

FAIR TRIALS

Legal Experts Advisory Panel

Position Paper

Joint position paper 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

November 2014

About Fair Trials International

Fair Trials is a non-governmental organisation that works for fair trials according to internationally recognised standards of justice and provides advice and assistance to people arrested across the globe. Our vision is a world where every person's right to a fair trial is respected. Fair Trials pursues its mission by helping people to understand and defend their fair trial rights; by addressing the root causes of injustice through our law reform work; and through targeted training and network activities to equip lawyers to defend their clients' fair trial rights.

Working with the Legal Experts Advisory Panel (“LEAP”) – a network of over 140 criminal justice and human rights experts including defence practitioners, NGOs and academics from 28 EU countries - Fair Trials has contributed to the negotiations surrounding the adoption of the first three Roadmap Directives. In 2013, Fair Trials held a series of five meetings at which the challenges surrounding the implementation of the Roadmap Directives were discussed with over 50 members of LEAP, and held a further meeting to discuss the proposed Directive on the Presumption of Innocence in June 2014. Fair Trials has also contributed to the implementation of the Roadmap Directives by training lawyers from all EU Member States.

About LEAP

The Legal Experts Advisory Panel (“LEAP”), coordinated by Fair Trials Europe, provides a unique opportunity for strategic networking between criminal justice and human rights experts in Europe, currently bringing together 85 expert defence practitioners, 20 NGOs and 17 academics from 28 EU countries. Members have in-depth knowledge of Europe's many criminal justice systems and a broad understanding of the many barriers to justice.

LEAP meets regularly to discuss criminal justice issues, identify common concerns, share examples of best practice and identify priorities for reform of law and practice. During 2012 and 2013, 12 LEAP meetings took place in 9 EU countries (Belgium, France, Greece, Hungary, Lithuania, Poland, the Netherlands, Spain and the UK) involving over 200 participants. In 2013, LEAP members also contributed to the development and delivery of four training workshops to 120 criminal lawyers on EU legislation on fair trial rights.

LEAP has identified clear priorities for future work by the EU to make fair trial rights a reality in Europe which form the basis of this report. Views expressed in this report are not the views of individual LEAP members but rather representative of the conclusions reached during LEAP meetings and during bilateral discussions with individual LEAP members.

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Executive Summary

1. Fair Trials welcomes this opportunity to comment on the proposed directive on the strengthening of certain aspects of the presumption of innocence and the right to be present at trial in criminal proceedings (“**the Proposed Directive**”). The Proposed Directive is a necessary and interrelated component of the rights protections currently being developed under the Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings (the “**Roadmap**”). The elements of the presumption of innocence that are safeguarded by the Proposed Directive lie at the heart of the notion of a fair trial, and in some instances offer a level of rights protection that will truly aid and facilitate mutual trust and recognition in judicial cooperation and improve the standard of human rights within the EU.
2. However, an adequate level of rights protection is not assured throughout the Proposed Directive and there are several key provisions which require strengthening in order to ensure that the presumption of innocence operates effectively in practice. Fair Trials highlights the following key recommendations:
 - a. **Witnesses as well as suspects** and accused should be informed of their right against self-incrimination (see paras 8-11);
 - b. **Legal as well as natural persons** should be included in the scope of the Proposed Directive (see paras 12-14);
 - c. Evidence collected in **administrative proceedings**, whose collection would have violated the terms of the Proposed Directive had the proceedings been criminal in nature, should not be admissible as evidence in criminal proceedings (see para 15);
 - d. The **prohibition on public references** to guilt before conviction should be broadened to include, inter alia, leaks to the media, and independent investigations conducted when violated (see paras 19-24);
 - e. Violations of the presumption of innocence that occur due to the **suspect’s presentation** in court should be prevented by ensuring that the use of the dock, glass boxes, handcuffs and prison uniforms are strictly **limited** to those individual cases that require them for security reasons (see paras 24-25)).
 - f. Regimes which shift the burden of proof to the accused should be more **explicitly limited** (see paras 26 -28);
 - g. Member States should be **required** to remind suspects of the **right to remain silent and not to incriminate oneself** more frequently, and to apply safeguards against unintentional “waivers” of these rights (see paras 29-33);
 - h. **Audio-visual recording of interrogations** should be required in order to protect against undue compulsion (see paras 34-38);
 - i. The **right to be present** at one’s trial should be enhanced by ensuring that retrials after trials in absentia meet the **requirements** of Article 6 of the ECHR, and that retrials are not arbitrarily denied to applicants who are not effectively informed of their rights or are unable to apply for a retrial within specified deadlines (see paras 39-41);
 - j. The **remedies** provision in Article 10 should be protected from efforts to weaken it (para 42-43); and
 - k. While more comprehensive EU **standards** on the use of pre-trial detention are required, the Proposed Directive should require Member States to ensure that the use of **pre-trial detention** does not undermine the presumption of innocence (see paras 44-45).
4. With the adoption of these recommendations, the Presumption of Innocence Directive will have the power to function as a key safeguard of international standards on accused and suspect’s rights in the EU, and will contribute to the effective operation of mutual recognition based on mutual trust and free movement within an area of freedom, justice and security.

INTRODUCTION

A. The need for legislation on the presumption of innocence

1. The presumption of innocence is a fundamental right and key element at the heart of fair trial rights protection under Article 6 of the European Convention of Human Rights (**ECHR**)¹ and Article 48 of the European Union Charter of Fundamental Rights², as well as in in the International Covenant on Civil and Political Rights³, the Universal Declaration of Human Rights,⁴ and a number of other international treaties and covenants. The Committee on Civil Liberties, Justice and Home Affairs of the European Parliament has said that the presumption of innocence is “a pillar of modern democratic criminal procedures based on respect for fundamental rights [that...] grew out of the historical experience with the inquisitorial procedure as well as totalitarian systems of the 20th century based on a presumption of guilt and the permission to use coercion against the suspect.”⁵
2. Despite its entrenched status in international law as well as in the domestic law of most countries, the United Nations Human Rights Committee has pointed out that “the presumption of innocence, which is fundamental to the protection of human rights, is expressed in very ambiguous terms or entails conditions which render it ineffective.”⁶ The Proposed Directive⁷ likewise highlights the challenges of enforcing this legal principle, which though broadly accepted in Member States’ legislation, nonetheless lacks specific, enforceable safeguards in many Member States, which too often results in systemic breaches of that principle.⁸
3. Those breaches and the variability in understanding of the elements of the presumption of innocence between Member States lead to an undermining of the objectives of the Roadmap.⁹ Although the presumption of innocence itself does not appear in the Roadmap, the Commission has long recognised its importance to the realisation of the right to a fair trial, as evidenced in

