including the **presumption of innocence** and the equality of arms:

> *'147. The Court has found above that in hearing room no. 338 of the Moscow City Court the applicant was confined in an overcrowded glass cabin, and found a violation of Article 3 of the Convention on that account (see paragraph 126 above).* ***The Court would find it difficult to reconcile the degrading treatment of the defendant during the judicial proceedings with the notion of a fair hearing****, regard being had to the* ***importance of equality of arms, the presumption of innocence****, and the confidence which the courts in a democratic society must inspire in the public, above all in the accused (see, mutatis mutandis, De Cubber v. Belgium, 26 October 1984, § 26, Series A no. 86, and Svinarenko and Slyadnev, cited above, § 131). It follows that for the first two months of the trial the court hearings in the applicant's case were conducted in* ***breach of Article 6 of the Convention.'***[103]

The Court added that even in the absence of a violation of Article 3, being placed in a glass cabin during the proceedings may affect the fairness of the proceedings as a whole and in particular the

[98] ECtHR, *Erdoğan Yağız v. Turkey*, App. no. 27473/02, Judgment of 6 March 2007.
[99] See for instance where an elderly detainee was shackled to his hospital bed with the presence of two police officers stationed outside his hospital ward: ECtHR, *Hénaf v. France*, App. no. 65436/01, Judgment of 27 November 2003.
[100] ECtHR, *Ramishvili and Kokhreidze v. Georgia*, App. no. 1704/06, Judgment of 27 January 2009, para. 97.
[101] ECtHR, *Svinarenko and Slyadnev v. Russia*, App. nos. 32541/08 and 43441/08, 17/07/2014, Judgment 17 July 2014, paras. 133-134; see also ECtHR, *Ramishvili and Kokhreidze v. Georgia*, App. no. 1704/06, Judgment of 27 January 2009, para. 100.
[102] ECtHR, *Yaroslav Belousov v Russia*, App. nos 2653/13 and 60980/14, Judgment of 4 October 2016, paras 145-154.
[103] Ibid. para. 147.

applicant's **right to participate effectively in the proceedings and to receive practical and effective legal assistance**.

> *'149. The Court reiterates that a **measure of confinement in the courtroom may affect the fairness of a hearing** guaranteed by Article 6 of the Convention, in particular it may have an impact on the exercise of an accused's rights to participate effectively in the proceedings and to receive practical and effective legal assistance (see Svinarenko and Slyadnev, cited above, § 134, and the cases cited therein). It has stressed that **an accused's right to communicate with his lawyer without the risk of being overheard by a third party is one of the basic requirements of a fair trial** in a democratic society; otherwise legal assistance would lose much of its usefulness (see Sakhnovskiy v. Russia [GC], no. 21272/03, § 97, 2 November 2010, with further references).* […]
>
> *151. In the present case, the applicant and his co-defendants were separated from the rest of the hearing room by glass, a physical barrier which to some extent **reduced their direct involvement in the hearing.** Moreover, this arrangement **made it impossible for the applicant to have confidential exchanges with his legal counsel, to whom he could only speak through a microphone and in close proximity to the police guards**. It is also of relevance that **the cabin was not equipped to enable the applicant to handle documents or take notes**.*
>
> *In the present case, the use of the security installation was not warranted by any specific security risks or courtroom order issues but was a **matter of routine**. […]. Such circumstances prevailed for the whole duration of the first-instance hearing, which lasted for over eight months, including seven months in hearing room no. 635, and could not but **adversely affect the fairness of the proceedings as a whole**.*
>
> *153. It follows that during the first-instance hearing the applicant's rights to **participate effectively in the proceedings and to receive practical and effective legal assistance had been restricted,** and these restrictions had been neither necessary nor proportionate. The Court concludes that the criminal proceedings against the applicant were conducted in violation of **Article 6 §§ 1 and 3** (b) and (c) of the Convention.'*[104]

The ECtHR made it clear in the cases mentioned above that the use of physical restraints may affect the presumption of innocence. However, to our knowledge, **it has not yet examined the use of physical restraints directly under Article 6(2) of the ECHR** which safeguards the presumption of innocence.

The Directive and ECtHR case law thus provide a complementary set of arguments to ensure the use of physical restraints respect the right to a fair trial. On the one hand, the Directive makes it clearer than ECtHR case law that measures of physical restraint run counter to the presumption of innocence when applied with insufficient justification and without regard for the specific circumstances of the case. On the other hand, ECtHR case law provides interesting arguments based

[104] ECtHR, *Yaroslav Belousov v Russia*, App. nos 2653/13 and 60980/14, Judgment of 4 October 2016, paras 147-153. See also the following case regarding the use of a glass box with a small window: ECtHR, *Mariya Alekhina and Others v. Russia*, App. no. 38004/12, Judgment of 17 July 2018, para. 168.

on the rights to be free from degrading treatment, to participate effectively in the proceedings and to receive effective legal assistance.

b. Physical restraint measures accepted in exceptional circumstances

Article 5(2) of the Directive makes it clear that it does not create an absolute right: measures of physical restraint are permitted on a case-specific basis in three limited circumstances. Their use must be "required" for '**case-specific reasons**' related to:

(1) security, including to prevent suspects or accused persons from harming themselves or others or from damaging any property;
(2) the prevention of suspects from absconding ; or
(3) the prevention of suspects from having contact with third persons.

> 2. Paragraph 1 shall not prevent Member States from applying measures of physical restraint that are **required for case-specific reasons**, relating to **security** or to the prevention of suspects or accused persons from **absconding** or from having **contact with third persons**.'

Recital 20 of the Directive further explains these three grounds:

> 'The competent authorities should abstain from presenting suspects or accused persons as being guilty, in court or in public, through the use of measures of physical restraint, such as handcuffs, glass boxes, cages and leg irons, unless the use of such measures is required for **case-specific reasons**, either relating to **security**, including to prevent suspects or accused persons from **harming** themselves or others or from **damaging** any property, or relating to the prevention of suspects or accused persons from **absconding** or from having **contact** with third persons, such as witnesses or victims. The possibility of applying measures of physical restraint **does not imply that the competent authorities are to take any formal decision on the use of such measures**.'

Recital 20 notes that authorities are not obliged to make a formal decision before using these exceptions. However, the need for '**case-specific reasons'** requires an individual assessment in each case as regards the **proportionality of the use of measures of physical restraint** given the circumstances of each case.

This is in line with the case law of the ECtHR. Interestingly, ECtHR case law does not explicitly consider the risk from the perspective of having contact with a third person:

> *' As regards measures of restraint such as handcuffing, these do not normally give rise to an issue under Article 3 of the Convention where they have been imposed in connection with lawful arrest or detention and do not entail the use of force, or public exposure, exceeding* ***what is reasonably considered necessary in the circumstances****. In this regard, it is of importance for instance whether there is reason to believe that the person concerned would* ***resist arrest or try to abscond or cause injury or damage or suppress evidence****. […] However, the Court attaches* ***particular importance to the circumstances of each case*** *and examines it on a* ***case-by-case basis*** *in order to assess*

> *the need to restrain convicted persons outside the prison environment.' [Our translation]*[105]

Several factors should be taken into account to assess the proportionality of restraint in a particular case. These include:

- the **specific characteristics and behaviour of the suspect** or accused person, including their criminal record, their physical and mental condition. A person's voluntary surrender to the police should be regarded as a factor pointing towards the lack of danger underlying the need for means of restraint;
- the **vulnerability** of the suspect or the accused person, in particle those of minors, people with disability, people whose mobility is significantly hampered, pregnant women and elderly people; and
- the **circumstances of the case**.

3. Other aspects of the suspect presentation

As mentioned earlier, Article 5 of the Directive only regulates the use of "measures of physical restraints". In practice, many other aspects related to the suspect's presentation but which does not involve the use of physical restraints may jeopardise the presumption of innocence.

For instance, the Directive does not prohibit the **use of clothing** that identifies a person as a detainee (such as the orange boiler suit which has become synonymous with Guantanamo Bay detainees). This is, however, referred to in Recital 21 of the Directive:

> 'Where feasible, 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 those persons are guilty.'

Unfortunately, recitals of directives have no legal binding force and do not in themselves contain any enforceable rights or obligations. However, this provision echoes ECtHR case law which found violations of Article 6(2) of the ECHR when suspects or accused persons are presented in trial wearing prison clothing where no sufficient justification has been given by the respondent State. This is a matter in regards to which the ECtHR has been more firm in establishing such conduct as a violation of the presumption of innocence under Article 6(2) of the ECHR, as opposed to other measures of physical restraint (e.g. glass dock, cages, etc), which, as noted above, are more generally seen by the ECtHR as violations of Articles 6(1) (right to a fair trial), Article 6(3) (defence's rights) and Article 3 ECHR.

> - *ECtHR, Samoilă and Cionca v Romania, 4 March 2008:* The applicants had been presented before the court wearing prison clothes usually worn only by convicts. The ECtHR found that as it had not been established that the applicants had no suitable clothes of their own, the practice had been unjustified and was likely to

[105] ECtHR, *Gorodnitchev v. Russia*, Appl. no. 52058/99, Judgement of 24 May 2007, para. 101-102; ECtHR, *Svinarenko and Slyadnev v. Russia*, App. nos. 32541/08 and 43441/08, 17/07/2014, Judgment of 17 July 2014, para. 117.

confirm the public's impression that the applicants were guilty. Based on this element and additional considerations relating to public statements made by police officers about the guilt of the applicants, the Court concluded that there had been a violation of the presumption of innocence guaranteed by Article 6(2) ECHR.[106]

- *ECtHR, Jiga v Romania, 16 March 2010:* The applicants had been presented before the court wearing prison clothes usually worn only by convicts. In order to justify this measure, the Government maintained that it was necessary where the person concerned did not have personal clothing or as a public health measure. However, the Court noted that they provided no concrete arguments as to whether such a measure was necessary in the instant case, which suggested that the practice had been unjustified in the applicant's case. The Court considered that this measure was all the more prejudicial to the applicant since his co-accused participated in the hearings in civilian clothes. Such difference was likely to reinforce the public's impression that the applicant was guilty. The Court therefore found that there had been a violation of the right to be presumed innocent, as guaranteed by Article 6 § 2.[107]

Other elements may also have an adverse impact on the presumption of innocence. For instance, **the equipment worn by law enforcement personnel** carrying out the escort or guarding the suspect during the proceedings may also give the impression that the suspect is dangerous and guilty. Due to this concern, in Croatia and Spain, the escorting officers for minors usually wear civilian apparel so as to minimise the impact on the dignity and the presumption of innocence of the young suspect. In Spain, they also sit at the back of the courtroom so they cannot be identified as police.[108]

Lawyers also report that **the staging of the trial** and in particular the place where suspects sit (e.g. next to their lawyer or in the middle of the courtroom) might also impact the way they are perceived.[109]

4. Remedies

As above mentioned, Article 10 of the Directive provides a general right to an effective remedy for violation of the rights guaranteed under the Directive but leaves it to the Member States to decide what the appropriate remedy should be. It is, however, clear from ECtHR case law that those will be case-specific, depending on the **nature and the context in which the violation took place, including the stage of the proceedings at which the violation was identify and complain about**.[110] As for public statements, redress can include procedural action such as dropping the charges in case of a serious violation. Most often, remedies designed to rectify to the person's dignity and reputation will

[106] ECtHR, *Samoilă and Cionca v Romania*, App. no. 33065/03, Judgment of 4 March 2008, paras. 99-101.
[107] ECtHR, *Jiga v Romania*, App. no. 14352/04, Judgment of 16 March 2010, para. 101-103.
[108] Hungarian Helsinki Committee, Law Enforcement Toolkit: the use of restraints and its impact on the presumption of innocence, 2019, pp. 23-24.
[109] Ibid. pp. 26-27.
[110] ECtHR, *Salduz v. Turkey*, App. no. 36391/02, Judgment of 27 November 2008, para. 72 in relation to violation of Article 6 § 1.

be the primary mechanism for redress for the unjustified use of physical restraints, especially if these were given some publicity in the media. This generally includes compensation and rectification from the media that published the footage.[111] We invite you to refer to Section B.4. above for further details.

In addition to judicial review, some Member States have established specific procedures to lodge a complaint directly to the police authorities.[112]

D. THE BURDEN OF PROOF

1. The issue

The presumption of innocence also determines who should meet the burden of proof in criminal proceedings. Since the suspect or the accused person is presumed innocent, the *onus probandi* on which a criminal conviction is based must necessarily fall on the prosecution and any doubt as to guilt should benefit the suspect or accused person (*in dubio pro reo*). These principles are fundamental to the right to a fair trial because they ensure that courts' judgments are based on evidence, not mere assumptions, and that evidence is collected through rigorous investigation, not mere reliance on confessions or dubious witness statements without a rigorous search for all available corroborating material. The *in dubio pro reo* principle, therefore, helps to reduce miscarriages of justice, resulting in the cost savings and increased public trust.[113] According to the EC's Impact Assessment, despite adequate legal standards and general remedies in the EU Member States, breaches of this aspect of the presumption of innocence continued to occur at the time of the Assessment. These include, for instance, pressure placed on suspects by the police to negotiate a plea bargain, acquitting decisions which seem to have to be substantiated in much more detail than convictions or a guilty verdict delivered even though insufficient evidence was presented to justify it.[114]

2. The principle

Under Article 6(1) of the Directive, Member States are required to ensure that the burden of proof is on the prosecution.

> '1. Member States shall ensure that the **burden of proof for establishing the guilt** of suspects and accused persons is **on the prosecution**. This shall be 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 law.

[111] Fair Trials, Innocent until proven guilty? The presentation of suspects in criminal proceedings, Report, 2019, p. 47.
[112] Hungarian Helsinki Committee, Innocent until proven guilty: the use of restraints and its impact on the presumption of innocence – Comparative study, 2019, pp. 30-33.
[113] Impact Assessment, n17, pp 21-23.
[114] Ibid.

Article 6(2) continues by stating that a doubt when sentencing must always favour the accused person.

> '2. Member States shall ensure that any doubt as to the question of guilt is to benefit the suspect or accused person, including where the court assesses whether the person concerned should be acquitted.'

Article 6 of the Directive enshrined the basic principles developed in ECtHR case law.