¹ European Convention of Human Rights, Article 6(2), available at: http://www.echr.coe.int/Documents/Convention_ENG.pdf

² Charter of Fundamental Rights of the European Union, Article 48(1), available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0389:0403:en:PDF>

³ International Covenant on Civil and Political Rights, Article 14(2), available at: <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

⁴ Universal Declaration of Human Rights, Article 11, available at: <http://www.un.org/en/documents/udhr/>

⁵ Working Document on Strengthening of Certain Aspects of the Presumption of Innocence and of the right to be present at one’s trial in criminal proceedings, 17 March 2014, available at: <http://www.statewatch.org/news/2014/mar/ep-presum-innocence-wp1.pdf>

⁶ UN Human Rights Committee, General Comment 13, Article 14 (Twenty-first session, 1984), available at: <http://www1.umn.edu/humanrts/gencomm/hrcom13.htm>

⁷ Directive of the European Parliament and of the Council on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings, COM(2013) 821/2, para 23, available at: http://www.ecba.org/extdocserv/projects/poi/20132711_PropEC_Pol.pdf (“the proposed directive”)

⁸ 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*/, (“Impact Assessment”) pg 5, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52013SC0478&from=en>

⁹ Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings (2009/C 295/01), available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:295:0001:0003:en:PDF>.

part by its production of a Green Paper on the topic in 2006.¹⁰ The Commission's Impact Assessment accompanying the proposed Directive ("**Impact Assessment**")¹¹ describes the Presumption as "overarching and complementary to other procedural rights," and that its insufficient protection is "detrimental to the general perception EU citizens have of the EU justice standard."¹² The Proposed Directive itself recognises "the existence of a clear link between the presumption of innocence and other fair trial rights, in the sense that when such rights are breached, the presumption of innocence is also at stake."¹³

4. Besides the interconnectedness of the presumption of innocence with other procedural rights and the associated impact on mutual trust and mutual recognition in the EU, the Impact Assessment further notes that the Proposed Directive would produce "significant benefits by reducing the number of miscarriages of justice, thus promoting mutual trust of judicial authorities by increased clarification of Article 48 of the Charter." It also notes that the financial impact of the Proposed Directive, "already limited [...] should [...] further reduce as the right to be presumed innocent should be more respected, and thus remedies for its breach would be less used." It also identifies the potential for reduced costs associated with reduction in appeals, retrials, financial compensation, and aborted prosecutions due to the breach of suspects' fair trial rights resulting from an insufficient protection of the right to be presumed innocent.¹⁴
5. Due to the fundamental importance of the right to a fair trial to both a democratic society and to the underpinnings of judicial cooperation based on mutual recognition, the presumption of innocence requires safeguarding with EU legislation, consistent with Article 82 of the Treaty for the Functioning of the European Union ("**TFEU**"). The case for EU legislation is especially strong in light of the fact that current expressions of the presumption of innocence as set out in the Charter, the ECHR, and in the case law of the ECtHR, tend to be of a general nature, and the post-facto examination of individual cases by the ECtHR is insufficient to remedy all breaches of the presumption of innocence.¹⁵ The Commission considered that the ECtHR's reluctance to lay down prescriptive requirements in lieu of general minimum standards, and its inability to prevent future breaches in a systematic way, were insufficient to produce the climate of mutual trust necessary to facilitate mutual recognition.¹⁶

B. Key issues for further development in the Proposed Directive

6. We affirm the Commission's insight that the broad principle of the presumption of innocence can only be realised in practice as a collection of discrete, specific, and enforceable rights. Those separable aspects of the presumption of innocence are recognised by the Proposed Directive as: (1) the right not to be pronounced guilty by the authorities before a final judgment (Article 4); (2) the burden of proof remaining on the prosecution and the standard of that proof (Article 5); (3) the right not to incriminate oneself and not to cooperate and the right to remain silent (Articles 6 and 7); and (4) the right to be present at one's trial (Article 8). These elements go some distance in clarifying the practical functioning of the presumption of innocence, which

¹⁰ European Commission, Green Paper on the Presumption of Innocence, COM(2006)174, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52006DC0174&from=EN> ("the Green Paper")

¹¹ See above note 8, Impact Assessment, pg 5.

¹² See note 8 above, page 9.

¹³ See above note 7, Proposed Directive, para 14 of Explanatory Memorandum.

¹⁴ See note 8, Impact Assessment, pg 3.

¹⁵ See note 8, Impact Assessment, rec. 4.1.1

¹⁶ See note 8, Impact Assessment, page 10.

operates to force prosecuting authorities to prove criminal accusations by non-coercive means. When respected, the presumption of innocence should protect individuals from undue duress and improve the quality of investigations and thus the reliability of convictions and therefore public support for the justice system.

7. However, Fair Trials considers that in order to achieve the goal of making the presumption of innocence a practical and enforceable right, further consideration must be given to a number of key issues in the Proposed Directive, including several which have been overlooked by the current drafting:
 - a. **Witnesses as well as suspects** and accused should be informed of their right against self-incrimination (see paras 8-11);
 - b. **Legal as well as natural persons** should be included in the scope of the Proposed Directive (see paras 12-14);
 - c. Evidence collected in **administrative proceedings**, whose collection would have violated the terms of the Proposed Directive had the proceedings been criminal in nature, should not be admissible as evidence in criminal proceedings (see para 15);
 - d. The **prohibition on public references** to guilt before conviction should be broadened to include, inter alia, leaks to the media, and independent investigations conducted when violated (see paras 19-24);
 - e. Violations of the presumption of innocence that occur due to the **suspect's presentation** in court should be prevented by ensuring that the use of the dock, glass boxes, handcuffs and prison uniforms are strictly limited to those individual cases that require them for security reasons (see paras 24-25);
 - f. Regimes which shift the burden of proof to the accused should be more **explicitly limited** (see paras 26-28);
 - g. Member States should be required to remind suspects of the **right to remain silent and not to incriminate oneself** more frequently, and to apply safeguards against unintentional "waivers" of these rights (see paras 29 – 33);
 - h. **Audio-visual recording** of interrogations should be required in order to protect against undue compulsion (see paras 34-38);
 - i. The **right to be present** at one's trial should be enhanced by ensuring that retrials after trials in absentia meet the requirements of Article 6 of the ECHR, and that retrials are not arbitrarily denied to applicants who are not effectively informed of their rights or are unable to apply for a retrial within specified deadlines (see paras 39-41);
 - j. The **remedies** provision in Article 10 should be protected from efforts to weaken it (para 42-43); and
 - k. While more comprehensive EU standards on the use of pre-trial detention are required, the Proposed Directive should require Member States to ensure that the use of **pre-trial detention** does not undermine the presumption of innocence (see paras 44-45).

COMMENTS ON THE PROPOSED DIRECTIVE

A. Article 2: Scope

a. Relevance of Proposed Directive to witnesses as well as formal suspects and accused persons

8. In order for the Proposed Directive to reach all those who should benefit from its protections and to operate effectively as more than a formal principle, its scope must anticipate the actual, real-life situations in which individuals become suspected of crimes in the initial stages of police

questioning, irrespective of the formal qualification of the person as a suspect or accused.¹⁷ The Proposed Directive acknowledges that the guarantees of Article 6 must therefore “apply to witnesses whenever they are in reality suspected of a criminal offence.”¹⁸ However, this insight is not reflected in the Proposed Directive’s operative provisions.

9. Article 2 of the Proposed Directive should make clear that the rights therein attach not only to formal suspects or accused persons, but also to individuals who are summoned or volunteer to give testimony as witnesses, who become or are likely to become suspects in the course of questioning, or in situations where investigating authorities mislead suspects into believing they are merely witnesses. Including this category of suspect explicitly in the scope will help to ensure that authorities are not able to circumvent the right to silence by interviewing people without informing them or formally asserting their status as a suspect or accused. Similarly, individuals should not suffer from a reduced right to silence by virtue of the fact that they participated, whether voluntarily or involuntarily, in proceedings as a witness initially.
10. Members of the LEAP network have reported that this scenario is one which often gives rise to violations of the presumption of innocence, particularly the right to silence.

From Witness to Suspect: Spain

Spanish LEAP members report that it is common practice for prosecutors to initiate investigations (without judicial supervision) by calling a number of individuals related to the case as witnesses and interrogating them. Once this initial investigation is complete, the prosecutor will bring the case before the investigation court in which a number of individuals who have already been deposed as witnesses are now called as suspects. In practice, though these statements should not be referred to in court, lawyers report that courts do take note of the content of these prior statements.

This scenario was explicitly recognised in Directive 2013/48/EU, on the right of access to a lawyer in criminal proceedings (the “**Access to a Lawyer Directive**”)¹⁹, which provides,

“Where a person other than a suspect or accused person, such as a witness, becomes a suspect or accused person, that person should be protected against self-incrimination and has the right to remain silent, as confirmed by the case-law of the European Court of Human Rights. This Directive therefore makes express reference to the practical situation where such a person becomes a suspect or accused person during questioning by the police or by another law enforcement authority in the context of criminal proceedings. Where, in the course of such a questioning, a person other than a suspect or accused person becomes

¹⁷ See note 7 above, Proposed Directive, para 13 of the Explanatory Memorandum, citing *Salduz v Turkey*, (App. No. 36391/02, 27 November 2008), para 52, available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-89893>, and *Brusco v France* (App. No. 1466/07, 14 October 2010), paragraph 47, available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-101148>).

¹⁸ *Ibid.*

¹⁹ 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, Recital 21, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:294:0001:0012:EN:PDF>.

a suspect or accused person, questioning should be suspended immediately. However, questioning may be continued if the person concerned has been made aware that he or she is a suspect or accused person and is able to fully exercise the rights provided for in this Directive.”

11. The Access to a Lawyer Directive reiterates this understanding in its operative provisions, stating that “[t]his Directive also applies [...] to persons other than suspects or accused persons who, in the course of questioning by the police or by another law enforcement authority, become suspects or accused persons.”²⁰ Similar language should be inserted into Article 2 of the Proposed Directive.

Recommendation: Article 2 should explicitly apply to persons other than suspects or accused persons who, in the course of questioning, become suspects or accused persons. Witnesses as well as suspects should be informed of the right against self-incrimination and any evidence collected in violation of these provisions should be inadmissible.

b. Natural vs legal persons

12. The Proposed Directive explicitly limits its scope to natural persons, excluding legal persons from its ambit and leaving their protection to existing safeguards, while acknowledging that the case law of the ECtHR has not clearly recognised the right of silence for legal persons,²¹ nor has the CJEU in the context of competition cases.²² The Proposed Directive’s silence on the issue in light of the lack of strong guidance from regional courts is understandable, but results in a situation of continued ambiguity, unpredictability and lack of consistency between Member States – the exact conditions which have been identified as leading to a decreased atmosphere of mutual trust and functioning of mutual recognition. This represents a missed opportunity for the Proposed Directive to bring clarity and increased rights protection that would clearly improve regional understanding and enforcement of the presumption of innocence.
13. The need for greater clarity with regard to the right to silence for legal persons is particularly urgent in light of the Proposed Directive’s explicit intention to “strengthen the legal safeguards that protect individuals involved in proceedings conducted by the European Public Prosecutor’s Office (“EPPO”).”²³ Without extension to legal persons however, legal safeguards in relation to proceedings conducted by the EPPO are not sufficiently strengthened, especially in light of the likelihood that legal persons will be the subject of proceedings of the EPPO due to its focus on financial crime. Furthermore, police and judicial cooperation instruments including the European Investigation Order²⁴ and the EU Framework Decision on Asset Freezing²⁵ also apply

²⁰ See above note 19, Access to a Lawyer Directive, Article 2(3).

²¹ See note 7 above, Proposed Directive, para 26-27. See also *Funke v France*, App. No. 10828/84, 25 February 1993, available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57809>

²² *Orkem v. Commission*, Case 374/87, ECR 3283, 18 October 1989, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61987CJ0374&from=EN>

²³ See note 7 above, Proposed Directive, para 10.