> *'77. Paragraph 2 (art. 6-2) embodies the principle of the presumption of innocence. It requires, inter alia, that when carrying out their duties, the members of a court should* ***not start with the preconceived idea*** *that the accused has committed the offence charged; the* ***burden of proof is on the prosecution, and any doubt should benefit the accused.*** *It also follows that it is for the prosecution to inform the accused of the case that will be made against him, so that he may prepare and present his defence accordingly, and to adduce evidence sufficient to convict him.'*[115]

The ECtHR also stressed that a court's judgment must be based on the evidence put before it and not on mere allegations or assumptions.[116]

3. Limited scope of application

In *DK*, the CJEU clarified the scope of application of the principles stated in Article 6. It explained that the Directive distinguishes between **judicial decisions on guilt**, which necessarily occur at the conclusion of the criminal proceedings, and **other procedural acts**, such as acts of the prosecution and preliminary decisions of a procedural nature. Based on this distinction (which emerges from the difference of wording between Articles 6 and 4 of the Directive), the Court held that Article 6 of the Directive only applies to the former:

> The reference to establishing 'guilt' in Article 6(1) and (2) of Directive 2016/343 must therefore be construed as meaning that the aim of that provision is to govern the allocation of the burden of proof **only in the adoption of judicial decisions on guilt.**[117]

The *DK* case related to a rule under Bulgarian criminal procedure according to which, when the case of a suspect in pre-trial detention reaches trial, the trial court is responsible for dealing with the lawfulness of the pre-trial detention as well as the merits of the case. Once the trial court finds the pre-trial detention lawful, it becomes indefinite and can only be reviewed on application by the defendant; in such application, the defendant must convince the court of changed circumstances that would justify release. A Bulgarian court submitted a preliminary request to determine whether this national rule shifts the onus from the prosecution to the defendant to provide evidence for release in contradiction with Article 6 of the Directive.

---

[115] ECtHR, *Barberà, Messequé and Jabardo v. Spain*, App. no. 10590/83, Judgment of 6 December 1988, para. 77.
[116] ECtHR, *Telfner v. Austria*, App. no. 33501/96, Judgment of 20 March 2001, paras. 18-20.
[117] CJEU, *Case C-653/19 PPU – DK*, Judgment of 28 November 2019, ECLI:EU:C:2019:1024, para. 33.

Based on the above-mentioned distinction, the Court **excluded decisions on pre-trial detention** from the scope of Article 6 of the Directive.

> **'A judicial decision having as its sole purpose the potential continued detention on remand pending trial** of an accused person seeks only to resolve the question whether that person must be released or not, in the light of all the relevant circumstances, without establishing whether that person is guilty of having committed the offence with which he is charged. […] Thus, that decision cannot be considered a judicial decision on the guilt of the accused person for the purposes of that directive. Consequently, it must be held that Article 6 of that directive does not apply to the procedure leading to the adoption of such a decision, so that **the allocation of the burden of proof in the context of that procedure is solely within the remit of national law**.'[118]
>
> 'In the light of all the foregoing considerations, the answer to the question referred is that Article 6 of Directive 2016/343 and Articles 6 and 47 of the Charter do not apply to a national law that makes the release of a person held in detention on remand pending trial conditional on that person establishing the existence of new circumstances justifying that release.'[119]

The Court held nevertheless that Articles 3 and 4 of Directive 2016/343 preclude such a decision from referring to the accused person as being guilty.[120]

This decision was criticised by commentators as over-restricting the applicability of the Directive; they also opined that the court had missed an opportunity to provide common standards on pre-trial detention.[121]

The ECtHR has repeatedly made the link between pre-trial detention and the burden of proof – although not under the right to presumption of innocence (article 6(2) ECHR) but the right to liberty (article 5 ECHR).

> *'[T]he Court points out that on more than one occasion the domestic authorities refused to release the applicants arguing that the latter failed to furnish evidence that their detention was no longer necessary (see paragraphs 19 and 24 above). In this connection, the Court reiterates that it has repeatedly considered the practice of* ***shifting the burden of proof to the detained person*** *in such matters to be tantamount to* ***overturning the rule of Article 5 of the Convention****, a provision which makes detention an exceptional departure from the right to liberty and one that is only permissible in exhaustively enumerated and strictly defined cases […]'*[122]

[118] *Ibid*. para 35-38.
[119] *Ibid*. para. 42.
[120] *Ibid*. para. 36.
[121] See notably Adriano Martufi and Christina Peristeridou, *CJEU, Case C 653/19 PPU, DK*, November 2019.
[122] ECtHR, *Pastukhov and Yelagin v. Russia*, App. no. 55299/07, Judgment of 19 December 2013, para. 49; ECtHR, *Magnitskiy and Others v. Russia*, App. nos. 32631/09 and 53799/12, Judgment of 27 August 2019, para. 222; ECtHR, *Zherebin v. Russia*, App. no. 51445/09, Judgment of 24 December 2013, para. 60; ECtHR, *Ilijkov v.*

Resorting to ECtHR case law might therefore be more successful on issues related to burden of proof and pre-trial detention.

4. Reversal of the burden of proof

Article 6 of Directive does not address the cases of **reversal of the burden of proof or the use of presumptions of fact or law**. Presumptions of fact or law are used in several Member States, often in relation to traffic offences, environmental crime, financial crime, and drug-related crime. A presumption means that proof of certain objective facts alone is sufficient to prove guilt, i.e. irrespective of whether the facts result from criminal intent or from negligence. For instance, the person in whose name a vehicle has been registered is presumed to have driven it at the moment the traffic offence was committed.[123]

Mentioning the use of presumptions in the Directive was highly debated during its drafting.[124] As a compromise between the European Parliament and the Council, the possibility of using presumptions provided specific conditions were satisfied was recognised in Recital 22 of the Directive.

> '[…] The presumption of innocence would be infringed if the burden of proof were shifted from the prosecution to the defence, **without prejudice to** any ex officio fact-finding powers of the court, to the independence of the judiciary when assessing the guilt of the suspect or accused person, and **to the use of presumptions of fact or law concerning the criminal liability of a suspect or accused person**. Such presumptions should be confined within **reasonable limits**, taking into account **the importance of what is at stake** and maintaining the **rights of the defence**, and the means employed should be **reasonably proportionate** to the legitimate aim pursued. Such presumptions should **be rebuttable** and in any event, should be used only where the rights of the defence are respected.'

As mentioned in the introduction of this toolkit, recitals have no legal binding force and cannot alter the content of substantive provisions. They cannot be validly relied on as a ground for derogating from the actual provisions of the Directive.[125] It was argued that the use of presumptions is **not a true exception to the general rule** regarding the burden of proof but more a modified application of this rule: the presumptions are applied when the authorities already have incriminating evidence,

---

Bulgaria, App. no. 33977/96, Judgment of 26 July 2001, paras. 84-85; ECtHR, *Rokhlina v. Russia*, App. no. 54071/00, Judgment of 7 April 2005, para. 67.

[123] This was validated by the ECtHR in the following case: ECtHR, *Falk v. Netherlands*, Appl. no. 66273/01, Judgment of 19 October 2004.

[124] On this issue, see: Steven Cras and Anže Erbežnik, *The Directive on the Presumption of Innocence and the Right to Be Present at Trial: Genesis and description of the new EU-Measure*, Eucrim, 1 April 2006.

[125] The CJEU ruled that the preamble to an EU act has no binding legal force and cannot be validly relied on as a ground for derogating from the actual provisions of the act in question or for interpreting those provisions in a manner clearly contrary to their wording. CJEU, *Case C-134/08 Hauptzollamt Bremen v. J.E. Tyson Parketthandel GmbH hanse j.*, Judgement of 2 April 2009, ECLI:EU:C:2009:229, para. 16.

such as a photo of a speeding car. It is unfortunate that such an important issue was dealt in the recitals which are aimed to be used only as source of interpretation of the Directive. [126]

Recital 22 confines presumptions to situations in which the following strict conditions are fulfilled:

- in employing presumptions in criminal law, States should take into account the importance of what is at stake and should maintain the rights of the defence. Any presumptions employed should be reasonably **proportionate to the legitimate aim** in question;
- presumptions **should be rebuttable**, i.e. the accused should be given the opportunity to challenge the presumption of guilt and present exculpatory evidence; and
- they should be used **only where the rights of the defence are respected.**

These conditions are similar to those established by the ECtHR. The ECtHR has also confirmed the use of 'presumptions of fact or law' / 'strict liability' under limited circumstances.

> *'In every legal system there are presumptions of fact or law; the Convention does not, of course, in principle prevent this, but in criminal matters it obliges the Contracting States not to exceed a certain threshold in this respect. […] Article 6 (2) […] requires States to confine them* ***within reasonable limits*** *which take into account the* ***seriousness of the matter at stake*** *and preserve* ***the rights of the defence****.'*[127] [Our translation]
>
> *'[I]n employing presumptions in criminal law, the Contracting States are required to strike a balance between the importance of what is at stake and the rights of the defence; in other words, the means employed have to be* ***reasonably proportionate to the legitimate aim sought*** *to be achieved.'*[128]

[126] Steven Cras and Anže Erbežnik, *The Directive on the Presumption of Innocence and the Right to Be Present at Trial: Genesis and description of the new EU-Measure*, Eucrim, 1 April 2006. See also the Commission's concern: Council of the European Union, *Statement by the Commission relating to Article 6 on the burden of proof*, 1 February 2016, 2013/0407 (COD).

[127] ECtHR, *Salabiaku v. France*, Appl. no. 10519/83, Judgement of 7 October 1988, para 28. The case concerns a presumption of criminal liability for smuggling drugs inferred from the possession of narcotics. See also ECtHR, *Janosevic v. Sweden*, App. no. 34619/97, Judgment of 23 July 2002, para. 100, concerning tax surcharges on the basis of objective grounds (that is, without any requirement of intent or negligence on the part of the taxpayer) and enforcement thereof prior to a court determination); ECtHR, *Radio France and Others v. France*, App. no. 53984/00, Judgment of 30 March 2004, para. 24, concerning the presumption of criminal liability of a publishing director for defamatory statements made in radio programmes; ECtHR, *Västberga Taxi Aktiebolag and Vulic v. Sweden*, App. no. 36985/97, Judgment of 23 July 2002, para. 113 , concerning objective responsibility for tax surcharges; ECtHR, *Klouvi v. France*, App. no. 30754/03, Judgment of 30 June 2011, para. 41, regarding inability to defend a charge of malicious prosecution owing to a statutory presumption that an accusation against a defendant acquitted for lack of evidence was false; ECtHR, *Iasir v. Belgium*, App. no. 21614/12, Judgment of 26 January 2016, para. 30, concerning substantive presumptions on participation in an offence by co-accused; ECtHR, *Zschüschen v. Belgium*, App. no. 23572/07, Decision of 2 May 2017, para. 22, concerning money laundering proceedings).

[128] ECtHR, *Janosevic v. Sweden*, App. no. 34619/97, Judgment of 23 July 2002, para. 101.

5. Remedies

Violations of the principle according to which burden of proof is on the prosecution may have severe consequences for the suspect or the accused person. As mentioned above, Article 10 of the Directive provides a general right to an effective remedy for violation of the rights guaranteed under the Directive. However, it is up to the Member States to decide what the appropriate remedy should be.

In practice, a few Member States have established a specific remedy that annuls the proceedings. In other Member States, only general remedies, such as the introduction of an appeal, are available.[129]

[129] Impact Assessment, n17, pp. 19-20.

II – RIGHT TO REMAIN SILENT AND NOT TO INCRIMINATE ONESELF

A. THE ISSUE

The right to remain silent and the right not to incriminate oneself are "generally recognised international standards which lie at the heart of the notion of a fair procedure".[130] Both are closely related to the protection of the presumption of innocence and the avoidance of miscarriages of justice.

"The right not to incriminate oneself is primarily concerned (…) with respecting the will of an accused person to remain silent". As the prosecution has the sole responsibility to prove the guilt of a person, a person should not be forced to assist the prosecution by being forced to provide evidence against their will.[131]

In addition, these rights represent a fundamental protection of individual dignity before the coercive power of the state. They seek to protect the suspect or the accused person against improper methods of coercion or oppression by the authorities. They are key safeguards against coerced confessions, which by their nature are unreliable. As such, these rights encourage independent and thorough investigations and help to improve the quality of policing and prosecuting.

In practice, these rights are often violated. For instance, practitioners report police officers suggesting to suspects or accused persons that, if they exercise their right to silence, the courts will draw adverse inference, will view it as an aggravating factor or will be more likely to find that the suspect or the accused person should be subject to pre-trial detention.[132] The risk of coerced waivers of these rights is especially acute where suspects do not have adequate access to information about their rights and to a lawyer to support them in exercising them. This risk is further exacerbated where they are vulnerable in other ways (i.e. age,[133] level of literacy,[134] drug dependence,[135] etc). In some Member States, exercising the right to silence can in certain circumstances be used as incriminatory evidence. Some Member States do not have specific remedies for breaches of these rights and while recognising a general right to appeal, they allow the evidence obtained in breach of the right to remain silent to be considered by the court.[136]

---

[130] ECtHR, *Heaney and McGuiness v. Ireland*, App. no. 34720/97, Judgment of 21 December 2000, para. 40; see also ECtHR, *Saunders v the United Kingdom*, App. no. 19187/91, Judgment of 17 December 1996, para. 68.
[131] ECtHR, *Saunders v the United Kingdom*, App. no. 19187/91, Judgment of 17 December 1996, para 69.
[132] Jodie Blackstock, Ed Cape, Jacqueline Hodgson, Anna Ogorodova, Taru Spronken, Inside Police Custody An Empirical Account of Suspects' Rights in Four Jurisdictions, Intersentia, 2014.
[133] ECtHR, *Panovits v. Cyprus*, App. No 4268/04, Judgment of 11 December 2008, para. 67.
[134] ECtHR, *Kaçiu and Kotorri v. Albania*, App. Nos 33192/07 and 33194/07, Judgment of 9 December 2013, para.
120.
[135] ECtHR, *Płonka v. Poland*, App. No 20310/02, Judgment of 31 March 2009, para. 37.
[136] Impact Assessment, n17, pp. 24-25.

The rights to remain silent and not to incriminate oneself are so interlinked we decided to present them together as in the Directive. Unfortunately, the Directive missed the opportunity to address the issue of the waiver of the right to remain silent and the right not to incriminate oneself.

B. THE PRINCIPLES

Article 7 of the Directive recognises the right to remain silent and not to contribute to incriminating oneself when questioned.

> '1. Member States shall ensure that suspects and accused persons have the right to remain silent in relation to the criminal offence that they are suspected or accused of having committed.'
>
> '2. Member States shall ensure that suspects and accused persons have the right not to incriminate themselves.'

As explained in the introduction and Recitals 24 and 25 of the Directive, both are linked with the presumption of innocence.