²⁴ Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, Art 4(2), 26(1) and 26(6) available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32014L0041&from=EN>

²⁵ Council of the European Union, Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence, Art 12(2). available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:196:0045:0055:en:PDF>

to legal persons, and clear, minimum procedural safeguards for legal persons are therefore also necessary for the effective functioning of these instruments.

14. Besides the impact of increased prosecutorial and judicial cooperation measures, criminal prosecutions of legal persons must be undertaken with the same integrity and legal force as those of natural persons. If such prosecutions are advanced without full due process guarantees including the right to silence applying to defendants, the line between administrative and criminal proceedings is blurred. This lower standard of procedural scrutiny will allow prosecuting authorities to proceed in these matters without a clear burden of proof, and therefore without the same legal and moral authority that would otherwise follow from a procedurally robust criminal prosecution.

Recommendation: In light of the increasing demands of mutual recognition instruments and the general demands of Article 6 with consequences for legal persons, that the Proposed Directive be extended to legal persons in order to ensure the climate of mutual trust and protection of procedural rights necessary for their smooth functioning.

b. Exclusion of administrative proceedings

15. A further limitation on the scope of the Directive is the exclusion of administrative proceedings leading to sanctions such as competition, trade, tax, financial services proceedings and other investigations in relation to these proceedings.²⁶ Though this limitation is found in the explanatory memorandum rather than the operative provisions of the Proposed Directive, this explicit exclusion does not appear to anticipate the danger of introduction of evidence collected in these proceedings into later criminal proceedings, without attendant due process guarantees being applied.

Recommendation: The Proposed Directive should make clear, in an operative provision, that evidence collected in administrative proceedings, whose collection would have violated the terms of the Proposed Directive had the proceedings been criminal in nature, should not be admissible as evidence in criminal proceedings.

B. Article 3: The Presumption of Innocence

16. A strong articulation of the principle of the presumption of innocence is an important function of the Proposed Directive, and we are therefore pleased to see Article 3 dedicated to a clear statement of this basic principle.
17. However, on its own, with no concrete, exercisable rights or guidance, Article 3 does nothing to assist Member States to strengthen the right, and therefore fails to achieve the goals of the Directive and the Impact Assessment's conclusion that "particular attention should be given to those aspects which create concrete and tangible rights for citizens – rather than general principles of procedural criminal law".²⁷ As it stands, the current drafting of Article 3 simply

²⁶ See note 7 above, Proposed Directive, Explanatory Memorandum, para 6.

²⁷ See note 8 above, Impact Assessment, page 3.

entrenches the pervasive difficulty that Member States face in ensuring that law enforcement authorities, judicial authorities, and other public bodies take effective measures to uphold the principle of the presumption of innocence in practice.

18. More clarity and prescription is needed in order to provide clear guidance to Member States as to what is necessary in order to meet the minimum standards established by the Proposed Directive. As an example, Article 5.1 of the Directive on the right to Interpretation and translation in criminal proceedings²⁸ (“**the Interpretation and Translation Directive**”) requires Member States to “take concrete measures to ensure that [...] interpretation and translation provided meets the quality required under [other relevant Articles].” The Access to a Lawyer Directive requires that Member States “endeavour to make general information available to facilitate the obtaining of a lawyer by suspects or accused persons.”

Recommendation: The drafting of Article 3 should require Member States to take concrete measures to ensure that adequate protections are put in place so that suspects are treated in ways that ensure that the presumption of innocence is respected.

C. Article 4: Public references to guilt before conviction

Case Study: Dan Grigoire Adamescu (Romania)

Mr Adamescu, the owner of a newspaper critical of the current Romanian government, stands accused of corruption in Romania. Judicial statements made in the course of pre-trial detention proceedings have failed to respect the presumption of innocence.

- In a decision to detain Mr Adamescu, the judge referred to “the seriousness of the illegal actions committed by him”, describing them as established facts rather than as yet unproved allegations.
- At an appeal hearing challenging his detention, the Court of Cassation cited as one of its main reason for denying the appeal the fact that “the defendant[s] continue to deny committing the crimes of which they stand accused and to challenge the existence of any evidence that justifies a reasonable suspicion that they did, in fact, commit these crimes.”

19. Protection for accused people from premature declarations of guilt is at the heart of the Article 6(2) (ECHR) conception of the presumption of innocence, making Article 4 of the Proposed Directive a key provision that must be retained. However this aspect of the right is substantially more detailed and developed in ECtHR case law than the minimal language used by Article 4 of the Proposed Directive. Further detail is needed to provide thorough, concrete and enforceable guidance.

²⁸ 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, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:280:0001:0007:EN:PDF>.

20. “Public declarations of guilt” includes of course the classic scenario of a statement to the press about a pending criminal investigation in which a public official describes an accused as having actually committed the crime of which he is accused.²⁹ The terms of Article 4 should also be expanded to reflect a broader understanding of this phenomenon. For example, members of the LEAP network have reported that authorities may make statements informally in interviews, or by providing or leaking information to the press that tends to create prejudice and bias against the accused before facts are established in court.³⁰ Member States should be required to conduct independent investigations of leaks of confidential material from criminal proceedings to the public.
21. Public declarations of guilt can also include some judicial statements in court during the pre-trial period,³¹ particularly in the context of decisions on pre-trial detention or the revocation of parole,³² which portray or rely upon an assumption of the accused as guilty in ways that trespass beyond facts established by evidence and undermine the presumption of innocence.³³
22. The understanding of “public authority” must also remain sufficiently broad, so that it clearly includes any person of recognised public standing, not only elected representatives or employees of public authorities.³⁴
23. Prejudicial media coverage severe enough to undermine the presumption of innocence often happens without official sanction or comment, through media channels themselves. With respect for freedom of the press, Article 4 should include guidance for this type of breach of the presumption of innocence, such as ensuring adequate contempt of court regulation, to ensure that journalists or media outlets are not able to prejudice the proceedings.

Case study (England and Wales): Chris Jefferies

In 2010 Chris Jefferies was arrested on suspicion of murdering Yeates, who was a tenant in the building he lives in and owns. Jefferies was a retired English literature teacher who faced subsequent vilification by newspapers before further investigation located another suspect who was later convicted for the murder. As a result of the prejudicial press coverage, Mr Jefferies was awarded damages for defamation from eight news outlets. The Attorney General for England and Wales successfully prosecuted two newspapers for contempt of court for their reporting of Jefferies’ arrest and the Lord Chief Justice of England and Wales stated that, ‘in our judgment, as a matter of principle, the vilification of a suspect under arrest is a potential impediment to the course of justice.’

²⁹ *Alenet de Ribemont v France*, App. No. 15175/89, 10 February 1995, para 39-41, available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57914>

³⁰ Communiqué issued after the meeting of the Legal Experts Advisory Panel of 4 March 2014 in Brussels: The Presumption of Innocence & The Right to be Present at Trial, available at: <http://www.fairtrials.org/wp-content/uploads/Fair-Trials-International-Presumption-of-Innocence-communique.pdf>.

³¹ See, eg *Lavents v Latvia*, App. No. 58442/00, 28 November 2002, available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-65362>

³² See, e.g. *Bohmer v. Germany*, App. No. 37568/97, 3 October 2002, available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60668>

³³ *Daktaras v. Lithuania*, App. No. 42095/98, 10 October 2000, para 42-45, available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58855>

³⁴ *Kouzmin v Russia*, App. No. 58939/00, 4/10/2010, para 59-69, available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-97698>

24. The Proposed Directive furthermore overlooks an important component of the bundle of rights protecting suspects from public pronouncements of guilt before conviction, which relates to the appearance or presentation of the accused in the courtroom before and during trial. The recognition that the public presentation of the accused can undermine the presumption of innocence is well established in ECtHR case law,³⁵ and deserves explicit mention in the Proposed Directive.
25. Either in Article 4 or in a separate, free-standing Article, the Proposed Directive should require Member States to take measures to ensure that suspects are not presented in court or in public in ways that tend to suggest guilt, including the placement of the suspect in “the dock” as in the UK,³⁶ or in a glass box or partition (Spain, Italy, France and Germany),³⁷ as well as the use of handcuffs, leg irons, and prison clothes. These features may only be justified by legitimate and case-specific security concerns³⁸ and should be subject to judicial review.

Case Study (Luxembourg)

3 men accused of a serious crime were kept handcuffed and kept in a glass “box” throughout their trial. The handcuffs were only removed when the suspects testified.

Despite the suspects’ lawyer protesting the use of handcuffs in the absence of any suggestion of violence on the part of the suspects, other than the nature of the allegations, and the continuous presence of police in the courtroom to ensure safety, the judge and police refused, taking the position that every detained suspect must be kept in handcuffs in court, without individual determinations of their necessity being made.

Recommendations: Article 4 should require Member States to protect against public declarations of guilt before conviction by enforcing adequate contempt of court regulations to ensure that journalists and media are not able to prejudice proceedings. They should also be required to conduct independent investigations of any leaks from criminal proceedings to the public.

The Proposed Directive should also, in Article 4 or elsewhere, require Member States to ensure that suspects are not presented in court or in public in a manner which suggests guilt unless these are determined, on an individual basis, to be necessary for security reasons.

³⁵ See, eg *Jiga v. Romania*, App no 14352/02, 16 June 2010; *Samoila v. Cionca v. Romania*, App no 33065/03, 4 June 2008, paras. 91-101.

³⁶ L Mulcahy, (2013), ‘Putting the Defendant in their Place: Why do we still use the dock in criminal proceedings?’ *British Journal of Criminology*.

³⁷ S. DePorti, M. Chebrout, L. Fay, ‘The Dock and Physical Restraints: the presumption of innocence put to the test by appearances at trial,’ *Themis Competition*, p 18, available at: http://www.ejtn.eu/Documents/Themis%202012/THEMIS%202012%20BUCHAREST%20DOCUMENT/Written_paper_France%206.pdf

³⁸ See, eg, *Meerbrey v. Germany*, App No. 37998/97, Commission Decision of 12 January 1998, available at: <http://eu.vlex.com/vid/meerbrey-v-germany-80915135>.

D. Article 5: Burden of proof

26. The principle that the burden of proof is on the prosecution, and that the accused should benefit from any doubt (*in dubio pro reo*) is fundamental to the right to a fair trial because it ensures that courts' judgments are based on evidence, not mere assumptions³⁹ 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 noted by the Commission in its Impact Statement as some of the driving reasons for the Proposed Directive.⁴⁰ Its inclusion in the Proposed Directive is therefore welcome, and of utmost importance.
27. The case law of the ECtHR has allowed for a shifting of the burden of proof in some limited factual circumstances, taking into account the importance of what is at stake and maintaining the rights of the defence.⁴¹ Fair Trials' LEAP members and others have raised concern over increasing use of such practices, which may take many forms, including strict liability regimes for a host of minor offences, increased pre-trial disclosure obligations on the defence, or routine reliance on or coercion of "guilty pleas" which remove the government's responsibility to prove their case.⁴²
28. Unfortunately, the test set out in Article 5(2) of the Proposed Directive for burden-shifting regimes is neither sufficiently clear nor enforceable in order to provide adequate guidance to Member States to ensure that the burden of proof is robustly upheld, and may permit Member States to extend burden shifting regimes in ways which would not be compatible with ECtHR jurisprudence. Article 5's statement that "any presumption, which shifts the burden of proof to the suspects or accused persons, is of sufficient importance to justify overriding that principle and is rebuttable," is too broad to adequately ensure that the principle of the burden of proof is safeguarded. In particular, "sufficient importance to justify overriding that principle" is not a known legal standard, and provides Member States too extensive an ability to shift the burden of proof on subjective and undefined grounds.

Recommendations: Article 5 should explicitly set out those situations in which the burden of proof may be shifted to the defence for limited purposes, and should identify criteria against which the appropriateness of burden-shifting regimes should be assessed. Even in these situations, it should make explicit that reverse presumptions must maintain the rights of the defence, including the right to present factual evidence and to confront and examine prosecution evidence.

³⁹ See note 8 above, Impact Assessment, sec. 4.2.2

⁴⁰ See note 8, Impact Assessment.