> (24) The right to remain silent is an important aspect of the presumption of innocence and should serve as protection from self-incrimination.
>
> (25) The right not to incriminate oneself is also an important aspect of the presumption of innocence. Suspects and accused persons **should not be forced**, when asked to make statements or answer questions, **to produce evidence or documents or to provide information** which may lead to self-incrimination.

The Directive is one of the first EU instruments to mention the right to remain silent and the right not to incriminate oneself explicitly.[137] Neither were mentioned in the ECHR or the Charter. However, the ECtHR has consistently recognised that they form part of the requirements of a fair trial:

> *'The Court also reiterates that the right to silence and the right not to incriminate oneself are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6.'*[138]

1. Scope of application

a. Criminal proceedings – criminal offence

As per the other provisions of the Directive, the rights enshrined in Article 7 only cover testimony and evidence that has been obtained under compulsion **in criminal proceedings**. Recital 11 of the Directive notes:

[137] The right to remain silent was first included in Article 3 of the Right to Information Directive.
[138] ECtHR, *Pishchalnikov v. Russia*, App. no. 7025/04, Judgment of 24 September 2009, para. 71.

> (11) This Directive should apply only to criminal proceedings as interpreted by the Court of Justice of the European Union (Court of Justice), without prejudice to the case-law of the European Court of Human Rights. This Directive should not apply to civil proceedings or to administrative proceedings, including where the latter can lead to sanctions, such as proceedings relating to competition, trade, financial services, road traffic, tax or tax surcharges, and investigations by administrative authorities in relation to such proceedings.

Accordingly, the Directive does not ensure the right to silence and the right not to incriminate oneself regarding evidence obtained under compulsion in non-criminal proceedings. However, the ECtHR recognised that the subsequent use in criminal proceedings of evidence obtained in non-criminal proceedings by the use of compulsion may breach the right not to incriminate oneself.

> *'The public interest cannot be invoked to justify the use of answers compulsorily obtained in a non-judicial investigation to incriminate the accused during the trial proceedings.'*[139]

In addition, Article 7 of the Directive specifies that the right to silence and the right not to incriminate oneself only apply **in relation to the criminal offence** that the person is suspected or accused of having committed. According to Recital 26, this means that a person could still be required to answer certain questions, for instance, to identify themselves.

> (26) The right to remain silent and the right not to incriminate oneself should apply to questions relating to the criminal offence that a person is suspected or accused of having committed and **not, for example, to questions relating to the identification** of a suspect or accused person.

b. Minor offences

In contrast with the other Roadmap Directives, the Presumption of Innocence Directive applies to minor offences. However, Article 7(6) of the Directive specifically allows Member States to conduct proceedings relating to such minor offences, or certain stages thereof, in writing or without questioning the suspect or the accused person so as to avoid the requirements derived from the right to remain silent and not to self-incriminate.

> '6. This Article shall not preclude Member States from deciding that, with regard to **minor offences, the conduct of the proceedings**, or certain stages thereof, may take place **in writing or without questioning of the suspect or accused person** by the competent authorities in relation to the offence concerned, provided that this complies with the right to a fair trial.'

Recital 30 of the Directive cites minor road traffic offences as an example of minor offences.

[139] ECtHR, *Saunders v the United Kingdom*, App. no. 19187/91, Judgment of 17 December 1996, para74.

2. The notion of improper compulsion

As indicated by the ECtHR, "the right to silence and the privilege against self-incrimination are primarily designed to **protect against improper compulsion** by the authorities and the obtaining of evidence through methods of coercion or oppression in defiance of the will of the accused', and 'to protect the freedom of a suspected person to choose whether to speak or to remain silent when questioned by the police."[140]

To determine which methods of coercion are prohibited, the ECtHR stressed the need to consider **the nature and degree** of compulsion used to obtain the evidence. It identified at least three kinds of situations which give rise to concerns as to **improper compulsion** in breach of Article 6.

> 1. *'The first is where a suspect is **obliged to testify under threat of sanctions** and either testifies in consequence (see, for example, Saunders, cited above; and Brusco v. France, no. 1466/07, 14 October 2010) or is sanctioned for refusing to testify (see, for example, Heaney and McGuinness, cited above; and Weh v. Austria, no. 38544/97, 8 April 2004).*
> 2. *The second is where **physical or psychological pressure**, often in the form of treatment which **breaches Article 3 of the Convention**, is applied to obtain real evidence or statements (see, for example, Jalloh, Magee and Gäfgen, all cited above).*
> 3. *The third is where the authorities use **subterfuge** to elicit information that they were unable to obtain during questioning (see Allan v. the United Kingdom, no. 48539/99, ECHR 2002-IX).'*[141]

In the latter case, the Court found that placing a police informer in the accused person's cell to elicit information from him, because he had exercised his right to silence during police interview, was an illicit subterfuge which breached his right to silence.[142]

C. RIGHT TO INFORMATION AND ACCESS TO A LAWYER

As the ECtHR has stated, the rights to remain silent and not to incriminate oneself are essential elements of the right to a fair trial.[143] They are closely connected with the other rights protected under the Roadmap Directives (i.e. access to a lawyer, right to information, right to legal aid, etc.) –

[140] ECtHR, *Allan v the United Kingdom*, App. no. 48539/99, Judgment of 5 November 2002, para. 50.
[141] ECtHR, *Ibrahim and Others v. the United Kingdom*, App. nos. 50541/08, 50571/08, 50573/08 and 40351/09, Judgment of 13 September 2016, para. 267.
[142] ECtHR, *Allan v the United Kingdom*, App. no. 48539/99, Judgment of 5 November 2002, para. 52-53.
[143] See among others, ECtHR, *Heaney and McGuiness v. Ireland*, App. no. 34720/97, Judgment of 21 December 2000, para. 40; ECtHR, *Saunders v the United Kingdom*, App. no. 19187/91, Judgment of 17 December 1996, para. 68; ECtHR, *John Murray v. the United Kingdom*, App. no. 18731/91, Judgment of 8 February 1996, para. 45; ECtHR, *Bykov v. Russia*, App. no. 48539/99, Judgment of 5 November 2002, para. 92.

all of them enable the suspect or the accused person to know about the right no to make incriminating statement and to make full use of it.[144]

Under the Right to Information Directive, suspects and accused persons must **promptly be informed of their right to remain silent**.[145] The ECtHR recognised that "the importance of informing a suspect of the right to remain silent is such that, even where a person willingly agrees to give statements to the police after being informed that his words may be used in evidence against him, this cannot be regarded as a fully informed choice if he has not been expressly notified of his right to remain silent".[146]

Surprisingly, the obligation to inform suspects and accused persons of the right not to incriminate themselves is not listed in the Right to Information Directive. The EU legislator tried to rectify this omission by including it in Recital 31 of the Presumption of Innocence Directive:

> (31) Member States should consider ensuring that, where suspects or accused persons are provided with information about rights pursuant to **Article 3 of Directive 2012/13**/EU, they are **also provided with information concerning the right not to incriminate oneself**, as it applies under national law in accordance with this Directive.
>
> (32) Member States should consider ensuring that, where suspects or accused persons are provided with a **Letter of Rights** pursuant to Article 4 of Directive 2012/13/EU, such a Letter also contains information concerning the **right not to incriminate oneself** as it applies under national law in accordance with this Directive.

Equally, one of the benefits of the **right to access a lawyer**, protected by the Access to a Lawyer Directive, is that lawyers can help suspects and accused person understand and exercise their rights to remain silent and not to incriminate oneself.[147] This is the clearest reason why early access to a lawyer is essential. This was recognised by the ECtHR in the *Salduz* case, where the Court held:

> *'In this respect, the Court underlines the importance of **the investigation stage** for the preparation of the criminal proceedings, as the evidence obtained during this stage determines the framework in which the offence charged will be considered at the trial. At the same time, an accused often finds himself in a particularly vulnerable position at that stage of the proceedings […]. In most cases, this particular vulnerability can only be properly compensated for **by the assistance of a lawyer** whose task it is, among other things, to **help to ensure respect of the right of an accused not to incriminate himself**. This right indeed presupposes that the prosecution in a criminal*

[144] See Fair Trials' Toolkit on the Right to Information Directive, Fair Trials' Toolkit on the Access to a Lawyer Directive.
[145] Article 3(1)(e) of the Right to Information Directive. For further analysis, see Fair Trials' Toolkit on the Right to Information Directive.
[146] ECtHR, *Navone and Others v. Monaco*, App. nos. 62880/11, 62892/11 et 62899/11, Judgment of 24 October 2013, para. 74; ECtHR, *Stojkovic v. France and Belgium*, App. no. 25303/08, Judgment of 27 October 2011, para. 54.
[147] See Fair Trials' Toolkit on the Access to a Lawyer Directive.

case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused.'[148]

➔ **Actively secure these rights before/during the interview**

Before the interview

- Ensure your client has been informed of their rights to silence and not to incriminate themselves. Discuss whether they wish to/should remain silent.

During the interview

- Identify whether the questions lead to the suspect departing from their initial choice to remain silent.
- Try to identify inappropriate or excessive pressure from the interviewer. If you notice that the interrogation is of a more accusatory nature (use of closed "attacking" questions in order to confirm the hypothesis of the suspect's guilt), or it seems as if the interrogator is aiming for a confession rather than hearing your client's story, there may be an increased need for your presence and intervention.
- Examples of excessive "pressure" include direct threats, lying about the evidence/presenting false evidence (e.g. telling the suspect there is overwhelming evidence without showing the details of it or telling a witness saw them), making false promises (e.g. more lenient treatment) or undermining the legal advisor (e.g. questioning the lawyer's competence).
- Take your own records of what is being said and the non-verbal behaviour of both parties.
- If necessary, intervene to advise your client not to answer, to ask for a break or to stop the interview. Explain the reasons for your intervention.[149]

D. PROTECTION AGAINST ADVERSE INFERENCES

Article 7(5) of the Directive prohibits drawing negative inferences from the exercise of the rights to remain silent and not to incriminate oneself by suspects or accused persons. "To permit such a procedure is to permit a penalty to be imposed by a criminal court on an accused because he relies upon a procedural right guaranteed by the Convention": either the suspect incriminates themselves by speaking, or he incriminates themselves by silence.[150]

'5. The exercise by suspects and accused persons of the right to remain silent or of the right not to incriminate oneself shall not be used against them and shall not be considered to be evidence that they have committed the criminal offence concerned.'

[148] ECtHR, *Salduz v. Turkey*, App. no. 36391/02, Judgment of 27 November 2008, para. 54.

[149] These actions points are based on NETPRALAT, 'Module 4 on Suspect Interview'. NETPRALAT is a project focusing on training European lawyers to apply procedural rights directives in pre-trial proceedings when assisting their clients, with a special focus on the right to translation. Please find further information on NETPRALAT website.

[150] Partly Dissenting Opinion of Judge Walsh, joined by Judges Makarczyk and Lohmus in ECtHR, *John Murray v. the United Kingdom*, App. no. 18731/91, Judgment of 8 February 1996.

This provision sets a higher standard of protection than the ECtHR case law – the latter does not consider the rights to remain silent and the right not to incriminate oneself as absolute.[151] In the highly criticised *John Murray* case,[152] the ECtHR held that adverse inferences could be drawn from a failure to testify in some limited circumstances. It then allowed the use of evidence obtained following "indirect compulsion", i.e. warnings to the accused that adverse inferences could be drawn from a refusal to provide an explanation to the police for being present at the scene of a crime or to testify during trial.[153]

> *'On the one hand, […] it is incompatible with [the right to remain silent] to base a conviction solely or mainly on the accused's silence or on a refusal to answer questions or to give evidence himself. On the other hand, [the right to remain silent] cannot and should not prevent that the accused's silence, in situations which clearly call for an explanation from him, be taken into account in assessing the persuasiveness of the evidence adduced by the prosecution. […] It cannot therefore be said that an accused's decision to remain silent throughout criminal proceedings should necessarily have no implications […] Whether the drawing of adverse inferences from an accused's silence infringes Article 6 (art. 6) is a matter to be determined in the light of all the circumstances of the case.*[154]

While the Directive rejects such an approach, Recital 28 of the Directive notes 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, ***in itself***, be considered to be evidence that the person concerned has committed the criminal offence concerned. This should be **without prejudice to national** rules concerning the assessment of evidence by courts or judges, provided that the rights of the defence are respected.'

The words "in itself" and the last sentence of Recital 28 leave the door open for judges to take into account the silence of the accused when evaluating other evidence or for the purpose of sentencing, provided that, in doing so, the proceedings remain fair for the suspect or the accused person. It is essential to recall that recitals cannot alter the content of substantive provisions and that the rule remains a clear prohibition on deriving any adverse inference from the right to remain silent.

The CJEU has yet to develop its own understanding of the prohibition against adverse interference and its relationship with Recital 28.

In practice, the European Commission's Impact Assessment noted that numerous Member States, including Belgium, Cyprus, Finland, France, Ireland, Latvia, Netherlands and Sweden would need to

[151] ECtHR, *John Murray v. the United Kingdom*, App. no. 18731/91, Judgment of 8 February 1996, para. 47; ECtHR, *Ibrahim and Others v. the United Kingdom*, App. nos. 50541/08, 50571/08, 50573/08 and 40351/09, Judgment of 13 September 2016, para. 269.
[152] See notably the partly dissenting opinion of Judge Pettiti in ECtHR, *John Murray v. the United Kingdom*, App. no. 18731/91, Judgment of 8 February 1996.
[153] ECtHR, *John Murray v. the United Kingdom*, App. no. 18731/91, Judgment of 8 February 1996.
[154] Ibid., para. 47.

change their legislation to ensure that it would not be possible to draw adverse inferences from exercising the right to silence.[155]

E. LIMITATIONS

While the Directive aimed to define the rights to remain silent and the right not to incriminate oneself as absolute rights,[156] it still allows for two limitations, thereby weakening the standard it established.

1. The use of legal powers of compulsion and independent evidence

a. The exception

Article 7(3) of the Directive first allows for the use of legal powers to gather self-incriminatory evidence which exists independently of the will of the suspect or the accused person.

> '3. The exercise of the right not to incriminate oneself shall not prevent the competent authorities from gathering evidence which may **be lawfully obtained through the use of legal powers of compulsion** and which has an existence **independent of the will** of the suspects or accused persons.'

According to Recital 29 of the Directive, this includes:

> '[…] material acquired pursuant to a warrant, material in respect of which there is a legal obligation of retention and production upon request, breath, blood or urine samples and bodily tissue for the purpose of DNA testing.'