⁴¹ See, eg *Salabiaku v France*, App no 10519/83, App no 10519/83, 6 December 1988, para 77, available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57570>; *Telfner v Austria*, App No 33501/96, 20 June 2001, available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-59347>; *O'Halloran and Francis v UK*, App nos 15809/02 and 25604/02, 29 June 2007, available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-81359>

⁴² Communique issued after the meeting of the Legal Experts Advisory Panel of 4 March 2014 in Brussels: The Presumption of Innocence & The Right to be Present at Trial, available at: <http://www.fairtrials.org/wp-content/uploads/Fair-Trials-International-Presumption-of-Innocence-communique.pdf>. See also note 10 above, sec. 4.2.2.

E. Articles 6 & 7: Rights not to incriminate oneself and to remain silent

29. The rights to silence and not to incriminate oneself, covered by Articles 6 and 7 of the Proposed Directive, are central to the presumption of innocence and their protection is paramount for the realisation of a fair trial. Together, the two principles act as a practical safeguard against many of the hallmarks of injustice. On a personal and philosophical level, the rights represent a fundamental protection of individual dignity before the coercive power of the state. They are key bulwarks against coerced confessions, which by their nature are unreliable, and encourage independent and thorough investigations, and thereby systematically improve the quality of policing and prosecuting. In this way, the rights to silence and against self-incrimination provide a concrete measure that helps to ensure that the burden of proof remains upon the prosecution.
30. Unfortunately, despite the centrality of the right to silence and the protection against self-incrimination, it is well established that suspects find these rights very difficult to uphold in practice. Investigators are highly motivated to encourage suspects to confess or to otherwise cooperate, and Fair Trials' LEAP members report a variety of tactics authorities may use to convince suspects to waive these rights. 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, and where they are vulnerable in other ways (i.e. age,⁴³ level of literacy,⁴⁴ drug dependence,⁴⁵ etc.).

Case Study (Poland)

The accused is a young man suffering from serious mental illness who was arrested on allegations related to the dissemination of content inciting others to terrorism. He was interrogated extensively without his family or a lawyer present, and eventually pleaded guilty and submitted extensive self-incriminating statements. He was detained pre-trial on the basis of those statements, and was detained for 8 months before court-appointed psychiatrists determined that he was severely mentally ill and that his behaviour posed no threat to public safety. The case was discontinued.

31. The interrelationship between the right to silence, the right to information and the right to a lawyer have been recognised by specific reference to the right to silence in the Right to Information and the Access to a Lawyer Directives. The Right to Information Directive requires Member States to ensure that suspects or accused persons are informed of the right to silence

⁴³ *Panovits v Cyprus*, App. No 4268/04 (Judgment of 11 December 2008) paragraph 67, available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-90244>.

⁴⁴ *Kaciu and Kotorri v Albania*, App. Nos 33192/07 and 33194/07 (Judgment of 9 December 2013), paragraph 120, available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-121770>

⁴⁵ *Plonka v Poland*, App. No 20310/02 (Judgment of 31 March 2009), paragraph 37, available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-91927>

promptly,⁴⁶ and that a Letter of Rights which sets out the right to silence in simple and accessible language is provided to suspects and accused persons upon arrest or detention.⁴⁷

32. Despite these legislative initiatives, the right to silence remains one of those areas of criminal procedural rights in which there is the most variability in understanding and protection between Member States. It has also already arisen as a challenge to full implementation of the Right to Information Directive, as some Member States have struggled to inform suspects effectively of the right to silence due to the incomplete protection of this right at a national level. In some Member States, the right to silence is expressed as a right to give evidence⁴⁸ or to refrain from giving evidence, which can confuse and obfuscate this key but difficult to enforce right. In order to achieve the goals of approximation of procedural rights to ensure mutual trust and the smooth functioning of mutual recognition instruments, this is an area that requires special attention, clarity, and enforceability to avoid perpetuating the current position of incoherence of the crucial right to silence in the EU.

The Right to Silence: England and Wales

In England and Wales, where adverse inferences from silence can lawfully be drawn, police have reported difficulties in advising suspects on the now-nuanced right. In a recent research study, *Inside Police Custody: An Empirical Account of Suspects' Rights in Four Jurisdictions*, an English police officer reported that,

'Sometimes the issue comes when [a police officer] doesn't fully understand the issue or know how to explain it, especially the middle part of the caution, which can be where the breakdown it' (378).

A lawyer reported to researchers that *'The police don't really understand the right to silence and will see it as a bit of a game and will try to undermine the decision to be silent and get them to answer questions' (379).*

33. For this reason, Article 7(2) of the Proposed Directive should make clear that Member States must inform the suspect of the right to remain silent, and explain the content of the right and the consequences of renouncing or invoking it, not only promptly upon arrest, but also, separately, prior to any interrogation or interview and prior to giving testimony in court. The right to silence must be explained in a simple and unequivocal way.
34. A key safeguard to assessing whether compulsion by authorities has been excessive, in light of the particular situation and potential vulnerabilities of individual suspects, is the routine use of

⁴⁶ Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, Article 3(1)(e), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:142:0001:0010:en:PDF>

⁴⁷ *Ibid*, Right to Information Directive, Article 4.

⁴⁸ See, e.g., Fair Trials International Legal Experts Advisory Panel Submission to the Legal Affairs Committee of the Parliament of Lithuania on the transposition of Directive 2012/13/EU on the right to information in criminal proceedings, available at: <http://www.fairtrials.org/wp-content/uploads/Lithuania-Parliament-Submission-English1.pdf>, paragraph 7.

audio-visual recording of police interviews, reconstructions, and other investigative acts directly involving the suspect, so that the use of elements of compulsion can be properly assessed by judicial authorities and violations of the presumption of innocence remedied. Audio-visual recording of interviews should be required in order that effective assessment and remedy can take place.