The Directive strictly prohibits the use of compulsion to request self-incriminatory evidence whose existence depends on the accused's will. Recitals 25 and 27 of the Directive explicitly indicate that suspects or accused persons should not be forced to produce documents or to provide information that could lead to self-incrimination.

> (25) The right not to incriminate oneself is also an important aspect of the presumption of innocence. **Suspects and accused persons should not be forced**, when asked to make statements or answer questions, **to produce evidence or documents or to provide information which may lead to self-incrimination.**
>
> (27) The right to remain silent and the right not to incriminate oneself imply that competent authorities **should not compel suspects or accused persons to provide information if those persons do not wish to do so.**

Despite this clarification, Article 7(3) remains vague, in particular, due to the difficulty in determining what is understood by "legal powers of compulsion" and "will-independent" material (notably when

[155] Impact Assessment, n17.
[156] Steven Cras and Anže Erbežnik, *The Directive on the Presumption of Innocence and the Right to Be Present at Trial: Genesis and description of the new EU-Measure*, Eucrim, 1 April 2006.

it relates to documents which existence is not certain). Broadly interpreted, this provision could extinguish the very essence of the right to silence and the right not to incriminate oneself.

b. A proportionality test to assess the legality of the exception

In order to determine whether the right to remain silent or the right not to incriminate oneself has been violated, Recital 27 of the Directive expressly requires taking into account "**the interpretation by the European Court of Human Rights** of the right to a fair trial under the ECHR". In fact, Article 7(3) is directly inspired by the case law of the ECtHR. As mentioned above, the latter does not consider the right to silence and the right not to incriminate oneself as absolute. It recognised that compelling the defendant to give evidence existing independently of the will of the accused does not necessarily infringe the presumption of innocence.[157] The ECtHR developed a **proportionality test** based on four factors to determine whether the right not to incriminate oneself has been violated:

> *(1) 'the nature and degree of compulsion used to obtain the evidence;*
> *(2) the weight of the public interest in the investigation and punishment of the offence in issue;*
> *(3) the existence of any relevant safeguards in the procedure; and*
> *(4) the use to which any material so obtained is put'.*[158]

(1) As regards to the **nature and degree of compulsion**, the ECtHR held that the use of compulsory powers in obtaining evidence which exists independently of the will of the accused does not infringe the presumption of innocence and is justified by the public interests of prosecuting crime, as long as it does not violate other rights such as the **prohibition of torture of Article 3 of the ECHR**.[159] As indicated in Section B.2. *'The notion of improper compulsion',* the Court also recognised the use of subterfuge or, under certain circumstances, the obligation to testify as imposing a degree of compulsion sufficiently important to destroy the very essence of the right against self-incrimination and the right to remain silent.

(2) The **public interest justification** may open the door to a broad range of arguments. ECtHR case law limits its scope of application:

> *'The general requirements of fairness contained in Article 6 (art. 6), including the right not to incriminate oneself, apply to criminal proceedings in respect of all types of criminal offences without distinction from the most simple to the most complex. The public interest cannot be invoked to justify the use of answers compulsorily obtained in a non-judicial investigation to incriminate the accused during the trial proceedings.'*[160]

[157] ECtHR, *Saunders v the United Kingdom*, App. no. 19187/91, Judgment of 17 December 1996, para. 69; *O'Halloran and Francis v. the United Kingdom*, App. nos. 15809/02 and 25624/02, Judgment of 29 June 2007, para. 47.
[158] ECtHR, *Jalloh v Germany*, App. no. 54810/00, Judgment of 11 July 2006, para. 117.
[159] Ibid., para 117.
[160] ECtHR, *Saunders v the United Kingdom*, App. no. 19187/91, Judgment of 17 December 1996, para. 74.

> *'[T]he security and public order concerns relied on by the Government cannot justify a provision which extinguishes the very essence of the applicants' rights to silence and against self-incrimination.'*[161]

(3) As for the **relevant safeguards**, the ECtHR noted that "**early access to a lawyer** is part of the procedural safeguards to which the Court will have particular regard when examining whether a procedure has extinguished the very essence of the privilege against self-incrimination."[162]

(4) As regards the **use of the evidence** obtained, the ECtHR noted that "it would be incompatible with the right to silence to base a conviction **solely or mainly** on the accused's silence or on a refusal to answer questions or to give evidence himself".[163]

In *Jalloh v Germany*, the Court held that **drugs hidden in the suspect's body** which were obtained by the forcible administration of emetics (medication that provoked vomiting) could be considered to fall into the category of material having an existence independent of the will of the suspect. The Court first found that the degree of force used and means used to obtain evidence violated Article 3 of the ECHR. It then analysed whether the gravity of the suspected offence and the public interest in securing the applicant's conviction (i.e. the urgent need to obtain evidence of the offence) could have justified the use of such evidence. Noting the use of inhumane and degrading treatment to obtain evidence, the small scale of the offense, the limited safeguards, and the decisive character of the evidence, the Court concluded that the use of evidence obtained by the forcible administration of emetics infringed the accused's right not to incriminate himself.[164] As argued by Judge Bratza, the use of a treatment which violates Article 3 of the ECHR to obtain evidence should alone have led the Court to conclude to a violation of Article 6 of the ECHR without engaging further in a proportionality test.[165]

Various stakeholders, starting with judges within the ECtHR, have often called this **proportionality test into question** since it could justify practices which disregard the will of the accused to remain silent.[166] We join them in their concern and believe the CJEU should develop its own understanding of the exception enshrined in Article 7(3) of the Directive due to the difference of regimes between the ECtHR case law and the Directive:

- The case law of the ECtHR is based on the recognition that the right to remain silent and the right not to incriminate oneself are relative rights. The above-mentioned factors were developed to assess the legality of both compelling the defendant to give evidence existing independently of the will of the accused *and* drawing adverse inferences from a person's silence. In contrast, the Directive attempts to set a higher standard by recognising these rights as absolute and only allowing one of these exceptions (i.e. the use of compelling legal

[161] ECtHR, *Heaney and McGuiness v. Ireland*, App. no. 34720/97, Judgment of 21 December 2000, para 58.
[162] ECtHR, *Salduz v. Turkey*, App. no. 36391/02, Judgment of 27 November 2008, para. 54.
[163] ECtHR, *Condron v the United Kingdom*, App. no. 35718/97, Judgment of 2 May 2000, para. 56; ECtHR, *John Murray v. the United Kingdom*, App. no. 18731/91, Judgment of 8 February 1996, para. 47.
[164] ECtHR, *Jalloh v Germany*, App. no. 54810/00, Judgment of 11 July 2006, para. 103-123.
[165] Concurring opinion Judge Bratza in ECtHR, *Jalloh v Germany*, App. no. 54810/00, Judgment of 11 July 2006.
[166] Impact Assessment, n17, pp. 24-25; Concurring opinion Judge Bratza in ECtHR, *Jalloh v Germany*, App. no. 54810/00, Judgment of 11 July 2006,; partly dissenting opinion of Judge Pettiti in ECtHR, *John Murray v. the United Kingdom*, App. no. 18731/91, Judgment of 8 February 1996.

powers to obtain evidence which exists independently of the will of the accused). As both frameworks are based on different premises, we argue that relying on the case law of the ECtHR to assess the legality of this exception is problematic. It risks diluting the protection established by the Directive since the standards of the ECtHR are more permissive and allow for exceptions which are prohibited by the Directive.

- The case law of the ECtHR on the issue is inconsistent and does not always offer clear guidance.[167] This could lead Member States to adopt diverging approaches and thereby undermine mutual trust. Please see below for a short selection of cases which are at odds with the aforementioned test, where the use of legal compulsory powers regarding the production of documents led to a violation of Article 6(1) of the ECHR:

  - *Funke v. France:* the ECtHR found that an attempt to compel the applicant to disclose documents, and thereby to provide evidence of offences he had allegedly committed, violated his right not to incriminate himself. In this case, the authorities believed certain documents must exist but they were not certain.[168]
  - *J.B. v. Switzerland:* the ECtHR considered the State authorities' attempt to compel the applicant to submit documents which might have provided information about tax evasion to be in breach of the principle against self-incrimination.[169]
  - *Chambaz v. Switzerland:* the ECtHR found that the imposition of fines for refusing to produce the documents requested amounted to pressure on the claimant to submit documents which violated the privilege against self-incrimination.[170]

Given this complex procedural background, it is unsurprising that the right to silence remains one of the areas of criminal procedural rights in which there is the most variability in understanding and protection between Member States.[171] Further clarification from the CJEU is needed to avoid perpetuating incoherence among the legislative regimes of Member States.

c. Illustration: forcing suspects to unlock their phone/PC

One contested area relates to the recent practice seen in several Member States of **using coercion to unlock a digital device** (e.g. a smartphone or a computer) **and obtain access to the evidence it contains,** either by compelling the suspect or the accused person to provide their passcode, by forcing them to keep their eyes open (Face ID recognition) or by forcing them to put their fingers on the device.[172] This practice is also referred as **"decryption orders".**[173] Domestic courts have argued

[167] Stijn Lamberigts, The Directive on the Presumption of Innocence, A Missed opportunity for Legal Persons, May 2016, p. 36.
[168] ECtHR, *Funke v. France*, App. no. 10828/84, Judgment of 25 February 1993, para. 44.
[169] ECtHR, *J.B. v. Switzerland*, App. no. 31827/96, Judgment of 3 May 2001, paras. 63-71.
[170] ECtHR, *Chambaz v. Switzerland*, App. no. 11663/04, Judgment of 5 April 2012.
[171] Fair Trials, Joint position paper of Fair Trials and the Legal Experts Advisory Panel on the proposed Directive on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings, 11 November 2014, p. 15.
[172] See for instance, Sweden Parliamentary Ombudsman, The provision in Chapter 28, Section 14 of the Code of Judicial Procedure on taking fingerprints does not constitute legal support for a decision to forcibly place a

that they can legally compel the accused person to provide biometric data such as the fingerprint, facial patterns, voice or DNA since this data exists independently of the accused's will. This is a trend of grave concern that could be challenged based on the Directive.

Decryption orders– Questionable case law on passcode

For instance, the Belgian Court of Cassation held that imposing a fine and/or imprisonment for refusing to provide a mobile phone passcode cannot be considered as violating the right to remain silent and the right not to incriminate oneself as protected by the ECHR and the Directive. The court considered that 'the right not to incriminate oneself and the presumption of innocence' were not absolute and must be balanced with the right to freedom and security guaranteed by Article 5 of the ECHR and the prohibition of abuse of rights detailed in Article 17 of the ECHR. It also noted the public interest in finding the truth. For the Belgian court, the right not to incriminate oneself primarily aims to avoid false statements made under coercion and, thus, produce unreliable evidence. The Court held that the passcode is static evidence which exists independently of the suspect's will, so there is no risk of unreliable evidence. The code could not, as such, be considered as self-incriminating. The Court stressed that the investigator had already located the device at the time the password was requested without subjecting the person to coercion and that the prosecuting authority demonstrated that the person in question knew the access code without reasonable doubt – two prerequisite conditions for the Court. Finally, the Court noted that the obligation to decrypt is vital for truth-finding.[174] The Advocate General noted that the fact that disclosure of an access code under duress may lead to incriminating evidence does not seem to be sufficient to assume a violation of the right to a fair trial provided several safeguards were respected. These safeguards included: (i) the prosecution prove that the suspect knows the code; (ii) such coercion is only used for serious forms of crime; (iii) other indications of guilt against the suspect already exist; and (iv) cooperation of the suspect is essential to decrypt the seized files and to find the truth.[175]

In parallel, the Belgian Constitutional Court was asked whether the relevant provision violated the principle of equality and the right to a fair trial. This is because the refusal to provide information on how to access a computer system or how it operates (obligation to provide information) is always criminally punishable, whereas the refusal to collaborate to put the computer system into operation or perform certain operations on it (obligation to cooperate) is not criminally punishable for the suspect and their relatives. The Court held that the difference of treatment was reasonably justified since:

> "In the first case, the accused is asked to provide information enabling access to a particular computer system, provided that this information exists independently of his or her will, so

suspect's finger on a mobile phone in order to unlock the phone, Decision Case Number:6849-2018, Decision of 6 March 2020.

[173] For an in-depth research on Brain-Computer Interface, focussing on the ECtHR and the Dutch frameworks, see Arvin Khozooei, Reading the mind of a suspect, January 2020.

[174] Belgium Court of Cassation, Decision of 4 February 2020, P.19.1086.N.

[175] See also Opinion of Advocate General De Smet in Belgium Court of Cassation, Decision of 4 February 2020, P.19.1086.N.

that the right not to contribute to his or her own criminalisation does not apply, whereas in the second case, he or she is asked to participate actively in the operations carried out in the computer system, i.e. to take an active part in the collection of evidence of the offence, which would be likely to lead him or her to contribute to his or her own criminalisation. The difference in treatment is therefore reasonably justified." [Our translation][176]

In our view, these rulings misunderstand the rationale of the right not to incriminate oneself. This right is broader than securing the exclusion of false statements made under duress; it also protects the will of the suspect to remain silent and the presumption of innocence according to which the burden of proof is borne by the prosecution. In addition, the balancing exercise of the Belgium Court of Cassation (right to remain silent vs. right to freedom and security and the prohibition of abuse of rights) is at odds with ECtHR case law[177] and completely overlooks the above-mentioned criteria set out by the ECtHR. It is also not clear from ECtHR case law that the verbalisation of an access code can be considered equal to getting blood or saliva from a suspect in the sense that both types of evidence exist independently of the will of the accused.[178] By extension, the reasoning of the Belgian Court of Cassation could dangerously be applied to all sorts of information, such as the location of evidence.[179] We would argue that requiring a suspect to say something of which only they have the knowledge is overpassing what is actually allowed under Article 7(3) of the Directive. Recital 25 of the Directive clearly indicates that suspects should not be forced, when asked to make statements, to provide information which may lead to self-incrimination. In any case, clarification from the CJEU would definitely be welcomed. Any preliminary reference should make clear that ECtHR case law on the right to remain silent and the right not to incriminate oneself is more permissive than the Directive and that the CJEU should developed its own understanding of Article 7(3) of the Directive.

➔ **What happened**

- You client received a decryption order.

➔ **Litigation strategy**

- Challenge that order before a court. Argue that Article 7 of the Directive protects the right to remain silent and the right not to incriminate oneself.
- Following general principle of criminal law, any exception to these principles should be interpreted strictly. Accordingly, Article 7(3) of the Directive is of strict interpretation.

[176] Belgium, Constitutional Court, Ruling n°28/2020 of 20 February 2020, Roll number 7075.

[177] The ECtHR has notably clarified several times that the procedural rights contained in Article 6 ECHR cannot lend themselves to abuse (see e.g. ECtHR, *Hizb ut-Tahrir v. Germany*, App. no. 31098/09, Judgment of 12 June 2012, p. 85).

[178] Refusal to speak has been discussed in very few cases, see: ECtHR, *Heaney and McGuiness v. Ireland*, App. no. 34720/97, Judgment of 21 December 2000; ECtHR, *Shannon v. the United Kingdom*, App. no. 6563/03, Judgment of 4 October 2005; in comparison with ECtHR *O'Halloran & Francis v. the United Kingdom*, App. nos. 15809/02 and 25624/02, Judgment of 29 June 2007.

[179] For further arguments, see this analysis (in Dutch): Joachim Meese, U hebt het recht om te zwijgen … maar als u uw zwijgrecht gebruikt, riskeert u daarvoor wel tot vijf jaar gevangenisstraf, Legal News, 6 February 2020 ("You have the right to remain silent ... but if you use your right to remain silent, you risk up to five years in prison" – our translation).

- In order to interpret Article 7(3) of the Directive, the court should refer to the recitals of the Directive. Recital 25 prohibits compelling suspect to produce evidence or documents or to provide information which "may lead to self-incrimination". Recital 27 prohibits compelling suspect to provide information if those persons do not wish to do so. Argue that forcing a person to say a passcode falls into these prohibitions.
- If relevant, argue that the ECtHR developed a four-factor test to determine whether the right not to incriminate oneself has been violated. Explain how, in the circumstances of your case, the right not to incriminate oneself and/or the right to remain silent have been/would be violated. Detail for instance the absence of incriminating evidence before asking for the phone passcode.
- If relevant, argue that due to the difference of framework between the ECtHR and the Directive (the former recognising these rights as relative while the latter was based on the assumption that those rights are absolute) and in the absence of clear indication from ECtHR case law, a preliminary question to the CJEU is necessary to clarify the scope of Article 7(3) of the Directive in relation to encryption orders.

2. The cooperative behaviour of suspects

Article 7(4) of the Directive allows judicial authorities to take into account cooperative behaviour when deciding on the sanction to impose.

> '4. Member States may allow their judicial authorities to take into account, when sentencing, cooperative behaviour of suspects and accused persons.'

This provision raises concerns as it could be used to incite suspects and accused persons to waive their right to silence and not to incriminate themselves in exchange for a shorter sentence. Alternatively, this provision could be used to justify lengthier sentences where someone has simply exercised their right to silence.

The CJEU could provide more clarity on the notion of "cooperative behaviour" and how it could be taken into account by the judicial authorities in conformity with the right to remain silent and the right not to incriminate oneself.

F. REMEDIES

As mentioned earlier, Article 10(1) of the Directive establishes **a general right to an effective remedy** for violation of the rights guaranteed under the Directive but leaves it to the Member States to decide what the appropriate remedy should be.

Article 10(2) of the Directive provides more guidance with regard to an effective remedy in case of statements made by suspects or accused persons or of evidence obtained in breach of the right to remain silent or the right not to incriminate oneself. Article 10(2) does not establish a firm exclusionary rule but simply points to the fact that the use of such evidence in criminal trial **should**

not prejudice the rights of defence and fairness of the proceedings. It also makes a reference to the **national rules regarding admissibility of evidence.** Similar language is used in Directive 2013/48/EU on the right of access to a lawyer.

> 1. Member States shall ensure that suspects and accused persons have an effective remedy if their rights under this Directive are breached.
>
> 2. **Without prejudice to national rules and systems on the admissibility of evidence,** Member States shall ensure that, in the assessment of statements made by suspects or accused persons or of **evidence obtained in breach of the right to remain silent or the right not to incriminate oneself, the rights of the defence and the fairness of the proceedings are respected**.

In practice, Member States have very different rules regarding the admissibility of the evidence obtained in breach of the right to remain silent or the right not to incriminate oneself. Some Member States, for example, Croatia apply an exclusionary rule for illegally obtained evidence, while others allow for such evidence to be admitted in trial but limit its use and value (e.g. as corroborative or non-decisive evidence). Some states, such as Sweden, apply a system of free assessment of evidence by judges in each case.

Nevertheless, Recital 45 of the Directive makes clear that **evidence obtained in violation of prohibition of torture**, inhuman and degrading treatment is **inadmissible**, as established by ECtHR case law[180] and Article 15 of the UN Convention against Torture.

> (45) When assessing statements made by suspects or accused persons or evidence obtained in breach of the right to remain silent or the right not to incriminate oneself, courts and judges should respect the rights of the defence and the fairness of the proceedings. In that context, regard should be had **to the case-law of the European Court of Human Rights**, according to which the admission of statements obtained as a **result of torture or of other ill-treatment in breach of Article 3 ECHR** as evidence to establish the relevant facts in criminal proceedings would render the proceedings as a **whole unfair.** According to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, any statement which is established to have been made as a result of torture should not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.

While the Directive does not include a clear exclusionary rule of any evidence obtained in breach of the right to remain silent or the right not to incriminate oneself, we find it difficult to imagine circumstances in which the admission of such evidence would not prejudice the overall fairness of proceedings and we encourage you to pursue that line of argument in national courts This view was strongly voiced by concurring judges in *Dvorski v. Croatia*, where they stated:

[180] ECtHR, *Gäfgen v. Germany*, App. no. 22978/05, Judgment of 1 June 2010; ECtHR, *El Haski v. Belgium*, App. no. 649/08, Judgment of 25 September 2012.

> *"Since the "exclusionary rule" has been established for the protection of privilege of against self-incrimination, the use of evidence collected in breach of this basic privilege will always render the trial unfair, irrespective of any other circumstances in the case. (..) If a tainted self-incriminatory statement is not excluded prior to trial, such an error in itself should be seen as a violation of the Convention without there being any need to assess the overall fairness of the proceedings. (..) No other legal remedy could rectify such errors and ultimately ensure the fundamental rights to fair trial."*[181]

Judge Zupančič added such evidence should be excluded from the case file and should never come to attention of the sitting court, meaning that for exclusion to be effective the evidence in question should be physically excluded from the case file. If the evidence is seen by a judge, it may still affect his/her decision-making on a subconscious level, thus rendering the remedy ineffective.[182]

Similarly, **notwithstanding the system of free admissibility of evidence in Finland**, in May 2012, the Finnish Supreme Court held the only way to avoid a violation of the rights of the suspect is for the incriminating evidence to **be precluded from being used in court.** For the Supreme Court, if the right not to incriminate oneself has been breached, this right cannot be corrected simply by allowing the evidence to be presented to the court and the court later on deciding on the credibility to give to the statement.[183]

The European Commission's Impact Assessment report further explained that:

> "The principle of free evaluation of evidence by the Court, which is a principle generally recognized in all EU Member States, **should not mean an absolute principle of free admissibility of all available evidence** and should nevertheless allow excluding from the case evidence obtained in violation of fundamental rights, which seems to be in terms of legal certainty the correct means to ensure that the judge is not influenced by such evidence when taking the final decision."[184]

It is also important to recall here that Recital 44 of the Directive and ECtHR case law indicate that the most appropriate form of redress for a violation of the right to a fair trial should, as far as possible, have the effect of placing the suspects or accused person in the position in which they would have been had their rights not been disregarded.[185]

Accordingly, in our view, an appropriate and effective remedy includes a declaration that the evidence obtained in breach of these rights is inadmissible, to order the retrial or to nullify the judgment if such evidence has been used in trial resulting in conviction. If these remedies are not available at the national level, courts should ensure that their decisions are not based directly or indirectly on such evidence. A remedy in the form of **a general right of appeal,** which is therefore

---

[181] Joint concurring opinion of judges Kalaydjieva, Pinto de Albuquerque and Turković in ECtHR, *Dvorski v. Croatia*, App. no. 25703/11, Judgment of 20 October 2015, paras. 17-18.
[182] Concurring opinion of judge Zupančič in ECtHR, *Dvorski v. Croatia*, App. no. 25703/11, Judgment of 20 October 2015, para. 12.
[183] Finland Supreme Court, KKO 2012:45, 9 May 2012, para. 45 and 46.
[184] Impact Assessment, n17.
[185] ECtHR, *Salduz v. Turkey*, App. no. 36391/02, Judgment of 27 November 2008, para. 72 in relation to violation of Article 6 § 1.

only available after the judgment of the first instance trial (which would have already taken into account the offending evidence), **cannot** in itself **be considered effective** if evidence obtained in violation of the right to remain silent or right not to incriminate oneself can be relied on and benefit prosecution's case in a criminal trial.

III – RIGHT TO BE PRESENT AT TRIAL

A. THE ISSUE

The Impact Assessment conducted by the European Commission, before the adoption of the Directive, stressed the right to be present at trial is closely connected with **presumption of innocence** and should therefore be included in the Directive. It explains that it follows from the principle of the presumption of innocence that "it is for the prosecution to inform the accused of the case that will be made against him, so that he may prepare and present his defence accordingly, and to adduce evidence sufficient to convict him".[186] If a suspect or accused person is not given the opportunity to be present at trial, this will impact both their rights to be informed of the accusation and, by extension, their presumption of innocence.

Beyond the presumption of innocence, the right to be present is an essential element of **the right to a fair trial**.[187] It enables the **effective participation** of the suspect or accused person in the trial and the **exercise of the rights of the defence**, in particular the right to defend oneself in person, to examine or have witnesses examined and, where relevant, to have the free assistance of the interpreter.

In practice, violations of the right to be present occur across EU Member States. The EC Impact Assessment noted that numerous Member States allowed for trial *in absentia* in violation of the minimum standards already established by the ECtHR, for instance when the suspect has not waived their right to be present. In addition, the right to a re-trial following trial *in absentia* is not properly secured in all Member States.[188] The remote participation of a suspect in their hearing, when the requisite exceptional circumstances are not present, and without the consent of the suspect is another challenge to the right to be present at one's trial. Practitioners report extended use of videoconference.[189] The remote participation of a suspect in the hearing is also a restriction of the right to be present. which requires an unequivocal waiver of the right to be physically present from the suspect or accused person. Practitioners report extended use of videoconference.[190]

[186] ECtHR, *Barberà, Messegué and Jabardo v. Spain*, App. no. 10590/83, Judgment of 6 December 1988, para. 77; Impact Assessment, n17.
[187] Recital 33 of the Directive; CJEU, *Case C-688/18,* Judgment of 13 February 2020, ECLI:EU:C:2020:94, para. 37; ECtHR, *Hermi v. Italy*, App. no. 18114/02, Judgment of 18 October 2006, paras. 58-59.
[188] Impact Assessment, n17.
[189] See Fair Trials, Safeguarding the right to a fair trial during the coronavirus pandemic remote criminal justice proceedings, 2020; Fair Trials, Beyond the emergency of the COVID-19 pandemic - Lessons for defence rights in Europe, June 2020; European Criminal Bar Association (ECBA), Statement of principles on the use of video-conferencing in criminal cases in a post-Covid-19 world, 6 September 2020.
[190] See Fair Trials, Safeguarding the right to a fair trial during the coronavirus pandemic remote criminal justice proceedings, 2020; Fair Trials, Beyond the emergency of the COVID-19 pandemic - Lessons for defence rights in Europe, June 2020; European Criminal Bar Association (ECBA), Statement of principles on the use of video-conferencing in criminal cases in a post-Covid-19 world, 6 September 2020.

B. THE PRINCIPLE

Article 8 of the Directive establishes the right to be present at the trial.

> 1. Member States shall ensure that suspects and accused persons have **the right to be present at their trial.**

Recital 41 of the Directive further explains that the right to be present at the trial can only be exercised when national law guarantees **the right to a hearing**. If no hearing is provided for, the right to be present at trial does not apply (see infra 'Limitations').

1. An essential requirement for the exercise of the rights of the defence

Referring to ECtHR case law, the CJEU stressed that the right to be present at trial is directly connected with the right to a fair trial, the right to a public hearing and the exercise of the rights of the defence:

> '35. As is apparent from recital 33 of that directive, the right of suspects and accused persons to be present at the trial is based on **the right to a fair trial**, enshrined in Article 6 of the ECHR, which corresponds, as stated in the Explanations relating to the Charter of Fundamental Rights (OJ 2007 C 303, p. 17), to the second and third paragraphs of Article 47, and Article 48 of the Charter.
>
> 36. In that regard, it is clear from the case-law of the European Court of Human Rights that **a public hearing** constitutes a fundamental principle enshrined in Article 6 of the ECHR. That principle is particularly important in criminal cases, where, generally, there must be at first instance a court which fully meets the requirements of Article 6 of the ECHR, and where an individual is entitled to **have his case 'heard'**, with the opportunity, inter alia, to **give evidence in his defence**, **hear the evidence against him**, and **examine and cross-examine witnesses** (ECtHR, 23 November 2006, *Jussila v. Finland*, CE:ECHR:2006:1123JUD007305301, § 40, and ECtHR, 4 March 2008, *Hüseyin Turan v. Turkey*, CE:ECHR:2008:0304JUD001152902, § 31).'[191]

The ECtHR has stressed the "capital importance" of the physical presence of the suspect or the accused person at their trial:

> *'58. In the interests of a fair and just criminal process it is of **capital importance that the accused should appear at his trial** (see Lala v. the Netherlands, 22 September 1994, § 33, Series A no. 297-A; Poitrimol v. France, 23 November 1993, § 35, Series A no. 277-A; and De Lorenzo v. Italy (dec.), no. 69264/01, 12 February 2004), and the duty to guarantee **the right of a criminal defendant to be present in the courtroom** – either during the original proceedings or in a retrial – ranks as **one of the essential***

[191] CJEU, *Case C-688/18*, Judgment of 13 February 2020, ECLI:EU:C:2020:94, paras. 35-36.