35. Even where audio-visual recording is not possible, any waiver of the right to remain silent should be recorded in writing, and ideally, reasons for waiver should also be recorded. Waivers of this right given in the absence of a lawyer should be particularly scrutinised, given the practical difficulty most suspects face in exercising that right without the support of a lawyer.⁴⁹ Furthermore, waivers of the right to silence given by suspects who are vulnerable in any way, including age,⁵⁰ mental ability, or drug use,⁵¹ or those who waive the right after a long period of detention or interrogation,⁵² must be evaluated critically.
36. Fair Trials welcomes the prohibition in Article 7(3) and 6(3) of the Proposed Directive of use of the exercise of the right to silence or not to incriminate oneself or to cooperate in criminal proceedings against the suspect at a later stage of proceedings or as a corroboration of facts. Allowing adverse inferences to be drawn from silence or non-cooperation eviscerates the heart of the right against self-incrimination – either the suspect incriminates himself by speaking, or he incriminates himself by silence. This provision, of course, extends protection beyond the minimum standards of the ECtHR, which has allowed the drawing of negative inferences from a suspect’s exercise of the right to silence in some limited circumstances.⁵³ In so doing, the Commission proposes a standard that is consistent with practice in most Member States and which is clearer and easier to administer than the nuanced positions on silence maintained by a minority of Member States, which as described above have led to problems implementing the existing procedural rights directives and contribute to a situation of legal uncertainty which erodes mutual trust between Member States.
37. This prohibition should be further enhanced by adding language indicating that no penalties can be imposed on a suspect for refusal to cooperate with an investigation or to self-incriminate. Such penalties may include fines, increases in severity of accusation or punishment, the threat of imposition of pre-trial detention, or the removal of benefits.
38. Articles 6(4) and 7(4) of the Proposed Directive, specifying remedies for breaches of these provisions, are so weak as to be ineffectual in providing useful guidance to Member States seeking to strengthen their protection of the presumption of innocence. It is difficult to imagine circumstances in which the admission of evidence obtained in breach of these provisions would not prejudice the overall fairness of proceedings. These provisions should simply state, “any evidence obtained in breach of this Article shall not be admissible.”

⁴⁹ See, i.e. *Saman v Turkey*, App. No 35292/05, (Judgment of 5 April 2011), paragraph 33, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-104355>.

⁵⁰ See above note 43, *Panovits v Cyprus*.

⁵¹ See above note 45, *Plonka v Poland*.

⁵² *Pishchalnikov v Russia*, App. No 7025/04 (Judgment of 24 September 2009), paragraph 69, available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-94293>

⁵³ See, e.g. *John Murray v. UK*, App. No. 18731/91, 8 February 1996, available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57980>

Recommendations: Articles 6 and 7 should require Member States to inform suspects of the right to silence more frequently, not only promptly upon arrest, but also prior to any interrogation or interview and prior to giving testimony in court.

It should also require Member States to audio-visually record police interviews to ensure that violations can be accurately identified and remedied.

The prohibition on the use of silence for corroboration purposes should be protected from derogation or weakening, and should be expanded to make clear that no other penalties can result from the exercise of silence.

Finally, the remedies provisions should make clear that any evidence collected in violation of these Articles should not be admissible.

F. Articles 8 and 9: Right to be present at one's trial and the right to a re-trial

39. The right to be present at trial is a key feature of the presumption of innocence, which at present is only protected in EU law for European Arrest Warrant cases, by the Framework Decision on Trials in Absentia.⁵⁴ The Proposed Directive offers an opportunity to improve upon the protections expressed in that instrument as well as ensuring that they reach all criminal defendants, not only those subject to extradition. Years of experience of the implementation of that Framework Decision have resulted in an understanding of its limitations and the need for strengthened provisions.

Case Study (Romania): Da An Chen

Da An Chen is a Chinese national living in the UK with his wife and their daughter until he was extradited to Romania in 2011 to serve a 20-year prison sentence following a conviction in absentia in 1995, of which he professes no knowledge and claims no involvement. Extradition was made on the undertaking that he would be given a retrial in Romania, but the procedure to which he was subject once returned to Romania did not constitute a full retrial with the ability to confront all evidence initially introduced at trial. Furthermore, key alibi evidence had become unavailable in the time since his original trial in absentia. His conviction was affirmed.

40. In particular, retrial provisions available to defendants as provided for in Article 8(3) and Article 9 should be strengthened, such that any such retrial or appeal must fully comply with the demands of Article 6 of the ECHR, including the right to confront previous evidence including the cross-examination of witnesses.
41. Article 8(3)(b), which allows for the denial of a retrial after trial in absentia to individuals who fail to request a retrial or appeal "within a reasonable amount of time," has led to denials of

⁵⁴ Council of Europe, Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby 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, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:081:0024:0036:EN:PDF>

retrials after trials in absentia, particularly for defendants who are vulnerable, detained, and/or reliant on legal aid and who therefore struggle to find information about and apply for retrials within given timelines. More clarity is needed on what constitutes “reasonable amounts of time” in which individuals can request retrials, and applicants should be able to apply for exceptions to the application of strict deadlines for retrials after trials in absentia when the interests of justice require them.

Recommendation: Retrial provisions available to defendants as provided for in Article 8(3) and Article 9 should be strengthened, such that any such retrial or appeal must fully comply with the demands of Article 6 of the ECHR, including the right to confront previous evidence including the cross-examination of witnesses.

G. Article 10: Remedies

42. An explicit provision on remedies such as that expressed in Article 10 of the Proposed Directive is both necessary and welcome to ensure that the Proposed Directive is implemented effectively. The already adopted Roadmap Directives are all facing challenges to effective implementation, in part due to insufficient clarity on remedies. The Interpretation and Translation Directive and the Right to Information Directive make no specific provision for judicial remedies for violations of their provisions. Instead, both make reference only to the requirement for Member States to (i) ensure that suspects and defendants have the right to challenge the failure of the authorities to provide access to the rights guaranteed under the directives and (ii) ensure that the fairness of the proceedings is safeguarded. The Access to a Lawyer Directive goes further, requiring that Member States must provide “an effective remedy under national law in the event of a breach of the rights” established by the measure, but also provides guidance as to the nature of that remedy, which seeks to mirror the requirements established by the European Court of Human Rights (ECtHR) in *Salduz*. Even this guidance however is very specific to the treatment of evidence collected in situations when the right to a lawyer has not been upheld, and remains subject to “national rules and systems on the admissibility of evidence”.
43. The standards established by the European Court of Human Rights do not provide a clear model for Member States to follow and are, in any event, ineffectively enforced. As long as procedural rights continue to be enforced inadequately due to ineffective judicial remedies, suspects and defendants will continue to suffer injustice and there will be no incentive for key stakeholders to abide by their obligations under the Roadmap Directives. A cautious approach should therefore be taken in relation to any attempts in negotiation of the Proposed Directive to weaken this provision or to make it subject to Member States’ national law.

Recommendation: Article 10 should be protected from any attempts to dilute it or make it subject to national law.