> ***requirements of Article 6*** *(see Stoichkov v. Bulgaria, no. 9808/02, § 56, 24 March 2005).'*[192]

The ECtHR has long recognised that **physical presence** at the hearing is a necessary **precondition for the effective participation in one's trial and the exercise of the rights of the defence**:

> *'Although this is not expressly mentioned in paragraph 1 of Article 6 (art. 6-1), the object and purpose of the Article taken as a whole show that a person "charged with a criminal offence" is entitled to* ***take part in the hearing****. Moreover, sub-paragraphs (c), (d) and (e) of paragraph 3 (art. 6-3-c, art. 6-3-d, art. 6-3-e) guarantee to "everyone charged with a criminal offence" the right* ***"to defend himself in person****", "to examine or have* ***examined witnesses****" and "to have the* ***free assistance of an interpreter*** *if he cannot understand or speak the language used in court", and it is difficult to see how he could exercise these rights without being present.'*[193]

The right of a suspect or accused person to participate effectively in their trial is therefore broader than the right to be present. It also includes the **right to hear and follow the proceedings**[194] and **the right to compile notes** in order to facilitate the conduct of the defence.[195] Effective participation also covers the **right to receive legal assistance**.[196] In this respect, the ECtHR stressed that the mere presence of the accused's lawyer cannot compensate for the absence of the accused.[197] In other words, the fact that the accused person is represented by a lawyer in a hearing does not deprive the accused person of the right to be present themselves. Where both the lawyer and the accused person are present, the courtroom setting should allow active participation of the accused, including the possibility to effectively and privately communicate with the lawyer. The ECtHR noted that: "an accused's right to communicate with his lawyer without the risk of being overheard by a third party is one of the basic requirements of a fair trial in a democratic society; otherwise legal assistance would lose much of its usefulness".[198]

The **use of confinement measures** in the court room, such as **docks, glass boxes and cages,** raise particular concerns with regards to the right to effective participation at one's trial and the right to be presumed innocent. Indeed, the ECtHR held that such arrangements may affect the fairness of a hearing by undermining the presumption of innocence of the accused and by impairing the accused's rights to participate effectively in the proceedings and to receive practical and effective legal assistance (for further analysis, please refer to Part I, Section C.2. '*The use of physical restraints during arrest or in court'* of this toolkit).

---

[192] ECtHR, *Hermi v. Italy*, App. no. 18114/02, Judgment of 18 October 2006, paras. 58-59; ECtHR, *Sejdovic v. Italy*, App. no. 56581/00, Judgment of 1 March 2006, paras. 81 and 84; ECtHR, *Arps v. Croatia*, App. no. 23444/12, Judgment of 25 October 2016, para. 28.

[193] ECtHR, *Colozza v. Italy*, App. no. 9024/80, Judgment of 12 February 1985, para. 27. *See also* ECtHR, *Marcello Viola v. Italy (No.2)*, App. no. 45106/04, Judgment of 5 October 2006, para. 52.

[194] ECtHR, *Murtazaliyeva v. Russia*, App. no. 36658/05, Judgment of 18 December 2018, para. 91.

[195] ECtHR, *Pullicino v. Malta*, App. no. 45441/99, decision of 15 June 2000; ECtHR, *Moiseyev v. Russia*, App. no. 62936/00, Judgment of 9 October 2008, para. 214.

[196] ECtHR, *Lagerblom v. Sweden*, App. no. 26891/95, Judgment of 14 January 2003, para. 49; ECtHR, *Galstyan v. Armenia*, App. no. 26986/03, Judgment of 15 November 2007, para. 89.

[197] ECtHR, *Zana v. Turkey*, App. No. 69/1996/688/880, Judgment of 25 November 1997, para. 72.

[198] ECtHR, *Mariya Alekhina and others v. Russia*, App. No. 3804/12, Judgment of 17 July 2018, para. 168.

Similarly, the **use of video link in proceedings** also affects the accused's rights to be physically present at trial and to participate fully and effectively in their own criminal proceedings. This issue is addressed in the following section 3 *'Remote participation'.*

For further information on the right to effective participation, we invite you to refer to the ECtHR guide on Article 6.[199]

2. Right to be notified of the trial date and location

The right to be notified about the time and place of the hearing is a precondition for exercising the right to be present. Without knowledge of the hearing the accused person cannot make a choice to attend it or if they so wish to waive that right.

The ECtHR established a clear **obligation to notify the suspect of the trial date, time and location sufficiently in advance**:

> *'65. […] the Court considers that in the interests of the administration of justice a litigant **should be notified** of a court hearing in such a way as to not only have **knowledge of the date, time and place of the hearing**, but also to have **enough time** to prepare his or her case and to attend the court hearing (see Kolegovy, cited above, § 40, and the cases cited therein, and Ažd*ajić *v. Slovenia, no. 71872/12, § 48, 8 October 2015).'*[200]

The ECtHR requires courts to exercise **due diligence** in securing the presence of the accused by properly summoning them[201] and to take measures to discourage an unjustified absence from the hearing.[202]

The Directive does not expressly provide for the right to be notified of the trial date and location. However, this obligation is implied by the provisions related to trial *in absentia*. Unequivocally proven notification of the time and date of the trial is indeed **especially important in the context of *in absentia* trials**. In this respect, Article 8(2) of the Directive requires the authorities to inform the suspect or accused person of the trial before holding a trial *in absentia*. Recitals 36 and 38 provide further clarification on **the obligation to inform** the accused person about the trial against them.

> (36) […] Informing a suspect or accused person of the trial should be understood to mean **summoning him or her in person** or, by other means, providing that person with **official information about the date and place of the trial** in a manner that enables him or her to become **aware of the trial.** Informing the suspect or accused person of the **consequences** of non-appearance should, in particular, be understood to mean informing that person that a **decision might be handed down** if he or she does not appear at the trial.

[199] ECtHR, Guide on Article 6 of ECHR: Right to a fair trial (criminal limb): the Guide is regularly updated by the Court and currently available in 16 languages.
[200] ECtHR, *Vyacheslav Korchagin v. Russia*, App. no. 12307/16, Judgment of 28 August 2018, para. 65.
[201] ECtHR, *Colozza v. Italy*, App. no. 9024/80, Judgment of 12 February 2985, para. 32; ECtHR, *M.T.B. v. Turkey*, App. no. 47081/06, Judgment of 12 June 2018, paras. 49-53.
[202] ECtHR, *Medenica v. Switzerland*, App. no. 20491/92, Judgment of 14 June 2001, para. 54.

> (38) When considering whether the way in which the information is provided is sufficient to ensure the person's awareness of the trial, particular attention should, where appropriate, also be paid to the **diligence exercised by public authorities** in order to inform the person concerned and to the diligence exercised by the person concerned in order to receive information addressed to him or her.

Similarly, in the context of *in absentia* trials, the CJEU requires notification of the date and time of the hearing either to be given personally to the accused or the fact that the summons has been received must be established unequivocally. It has held in the context of the European Arrest Warrant ('EAW') that:

> 'Article 4a(1)(a)(i) of Framework Decision 2002/584, as amended by Framework Decision 2009/299, must be interpreted as meaning that the person concerned must have been summoned, according to the national procedural rules applicable, directly in person or, if not, that it must be **unequivocally established from the information provided by the issuing authority that he was aware of the scheduled trial as a result of having actually received official information of the scheduled date and place of the trial**.'[203]

3. Remote participation

The increasing use of video-conferencing systems raises questions with regards to the right to be physically present at one's hearing. As mentioned earlier, the ECtHR has long recognised that effective exercise of defence rights presupposes the physical presence of the accused in the courtroom, therefore right to be present at trial means the right to be physically present in the courtroom if a hearing is held.[204] The physical absence of the accused person from the courtroom is likely to have an impact on their ability to participate fully and effectively in their own criminal proceedings. It may also limit their ability to confer confidentially with their lawyer during proceedings and to file and challenge evidence. Participation via video-ling or telephone can have a serious impact on person's ability to follow and understand the proceedings, especially for vulnerable suspects or accused persons. Remote participation is also a particularly serious challenge where the person is unrepresented and has no one physically present in the courtroom to advocate on their behalf. Without legal assistance, the person is likely to find remote hearings even more isolating, stressful and disorienting seriously diminishing their ability to participate in the hearing effectively.[205]

The Directive does not specifically address the issue of remote participation of suspects at their trial and the CJEU has yet to give its interpretation on the matter. However, in the context of European

[203] CJEU, *Case C-108/16 PPU Dworzecki*, Judgement of 24 May 2016, ECLI:EU:C:2016:346.
[204] ECtHR, *Marcello Viola v. Italy (No.2)*, App. No. 45106/04, Judgment of 5 October 2006, para. 52.
[205] See on these issues: Fair Trials, Safeguarding the right to a fair trial during the coronavirus pandemic remote criminal justice proceedings, 2020; Fair Trials, Beyond the emergency of the COVID-19 pandemic - Lessons for defence rights in Europe, June 2020; European Criminal Bar Association (ECBA), Statement of principles on the use of video-conferencing in criminal cases in a post-Covid-19 world, 6 September 2020.

Arrest Warrants, it has been argued that where the accused has participated remotely, the trial should be considered a trial *in absentia.* The Framework Decision 2009/299/JHA of 26 February 2009[206] establishes common standards for *in absentia* decisions to avoid a Member State refusing to recognise and to execute judicial decisions issued by another Member State for the mere reason that the suspect was not present at their trial. Under Article 4(a) of the Framework Decision, States may refuse the execution of an EAW issued for the purpose of executing a custodial sentence or a detention order if the person did not appear in person at the trial resulting in the decision. In this specific context, based on ECtHR case law and given the crucial importance of the right to be present at one's trial, researchers have argued that when a defendant participates in the trial by videoconference, the trial should be considered to be a trial *in absentia*.[207]

The ECtHR has found that suspects or accused persons' participation in proceedings by videoconference is **not *per se* contrary to the ECHR**, but resorting to a video hearing is a clear restriction of the right to be present. Therefore, the ECtHR required that States **justify** the use of this measure in light of the circumstances of the case and to provide **several safeguards**:

> *'[I]t is incumbent on the Court to ensure that recourse to [videoconference] **in any given case** serves **a legitimate aim** and that the **arrangements for the giving of evidence** are compatible with the requirements of respect for **due process**, as laid down in Article 6 of the Convention'.*[208]

Firstly, as for any restriction on the exercise of rights, limitations must pursue **a legitimate aim** and there must be a **reasonable relationship of proportionality** between the means employed and the aim sought to be achieved. As indicated in *Marcello Viola v. Italy,* the ECtHR requires that the measures need to be justified by **a legitimate aim** "**in any given case"**. This means that States have to ensure that the video participation of the suspect is justified by a legitimate aim in light of the **specific circumstances of the case**. In this respect, judges should notably take into consideration the impact of remote participation on vulnerable suspects such as minors, people with cognitive impairments, persons who require technical assistance and people in need of interpretation assistance.

In *Marcello Viola v. Italy*, the ECtHR considered the following elements relevant: the risk of absconding or attacks; the opportunity to renew contact with criminal organisations during the transfer of a prisoner subject to a restricted prison regime; the aim of reducing the delays caused by transferring detainees and thus simplifying and accelerating criminal proceedings on appeal; and the risk that a suspect accused of serious crimes related to the Mafia's activities exercises undue pressure on other parties in the proceedings by their mere presence in the courtroom. Accordingly, the Court concluded that "the applicant's participation in the appeal hearings by videoconference pursued legitimate aims under the Convention, namely, prevention of disorder, prevention of crime,

[206] Council Framework Decision 2009/299/JHA enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial (OJ L 81, 27.3.2009), p. 24.
[207] InAbsentiEAW, Improving Mutual Recognition of European Arrest Warrants for the Purpose of Executing Judgments Rendered Following a Trial at which the Person Concerned Did Not Appear in Person – Research Report, 2020, p. 66-67.
[208] ECtHR, *Marcello Viola v. Italy (No.2)*, App. no. 45106/04, Judgment of 5 October 2006, para. 67.

protection of witnesses and victims of offences in respect of their rights to life, freedom and security, and compliance with the 'reasonable time' requirement in judicial proceedings."[209] The Court stressed the specific circumstances of the case and in particular the fact that it relates to a specific crime, namely Mafia activities, and a specific stage of the procedure, namely appeal hearings during the second set of criminal proceeding.[210]

Secondly, as regard to the **arrangements needed to ensure that the conduct of the proceedings respect the rights of the defence**, the ECtHR held that:

> *'[I]t must be ensured that the applicant is **able to follow the proceedings and to be heard without technical impediments**, and that **effective and confidential communication with a lawyer** is provided for.*[211]

In this respect, the ECtHR stressed the importance of securing **the right of the lawyer to be present where their client is situated** – for instance by offering the possibility to the lawyer to send a replacement to the video-conference room or, conversely, attend on their client in person and entrust a replacement with their client's defence before the Court.[212] The Court found that the use of a video-conferencing system installed and operated by the State (as opposed to a telephone line secured against any attempt at interception) might legitimately raise doubts about the privacy of the communication.[213] However, although the ECtHR case law to date only mentions these aspects of effective participation, we encourage a wider interpretation of the obligation to ensure effective participation in remote hearings. This includes that the technology used for remote hearings should ensure effective exercise of all defence rights, notably the right to examine witnesses, to present and review evidence and right to have the assistance of an interpreter.

> ➔ **What happened**
> - The Court orders the hearing to proceed via videoconference while the suspect or accused person wants to be physically present or you believe this is not appropriate in their case.
>
> ➔ **Litigation strategy**
> - Argue that both the Directive and the ECtHR stress the "capital importance" of the physical presence of the suspect or the accused person at their trial.
> - Stress that your client does not consent to the use of video participation.
> - Request the Court to provide reasons for the use of remote proceedings in line with ECtHR case law (as ECtHR case law on any restriction of rights).

[209] Ibid. para. 67-72.
[210] For instance, regarding the aim of accelerated proceedings, the Court noted that 'The Court has accepted that other considerations, including the right to a trial within a reasonable time and the related need for expeditious handling of the courts' case-load, must be taken into account in determining *the need for a public hearing at stages in the proceedings subsequent to the trial at first instance*.' ECtHR, *Marcello Viola v. Italy (No.2)*, App. no. 45106/04, Judgment of 5 October 2006, para. 70.
[211] ECtHR, *Sakhnovskiy v. Russia*, App. no. 21272/03, Judgment of 2 November 2010, para. 98.
[212] ECtHR, *Marcello Viola v. Italy (No.2)*, App. No. 45106/04, Judgment of 5 October 2006, paras. 41 and 75; ECtHR, *Sakhnovskiy v. Russia*, App. no. 21272/03, Judgment of 2 November 2010, paras. 105-106.
[213] ECtHR, *Sakhnovskiy v. Russia*, App. no. 21272/03, Judgment of 2 November 2010, para. 104.

- Explain why, in the specific circumstances of the case, the use of remote proceedings is not legitimate, proportionate or risks violating the rights of the defence. Mention any specificity of the case, including: the vulnerabilities of your client (including the need for interpretation services); the complexity of the case; the nature of the hearing in question (e.g. assessment of evidence or examination of witnesses); the absence of adequate technology in the place of detention or in court; the lack of a secured video-conferencing system; the impossibility for you to be present where your client is situated; or the impossibility of having a multi-lawyer team (one being physically present with the suspect the other where the trial is taking place), etc.
- Ask for a full written court's decision, especially if the final decision is to hold the hearing remotely.

The approach developed by the ECtHR makes it clear that legislation that would impose the use of remote hearings by default, without allowing for an individual assessment of the circumstances of the case, would breach the right to be present at one's trial. As mentioned above, both the Directive and the ECtHR stress the "capital importance" of the physical presence of the suspect or the accused person at their trial. Any restriction to this right must, therefore, be strictly justified in light of the circumstances of the case and comply with several safeguards to ensure the right of the defence, including the right to legal assistance and effective participation. Under the Directive, suspects or accused persons may decide to waive their right to be present at trial and consent to attend their trial remotely, but the right to make that choice must be guaranteed. In other words, the accused can choose for remote participation, but they must have the right and opportunity to be physically present in the courtroom should they wish to do so. Accordingly, **legislation allowing the general use of remote hearing should provide for** the consent of the suspect (in line with the requirements imposed for waivers under ECtHR and CJEU standards) and ensure that the right of the defence during the hearing is respected. For further details on this issue, we invite you to refer to the following materials:

- Fair Trials, Safeguarding the right to a fair trial during the coronavirus pandemic remote criminal justice proceedings, 2020;
- Fair Trials, Beyond the emergency of the COVID-19 pandemic - Lessons for defence rights in Europe, June 2020; and
- European Criminal Bar Association (ECBA), Statement of principles on the use of video-conferencing in criminal cases in a post-Covid-19 world, 6 September 2020.

C. LIMITATIONS

1. Temporary exclusion from trial

Article 8(5) of the Directive recognises the temporary exclusion of the suspect from the trial.

> 5. This Article shall be without prejudice to national rules that provide that the judge or the competent court can exclude a suspect or accused person **temporarily** from the

> trial where necessary in the interests of **securing the proper conduct of the criminal proceedings**, provided that the **rights of the defence are complied with.**

According to Recital 40 of the Directive, this exclusion could, for instance, apply when the person concerned behaves violently in the courtroom.

> This could, for example, be the case where a suspect or accused **person disturbs the hearing and must be escorted out of the court room** on order of the judge, or where it appears that the presence of a suspect or accused person **prevents the proper hearing of a witness.**

The Directive merely indicates that such exclusion must be **temporary** and that the **rights of the defence** must be preserved. Additional guidance may be found in ECtHR jurisprudence.[214]

Given the crucial importance of the right to be present at one's trial, the exclusion of a person from their own trial should be **strictly exceptional**.[215] The ECtHR made this clear by requiring that the judge **inform the suspect** of the potential consequences of their behaviour in order to assess whether the suspect **unequivocally waived their right to be present at their trial**:

> *'173. The Court has also held that before an accused can be said to have, **through his conduct, waived implicitly an important right under Article 6 of the Convention**, it must be shown that he **could reasonably have foreseen the consequences** of his conduct in this regard (see Jones, cited above). […]*
>
> *177. The Court can accept that the applicant's behaviour might have been of such a nature as to justify his removal and the continuation of his trial in his absence. However, it remained incumbent on the presiding judge to establish **that the applicant could have reasonably foreseen what the consequences of his ongoing conduct would be prior to her decision to order his removal from the courtroom**.*
>
> *178. The Court discerns nothing in the material in its possession to suggest that the judge had either issued a warning or considered a short adjournment in order to **make the applicant aware of the potential consequences** of his ongoing behaviour in order to allow him to compose himself. In such circumstances, the Court is unable to conclude that, notwithstanding his disruptive behaviour, the applicant **had unequivocally waived his right to be present at his trial**. His removal from the courtroom meant that he was not in a position to exercise that right. The judge proceeded to examine the evidence in his absence and it does not appear that she*

[214] Recital 48 of the Directive.

[215] See for comparison, Article 63(2) of the Statute of the International Criminal Court: "If the accused, being present before the Court, continues to disrupt the trial, the Trial Chamber may remove the accused and shall make provision for him or her to observe the trial and instruct counsel from outside the courtroom, through the use of communications technology, if required. Such measures shall be taken *only in exceptional circumstances after other reasonable alternatives have proved inadequate, and only for such duration as is strictly required."*

> *made any inquiries as to whether the applicant would agree to conduct himself in an orderly manner so as to permit his return to the trial "*[216]

Both the CJEU and the ECtHR requires a waiver of the right to take part in the trial to be established in an **unequivocal** manner, be attended by **minimum safeguards** commensurate to its importance and that any such waiver does not run counter to any important public interest.[217] In the context of exclusion from trial for improper behaviour, the ECtHR considers relevant whether **the applicant's lawyer** was able to exercise the rights of the defence in the applicant's absence[218] (whether the matter was **addressed and, if appropriate, remedied in the appeal proceedings**, for example by allowing the suspect to obtain a re-examination of the evidence which had been taken at trial or to cross-examine those witnesses who had testified against them while they was absent from the trial.[219] In *Ananyev v. Russia*, the ECtHR held the suspect was not made aware of the consequences of his removal from the courtroom, and, in particular, of the fact that, if the court proceeded to try him in his absence, counsel would not be appointed to represent him. In such circumstances, the ECtHR was "unable to conclude that, notwithstanding his disruptive and unruly behaviour, the applicant had unequivocally waived his right to be present or represented by counsel at the trial. His removal from the courtroom meant that he was not in a position to exercise either of those rights when the judge decided to proceed with the examination of the evidence in his absence."[220]

Finally, we do not see how the hearing of witnesses without the presence of the accused person could be compatible with the respect of the rights of the defence as suggested by Recital 40 of the Directive. As stressed by the CJEU and the ECtHR, hearing evidence against the accused person and examining witnesses are essential elements of the right to a fair trial and require the presence of the accused.[221] The ECtHR made clear that if witnesses were to be heard during the exclusion of the suspect, the latter should be given the opportunity to cross-examine them at a later stage.[222] This approach is also clearly supported by CJEU case law on trials *in absentia*. In this context, the Court held that a suspect who did not appear at one of the hearings for reasons beyond his control should be entitled to repeat the steps taken in his absence, "in particular by conducting a further examination of a witness" – even though he was represented by his lawyer.[223]

---

[216] ECtHR, *Idalov v. Russia*, App. no. 5826/03, Judgment of 22 May 2012, paras. 177-178.
[217] CJEU, *Case C-688/18*, Judgment of 13 February 2020, ECLI:EU:C:2020:94, para. 37; ECtHR, *Idalov v. Russia*, App. no. 5826/03, Judgment of 22 May 2012, para. 172; ECtHR, *Sejdovic v. Italy*, App. no. 56581/00, Judgment of 1 March 2006, para. 86.
[218] ECtHR, *Marguš v. Croatia*, App. no. 4455/10, Judgment of 27 May 2014, para. 90.
[219] ECtHR, *Idalov v. Russia*, App. no. 5826/03, Judgment of 22 May 2012, paras. 179-180.
[220] ECtHR, *Ananyev v. Russia*, App. no. 20292/04, Judgment of 30 July 2009, para. 46.
[221] CJEU, *Case C-688/18*, Judgment of 13 February 2020, ECLI:EU:C:2020:94, para. 36.
[222] ECtHR, *Idalov v. Russia*, App. no. 5826/03, Judgment of 22 May 2012, paras. 179-180.
[223] CJEU, *Case C-688/18*, Judgment of 13 February 2020, ECLI:EU:C:2020:94, para. 48. See infra section D 'Absentia trials'.

Besides, other alternatives exist. Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime lays sets measures to protect witnesses, including screening or giving them the option of providing evidence by video link.[224]

➔ **What happened**

- Your client has been "temporarily excluded" from the trial.

➔ **Litigation strategy**

- Argue that both the Directive and the ECtHR stress the "capital importance" of the physical presence of the suspect or the accused person at their trial.
- Any restriction to this right must be strictly limited.
- Article 8(5) of the Directive indicates that such exclusion must be temporary and that the rights of the defence must be preserved.
- Recital 48 of the Directive notes that the Directive establishes minimum floor of rights and that the level of protection afforded by Member States should never fall below the standards provided for by the Charter or by the ECHR, as interpreted by the CJEU and by the ECtHR.
- In this context, the ECtHR requires that the judge inform the suspect of the potential consequences of their behaviour in person to assess whether the suspect unequivocally waived their right to be present at their trial. In addition, minimum safeguards must be respected such as the presence of the suspect's lawyer.
- Complain if these requirements have not been respected: this means your client's right to be present has been violated. Claim remedy under Article 9 of the Directive (right to a new trial) and argue that, at a minimum, your client should be entitled to repeat the steps taken in their absence, in line with ECtHR case law and CJEU jurisprudence on trial *in absentia*.

2. Written proceedings

Article 8(6) of the Directive allows proceedings to be conducted in writing.

> 6. This Article shall be without prejudice to national rules that provide for proceedings or certain stages thereof to be conducted **in writing**, provided that this complies with the right to a fair trial.

Recital 41 of the Directive further explains that the right to be present at the trial can be only be exercised when national law guarantees the right to a hearing. If no hearing is provided for, the right to be present at trial does not apply.

> (41) The right to be present at the trial can be exercised only if one or more hearings are held. This means that **the right to be present at the trial cannot apply** if the

[224] Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA (OJ L 315, 14.11.2012).

> relevant national rules of procedure **do not provide for a hearing**. Such national rules should comply with the Charter and with the ECHR, as interpreted by the Court of Justice and by the European Court of Human Rights, in particular with regard to the right to a fair trial. This is the case, for example, if the proceedings are conducted in a simplified manner following, solely or in part, **a written procedure or a procedure in which no hearing is provided for.**

The ECtHR also recognised that **the right to attend a hearing is intrinsically linked with the right to an oral and public hearing**.[225] In this respect, for **appeal or cassation proceedings,** the ECtHR considers that Article 6 does not always require a right to a public hearing, still less a right to appear in person.[226] The right to a hearing can be restricted, for instance, if the proceedings are limited to questions of law and do not review the facts. The requirement to hold an appeal hearing in public and in the presence of the accused depends, in summary, on the specific features of the appeal proceedings (including the scope of the court of appeal's powers) and the manner in which the person's interests are actually presented and protected before the appellate court, particularly in the light of the nature of the issues to be decided by it.[227]. The case law of the ECtHR on the issue is abundant but is fact-specific and we invite you to refer to the ECtHR guide on Article 6 for further guidance.[228]

Accordingly, the right to be present at trial still depends on the national rules of procedure of EU Member States, which present an important degree of variety.

D. EXCEPTIONS –TRIALS *IN ABSENTIA*

The Directive recognises that the right to be present at trial is not absolute and that under certain circumstances, it is possible to hold a trial *in absentia*, i.e. without the presence of the person concerned.

The Directive develops further the Framework Decision 2009/299/JHA of 26 February 2009.[229] The Framework Decision establishes common standards for *in absentia* decisions to avoid a Member State refusing to recognise and to execute judicial decisions issued by another Member State for the mere reason that the suspect was not present at their trial. Under Article 4(a) of the Framework Decision, States may refuse the **execution of an EAW** issued for the purpose of executing a custodial sentence or a detention order if the person did not appear in person at the trial resulting in the

[225] ECtHR, *Jussila v. Finland*, App. no. 73053/01, Judgment of 23 November 2006, para. 40; ECtHR, *Tierce and Others v. San Marino*, App. nos. 24954/94, 24971/94 and 24972/94, Judgment of 25 July 2000, para. 94; ECtHR, *Igor Pascari v. the Republic of Moldova*, App. no. 25555/10, Judgment of 30 August 2016, para. 27.
[226] ECtHR, *Fejde v. Sweden*, App. no. 12631/87, Judgment of 29 October 1991, para. 31.
[227] ECtHR, *Seliwiak v. Poland*, App. no. 3818/04, Judgment of 21 July 2009, para. 54; ECtHR, *Sibgatullin v. Russia*, App. no. 32165/02, Judgment of 23 April 2009, para. 36.
[228] ECtHR, Guide on Article 6 of ECHR: Right to a fair trial (criminal limb): the Guide is regularly updated by the Court and currently available in 16 languages.
[229] Council Framework Decision 2009/299/JHA enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial (OJ L 81, 27.3.2009), p. 24.

decision.[230] As explained by the European Commission's Impact Assessment, the Framework Decision merely provides grounds to refuse judicial cooperation (including for the execution of the European Arrest Warrant) if these minimum standards are not respected. Strictly speaking, it does not oblige Member States to respect these common minimum standards in all national proceedings.[231] The provisions of the Directive on trials *in absentia* are, therefore, welcomed.

1. Conditions

a. Persons waiving their right to be present

Recital 35 of the Directive indicates that suspects may, under certain conditions, waive their right to be present at trial.

> (35) The right of suspects and accused persons to be present at the trial is not absolute. Under certain conditions, suspects and accused persons should be able, **expressly or tacitly, but unequivocally, to waive that right**.

Based on ECtHR case law, the CJEU has clarified the conditions:

(1) the waiver must be **unequivocal**;
(2) it must be attended by **minimum safeguards** commensurate with its seriousness; and
(3) it must **not run counter to any important public interest**.

> '[…] a waiver of the right to take part in the hearing must be established unequivocally and be attended by minimum safeguards commensurate with its seriousness. Furthermore, it must not run counter to any important public interest (ECtHR, 1 March 2006, *Sejdovic v. Italy*, CE:ECHR:2006:0301JUD005658100, § 86, and ECtHR, 13 March 2018, *Vilches Coronado and Others v. Spain*, CE:ECHR:2018:0313JUD005551714, § 36).'[232]

The ECtHR stressed that the waiver of a right of to be present must be a **"knowing and intelligent waiver"**: before a suspect can be said to have implicitly waived their right to be present through their conduct – for instance when the suspect seeks to evade the trial, it must be shown that the suspect could reasonably have foreseen the consequences of their conduct.[233]

---

[230] The CJEU case law provides further guidance on the notion of "trial resulting in the decision", i.e. which proceedings held *in absentia* are covered by Article 4a of the Framework Decision. The CJEU notably held that the notion of "trial resulting in the decision" is an autonomous concept. It indicated that when the issuing Member State has provided for a criminal procedure involving several degrees of jurisdiction which may thus give rise to successive judicial decisions, with at least one of which has been handed down *in absentia*, Article 4a relates only to the instance at the end of which the decision is handed down which finally rules on the guilt of the person concerned and imposes a penalty on him, such as a custodial sentence, following a re-examination, in fact and in law, of the merits of the case. CJEU, *Case C-270/17 PPU, Tupikas*, Judgment of 10 August 2017, ECLI:EU:C:2017:628; see also CJEU, *Case C-271/17 PPU, Zdziaszek*, Judgement of 10 August 2017, ECLI:EU:C:2017:629 (regarding decision on cumulative sentence); CJEU, *Case C-571/17 PPU, Ardic*, Judgement of 22 December 2017, ECLI:EU:C:2017:1026 (regarding proceedings on violation of probation rules).
[231] Impact Assessment, n17.
[232] CJEU, *Case C-688/18*, Judgment of 13 February 2020, ECLI:EU:C:2020:94, para. 37.
[233] ECtHR, *Sejdovic v. Italy*, App. no. 56581/00, Judgment of 1 March 2006, paras. 86-87.