H. Pre-trial detention

44. Fair Trials is concerned by the explicit exclusion of pre-trial detention from the scope of the Proposed Directive, despite the central role that pre-trial detention can play in undermining the

presumption of innocence.⁵⁵ Research has shown⁵⁶ that defendants subject to pre-trial detention are more likely to be convicted, even when other factors such as the seriousness of the offence are excluded from consideration. We appreciate that pre-trial detention and alternatives to it is a broad area that deserves separate consideration by the EU institutions and the creation of specific minimum standards.⁵⁷ Further, we recognise that issues that have a direct impact on the presumption of innocence, such as length of detention⁵⁸ the imposition of pre-trial detention strictly for lawful grounds⁵⁹ and the principle of use of pre-trial detention as a last resort⁶⁰ probably cannot be addressed in sufficient detail in the Proposed Directive. However, the Proposed Directive should still take account of the ways in which pre-trial detention operates to undermine the presumption of innocence, without taking the place of a full piece of legislation on the topic of detention.

45. In particular, the threat of pre-trial detention should not be used as a method of compelling suspects or accused persons to waive their right to silence or their right not to self-incriminate. Where appropriate, authorities and decision-makers (including juries) should receive specific guidance or training on how to ensure that decisions on pre-trial detention or release remain independent from ultimate judgments of guilt or innocence.

55 See, e.g. *Gonta v Romania*, App. No. 38494/04, 1 October 2013, para 59, available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-126555>. See also *Sarban v Moldova*, App. No. 3456/05, 4 October 2005, para 101, available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-70371>.

56 See, e.g. US Department of Justice, Office of Justice Programs, 'Pre-trial Services Programs: Responsibilities and Potential', (March 2001), finding that statistically, defendants detained prior to trial plead guilty more often, are convicted more often, and are more likely to be sentenced to prison than are defendants who are released prior to trial. Available at: <https://www.ncjrs.gov/pdffiles1/nij/181939.pdf>. See also Lowenkamp, Vannstrand and Holsinger, 'Investigating the Impact of Pre-trial Detention on Sentencing Outcomes' (2001) Arnold Foundation, finding that those defendants who remained detained for the entire pre-trial period were more than four times more likely to be sentenced to jail and three times more likely to be sentenced to prison than those defendants who achieved pre-trial release available at: http://www.arnoldfoundation.org/sites/default/files/pdf/LJAF_Report_state-sentencing_FNL.pdf. See also Wheeler and Fry, 'Project Orange Jumpsuit: Effects of Pre-trial status on Felony and Misdemeanor Case Disposition in Harris County,' finding that in comparable cases, detained defendants are less likely dismissed or deferred and more likely sentenced to incarceration than their counterparts on pre-trial release with money bond. Working document available at: <https://www.scribd.com/doc/168593229/Project-Orange-Jumpsuit>

⁵⁷ See, eg: *Stockholm's Sunset: New horizons for justice in Europe*, March 2014, Fair Trials International, available at: <http://www.fairtrials.org/wp-content/uploads/Stockholms-Sunset.pdf>. *Detained without trial: Fair Trials International's response to the European Commission's Green Paper on Detention*, October 2011, Fair Trials International, available at: <http://www.fairtrials.org/documents/DetentionWithoutTrialFullReport.pdf>

⁵⁸ *Idalov v. Russia*, App. No. 5826/03, 22 May 2012, available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-110986>

⁵⁹ *Ibid.*

⁶⁰ *Smirnova v. Russia*, App. No. 46133/99 and 484183/99, 24 July 2003, available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61262>. *Letellier v. France*, App. No. 12369/86, 26 June 1991, available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57678>.

Recommendation: The Proposed Directive should include mention of the role pre-trial detention plays in undermining the presumption of innocence, and should require Member States to provide training and guidance to appropriate bodies on the maintenance of the presumption during pre-trial detention procedures. As mentioned in paragraphs 24-25 above, Member States must also ensure that accused people who are in pre-trial detention should not be presented in court in prison attire such as that worn by sentenced prisoners or shackles unless this is strictly necessary for security reasons.

H. Conclusion

46. The presumption of innocence, despite its universally acknowledged place at the heart of the right to a fair trial, is challenging to realise. It can only be translated from principle to practice when understood as a bundle of related rights expressed in concrete and enforceable terms. In general the Commission has understood this in its Proposed Directive, and Fair Trials welcomes the resulting Proposed Directive.
47. The case law of the ECtHR and the CJEU has been recognised as insufficient to ensure compliance with the presumption of innocence, and the variety of understanding and practice throughout Member States in relation to the right to silence and protection against self-incrimination, the prosecution's burden of proof, the right to be present at trial, the public treatment of the accused and the right to be present at trial, all attest to this insufficiency. Furthermore, key elements of the presumption of innocence including the effective notification and protection of the right to silence have arisen as sticking points in the implementation of the other Roadmap Directives, particularly the Right to Information Directive. The need for the Proposed Directive to bring clarity and uniformity to this area of law is acute, with direct and urgent effects on the functioning of mutual recognition instruments including the European Arrest Warrant, the European Investigation Order, the Framework Decisions on Freezing of Evidence and Assets⁶¹ and the mutual recognition of confiscation orders⁶² and the anticipated European Public Prosecutor's Office.
48. In some respects, such as the expansion of the right to silence beyond current ECtHR case-law to protect suspects from adverse inferences being drawn from the exercise of that right, the Proposed Directive rises to this challenge. But in too many other provisions, it merely restates the unsettled and ineffective status of the current case law of the ECtHR and the CJEU. This will not be sufficient to provide the climate of mutual trust the Proposed Directive aims to achieve. A decision to rely on the watered down and vague pronouncements that too often take the place of enforceable guidelines for Member States, will only ensure that areas of incoherence will remain, and will continue to be decided piecemeal by courts.
49. Fair Trials therefore urges the Council of the European Union and the European Parliament to apply a forward-looking and rights-minded approach to the key issues raised in this paper, so as to produce a truly effective Directive that will improve the reliability of criminal justice systems across the EU, and the effective operation of mutual recognition and judicial cooperation throughout the Union.

⁶¹ Council of the European Union, Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:196:0045:0055:en:PDF>

⁶² Council of the European Union, Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:328:0059:0078:en:PDF>