As explained by the ECtHR, the assessment of these conditions will inevitably focus on the question of whether the applicant had knowledge of the criminal proceedings against him, without which no valid waiver can occur.[234]

Based on this jurisprudence, Article 8(2) of the Directive allows decision on the guilt or innocence of a suspect to be handed down during trials *in absentia* provided that minimum safeguards are respected, i.e.:

(1) the suspect has been **informed** of the trial and the consequences of non-appearance **and did not appear**; or[235]
(2) the suspect has been **informed** of the trial **and mandated a lawyer** to represent them and that lawyer represented them.[236]

> 2. Member States may provide that a trial which can result in a decision on the guilt or innocence of a suspect or accused person can be held **in his or her absence, provided that:**
>
> (a) the suspect or accused person has **been informed, in due time**, **of the trial** and **of the consequences of non-appearance**; or
>
> (b) the suspect or accused person, having **been informed of the trial, is represented by a mandated lawye**r, who was appointed either by the suspect or accused person or by the State.
>
> 3. A decision which has been taken in accordance with paragraph 2 may be enforced against the person concerned.

We invite you to refer to *Section B.2.' Right to be notified of the trial date and location'* for further information on the obligation to inform the suspect of the trial.

b. Persons unable to appear at hearing for a reason beyond their control

i. *Postponement*

Recital 34 of the Directive deals with the situation of accused persons who are **unable to appear at hearings for a reason beyond their control**, for instance because of illness. It gives them the possibility of requesting an adjournment of the hearing.

> (34) If, **for reasons beyond their control**, suspects or accused persons are unable to be present at the trial, they should have the possibility to **request a new date for the trial** within the time frame provided for in national law.

[234] ECtHR, *M.T.B. v. Turkey*, App. no. 47081/06, Judgment of 12 June 2018, para. 49; ECtHR, *Dilipak and Karakaya v. Turkey*, App. nos. 7942/05 and 24838/05, Judgment of 4 March 2014, para. 87; and compare ECtHR, *Ait Abbou v. France*, App. no. 44921/13, Judgment of 2 February 2017, paras. 63-65.
[235] See also Recital 36 of the Directive.
[236] See also Recital 37 of the Directive.

ii. *Repeated postponements*

The Directive does not provide further guidance for situations in which a case is repeatedly adjourned due to the repeated absence of the accused person. In *TX and UW*, the CJEU confirmed the possibility of holding trial *in absentia* when the accused person is unable to appear at hearings for a reason beyond their control provided that the person **unequivocally waive their right to be present or** that **procedural steps**, which were taken during their non-appearance (e.g. questioning of a witness), can be **repeated – even though their lawyer attended the hearing in their absence.**

In this case, criminal proceedings were brought against 13 individuals for leading and/or participating in a criminal organisation. During the trial, over seven hearings were adjourned due to the absence of one of the accused persons. The Special Court for Criminal Cases was unable to determine whether the right of the accused person to be present at the trial was infringed if one of the hearings took place in their absence, despite the fact they were duly summoned, informed of the consequences of their non-appearance and represented by a lawyer.

> Article 8(1) and (2) of Directive must be interpreted as not precluding national legislation which provides, in a situation where the accused person has been **informed**, in due time, of his trial and of the consequences of not appearing at that trial, and **where that person was represented by a mandated lawyer** appointed by him, that his right to be present at his trial is not infringed where:
>
> – he **decided unequivocally not to appear** at one of the hearings held in connection with his trial; or
>
> – he did **not appear** at one of those hearings **for a reason beyond his control** if, following that hearing, he was **informed** of the steps taken in his absence and, with full knowledge of the situation, decided and stated:
>
> - either that he **would not call the lawfulness of those steps into question** in reliance on his non-appearance, [un
>
> - or that he **wished to participate in those steps**, leading the national court hearing the case **to repeat those steps**, in particular by conducting a further examination of a witness, in which the accused person was given the opportunity to participate fully.[237]

Regarding the last two options, the Court observed that:

> '[t]he situation in which the accused person, who was unable, for a reason beyond his control, to appear at a hearing held in connection with his trial and who was informed of steps taken in his absence during that hearing, stated that he would not call the lawfulness of the steps taken into question in reliance on that absence and that he did

[237] CJEU, *Case C-688/18*, Judgment of 13 February 2020, ECLI:EU:C:2020:94, para. 49.

> not want them to be repeated in his presence […] may be regarded as constituting an **unequivocal waiver of the right to be present** at the hearing concerned.'[238]
>
> 'In that regard, a person who has had repeated in his presence the steps taken during hearings at which he was unable to appear, **cannot be regarded as having been absent** from his trial.' [239]

i. *The concept of 'reason beyond their control'*

In *TX and UW,* the CJEU confirmed that illness is a "reason beyond the suspect's control" which can justify the absence of the suspect.[240] However, the Court did not elaborate on what was exactly covered by this concept.

In practice, lawyers report that suspects summoned in another Member State – but not subject to an EAW since detention is not justified – may be **unable to fund their travel expenses** to attend trial. In such situations, some Member States will proceed to a trial *in absentia*.[241] Such practice clearly breaches the Directive and the ECtHR standards since the suspect did not waive the right to be present at trial, they simply could not attend the hearing for a reason beyond their control. At minimum, a suspect or accused person should have the option to consent to a video-link participation in cross-border cases.[242]

c. Persons cannot be located

Article 8(4) of the Directive recognises an additional situation where trials *in absentia* may take place, namely when the **location of the suspect is unknown**. Two conditions must be met:

(1) the authorities must they have undertaken "**reasonable efforts" to locate the person**; and
(2) they must **inform the person**, in particular upon being apprehended, of the decision taken in absentia as well as of the possibility to challenge this decision and the right to a new trial or other legal remedy.

> 4. Where Member States provide for the possibility of holding trials in the absence of suspects or accused persons but it is not possible to comply with the conditions laid down in paragraph 2 of this Article because **a suspect or accused person cannot be located despite reasonable efforts having been made**, Member States may provide that a decision can nevertheless be taken and enforced. In that case, Member States shall ensure that when suspects or accused persons are informed of the decision, in particular **when they are apprehended, they are also informed of the possibility to challenge the decision** and of the right to a new trial or to another legal remedy, in accordance with Article 9.

[238] Ibid. para. 45-46.
[239] Ibid. para. 48.
[240] Ibid. para. 13.
[241] Fair Trials, Beyond the emergency of the COVID-19 pandemic - Lessons for defence rights in Europe, June 2020, p. 16. See also European Criminal Bar Association (ECBA), Statement of principles on the use of video-conferencing in criminal cases in a post-Covid-19 world, 6 September 2020, para. 31-41.
[242] Ibid.

Recital 39 of the Directive cites as examples situations in which the person has fled or absconded. It also indicates how the person should be informed of their rights when apprehended:

> Such information should be provided **in writing**. The information may also be provided **orally** on condition that the fact that the information has been provided is noted in accordance **with the recording** procedure under national law.

Article 8(4) of the Directive settles an important question which was not clear under the Framework Decision 2009/299/JHA: Member States are allowed to hold a trial *in absentia* in respect of a suspect or accused person whose location is unknown and **enforce the decision taken *in absentia* immediately**. In other words, once the person is apprehended, the authorities do not have to first wait for the person to decide on whether or not they request a new trial before enforcing the decision.

2. Remedy: right to a new trial

Article 9 of the Directive provides for the right to a **new trial** when trial was held *in absentia* and the conditions laid down in Article 8(2) of the Directive were not met. In other words, if the authorities hold a trial without the presence of the accused person, the person is entitled to a remedy and, in particular, a retrial in their presence, based on Articles 9 and 10 of the Directive – unless the requirements established by Article 8(2) of the Directive were respected.

Article 9 of the Directive further indicates that such a new trial or "other legal remedy" should allow for a **fresh determination of the merits of the case**, including examination of new evidence, and it should enable the **original decision to be reversed.**

> Member States shall ensure that, where suspects or accused persons were not present at their trial and the conditions laid down in Article 8(2) were not met, they have the right to a new trial, or to another legal remedy, which allows a **fresh determination of the merits of the case**, including examination of **new evidence**, and which may lead to the original decision being reversed. In that regard, Member States shall ensure that those suspects and accused persons have **the right to be present, to participate effectively**, in accordance with procedures under national law, and **to exercise the rights of the defence.**

This provision echoes long-standing case law of the ECtHR:

> *'A person should, once he becomes aware of the proceedings, be able to obtain from a court which has heard him, a fresh determination of the merits of the charge.'*[243]

The ECtHR has underlined the importance of effective participation in that re-trial:

[243] ECtHR, *Colozza v Italy*, App. no. 9024/80, Judgment of 12 February 2985, para. 29; ECtHR, *Krombach v France*, App. no. 29731/96, Judgment of 13 February 2001, para. 85; ECtHR, *Sejdovic v. Italy*, App. no. 56581/00, Judgment of 1 March 2006, para. 82; ECtHR, *Sanader v. Croatia*, App. no. 66408/12, Judgment of 12 February 2015, paras. 77-78.

> *'[T]he applicant, who was tried in absentia, had no opportunity to put the evidence on which his charges were based to adversarial argument or to contest his conviction before the competent courts of appeal. By the use of the remedy under Article 501 § 1 (3) of the Code of Criminal Procedure he was essentially required, simply in order to obtain a retrial, to challenge the factual findings of the final judgment by which he was convicted by submitting new facts and evidence of such a strength and significance that they could at the outset convince the court that he should be acquitted or convicted. Such demand appears disproportionate to the essential requirement of Article 6 that a defendant should be given an opportunity to appear at the trial and have a hearing where he could challenge the evidence against him (see paragraph 67 above), an opportunity which the applicant never had.'* [244]

The ECtHR also made it clear in *Colozza v. Italy* that if the authorities hold a trial *in absentia* without properly informing the accused person of the trial, the person is entitled to a remedy and, in particular, a retrial in their presence:

> *'Examination of the facts does not disclose that the applicant had any inkling of the opening of criminal proceedings against him; he was merely deemed to be aware of them by reason of the notifications lodged initially in the registry of the investigating judge and subsequently in the registry of the court. In addition, the attempts made to trace him were inadequate […]'*[245]
>
> *'Mr. Colozza's case was at the end of the day never heard, in his presence, by a "tribunal" which was competent to determine all the aspects of the matter. […]There was therefore a breach of the requirements of Article 6 para. 1.'*[246]

Finally, Article 9 of the Directive guarantees the right to a new trial or to "**another legal remedy**". The CJEU will have to provide further clarification on the meaning of this concept. We argue that a general right to appeal could not be considered as effective and appropriate since this is no different to the general right the suspect would have ordinarily had if they had attended the trial in person. Basically, this means the suspect tried *in absentia* loses an opportunity to make their case heard. Following that appeal, the suspect would not have access to another instance to challenge the Court's finding. According to ECtHR case law, a person convicted *in absentia* may only be deprived of their right to a new trial by the court which has heard them if they have been informed of the retrial and waived their right to appear and to defend themselves – explicitly or implicitly through their conduct.[247] Furthermore, Recital 44 of the Directive and ECtHR case law indicate that the most appropriate form of redress for a violation of the right to a fair trial should, as far as possible, have the effect of placing the suspect or accused person in the position in which they would have been had their rights not been disregarded.[248]

---

[244] ECtHR, *Sanader v Croatia*, App. no. 66408/12, Judgment of 12 February 2015, para. 93.
[245] ECtHR, *Colozza v Italy*, App. no. 9024/80, Judgment of 12 February 2985, para. 28.
[246] Ibid. paras. 32-33.
[247] ECtHR, *Sejdovic v. Italy*, App. no. 56581/00, Judgment of 1 March 2006, para. 82.
[248] ECtHR, *Salduz v. Turkey*, App. no. 36391/02, Judgment of 27 November 2008, para. 72 in relation to violation of Article 6 § 1.

FINAL REMARKS

The presumption of innocence, the right to remain silent and not to incriminate oneself, as well as the right to be present at the trial are essential safeguard in criminal proceedings. While the Directive only covers certain aspects related to the presumption of innocence, the Directive sets for some issues a higher standard than that currently established by the ECtHR jurisprudence.

The transposition of the Directive in the law of Member States has broadly been completed. However, as shown by Fair Trials' research, there are still many outstanding issues that undermine the effectiveness of the rights guaranteed by the Directive. Some of these issues relate to the very core of the right to be presumed innocent, such as the statements made by public officials on the guilt of the accused, adverse interference drawn from the accused's silence, the use of cages or glass boxes in court, pressure placed on suspects by the police to negotiate a plea bargain, or in absentia' trial without informing the suspect.

It is the role of practitioners to use the Directive and make sure it is enforced by domestic courts across the EU. We hope that this toolkit will support the efforts of lawyers across Europe, all of whom are invited to:

- Contact us for assistance, support and comparative best practice on the Directive.
- Let us know if courts (be they apex or first-instance) issue positive decisions applying the Directive. These can be of use to people in other countries.
- If questions of interpretation arise, consider the CJEU route: see the Using EU law Toolkit, our Preliminary reference Toolkit and our online training video on the preliminary ruling procedure in criminal practice.
- Visit our website www.fairtrials.org regularly for updates on key developments relating to the Directives, and news about in-person trainings and updates on relevant case law.
- Come to us if you don't get anywhere with the courts, because we can explore other options like taking complaints to the European Commission.
- Get involved with pushing the issues in the domestic context: see our paper "Towards an EU Defence Rights Movement" for concrete ideas on articles, litigation, conferences etc.