



Brussels, 22 September 2014
(OR. en)

13304/14

Interinstitutional File:
2013/0407 (COD)

DROIPEN 107
COPEN 222
CODEC 1845

NOTE

From:	Presidency
To:	Working Party on Substantive Criminal Law
No. Cion doc.:	17621/13 DROIPEN 158 COPEN 235 CODEC 2929
Subject:	Proposal for a Directive of the European Parliament and of the Council on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings - Revised text following the meeting of the Working Party on 4/5 September and the discussion in CATS on 16 September

Introduction

1. On 4 and 5 September 2014, the Working Party on Substantive Criminal Law and the Friends of the Presidency, respectively, continued their examination of the draft Directive.
2. On 16 September 2014, CATS held an orientation debate regarding Article 8, on the basis of doc. 12955/14.
3. In the light of these discussions, the Presidency revised the text of the draft Directive. This revised text, containing various explicative footnotes, is set out in the Annex.

Specific comments regarding Article 2

4. During the meeting of the Working Party on 4/5 September, the following text of Article 2 was drafted:

"This Directive applies to natural persons who are suspected or accused in criminal proceedings. It applies from the moment when a criminal offence has been or may have been committed until the final determination of the question whether the suspect or accused person has committed the offence concerned, including, where applicable, the resolution of any appeal or other judicial remedy."

5. Some Member States, however, expressed concerns. They stated that the expression "*moment when a criminal offence has been or may have been committed*" is not very precise, and observed that a link with the suspect or accused person is missing. It was also generally felt that the Directive should not apply to actions before the European Court of Human Rights in Strasbourg or before a national constitutional court, which would not deal with the question of "guilt", thus the question whether the person has committed the offence.

6. In this light, the Presidency has redrafted the text, proposing the following wording:

*"This Directive applies to natural persons who are suspected or accused in criminal proceedings. It applies from the moment when a person is suspected or accused of having committed a criminal offence, or an alleged criminal offence, until the final determination of the question whether the person has committed the offence concerned, including, where applicable, the resolution of any appeal or other judicial remedy concerning that question."*¹

¹ Alternatively, the final conclusion of the proceedings could be defined as the moment in which the decision becomes enforceable. Delegations will find in a footnote under Article 2 a drafting suggestion along this line.

7. In recital 8, it would be made clear that for the purpose of this Directive, actions before the European Court of Human Rights in Strasbourg or before a national constitutional court will not fall within the meaning of the term "*any appeal or other judicial remedy concerning the question whether the person has committed the offence*".

Specific comments regarding Article 8

8. CATS on 16 September examined the issue of Article 8 on the basis of doc. 12955/14. Member States basically replied to the question whether the draft Directive should contain minimum rules on trials in absentia, and if so, whether the text as proposed by the Commission in Article 8(2) and (3) would be adequate.²

² Paragraphs 2 and 3 of Article 8 as proposed by the Commission read as follows:

2. *Member States may provide for a possibility under which the trial court may decide on the guilt in the absence of the suspect or the accused person, provided that the suspect or accused person:*
- (a) *in due time:*
 - (i) *either was summoned in person and thereby informed of the scheduled date and place of the trial, or by other means actually received official information of the scheduled date and place of that trial in such a manner that it was unequivocally established that he or she was aware of the scheduled trial;*
 - and*
 - (ii) *was informed that a decision may be handed down if he or she does not appear for the trial; or*
 - (b) *being aware of the scheduled trial, had given a mandate to a legal counsellor, who was either appointed by the person concerned or by the State, to defend him or her at the trial, and was indeed defended by that counsellor at the trial.*
3. *If the conditions of paragraph 2 have not been met, a Member State can proceed to execution of a decision intended in that paragraph if, after being served with the decision and being expressly informed about the right to a retrial, or an appeal, in which the person has the right to participate and which allows a fresh determination of the merits of the case, including examination of new evidence, and which may lead to the original decision to be reversed, the person:*
- (a) *expressly states that he or she does not contest the decision;*
 - or*
 - (b) *does not request a retrial or appeal within a reasonable time frame.*

9. In CATS, it was confirmed that the problem with Article 8 lays in the fact that it is generally felt the rules on trials in absentia in the draft Directive should be aligned with the rules set out in Framework Decision 2009/299/JHA on trials in absentia. Indeed, setting different rules at European level concerning trials in absentia that apply in national criminal proceedings, on the one hand, and concerning mutual recognition between judicial authorities of Member States, on the other hand, may cause legal uncertainty and pose practical difficulties. The requirements of the Framework Decision, however, are very detailed and prescriptive. This is understandable, since the Framework Decision was concluded in another legal context (with unanimity voting), but it is also for this reason that many Member States do not want to transpose the rules of the Framework Decision in the draft Directive, which aims at setting *minimum* rules.
10. The outcome of the discussion in CATS can be described as follows:
- 11 Member States stated that they would prefer deleting paragraphs 2 and 3;
 - 6 Member States stated that they would prefer maintaining paragraphs 2 and 3;
 - 2 Member States showed perfect flexibility on the issue;
 - 1 Member State said that it could accept paragraphs 2 and 3 if there would be a general exclusion of minor offences;
 - 1 Member State observed that paragraphs 2 and 3 "are not convenient" and need to be reformulated.
11. DE presented a compromise solution, setting out basic standards that Member States would have to comply with as regards trials in absentia (see the relevant footnote under Article 8). Some Member States showed interest in working on that text.
12. The Presidency considers that, at this stage, there are 4 options to address the issue of Article 8, which are submitted to the Working Party for discussion:

Option 1: deletion of paragraphs 2 and 3

Paragraphs 2 and 3 are deleted, without any substitution.

Option 2: the German suggestion

Paragraphs 2 and 3 are deleted, but these paragraphs are substituted by a revised text of Article 8(1) along the suggestion put forward by Germany :

1. *Member States shall ensure that suspects or accused persons have the right to be present at the trial aiming at assessing the question of their guilt. **The effective exercise of this right shall, at least, require that the suspect or the accused***
 - a) *is summoned to the hearing in due time and in due form;*
 - b) *is informed of the consequences of unexcused non-appearance; and*
 - c) *has the right to request a new hearing date if, for compelling reasons for which he is not responsible, he is prevented from participating in the hearing.*

Option 3: insertion of a reference to the Framework Decision in the draft Directive

Paragraphs 2 and 3 are deleted, but these paragraphs are substituted by a new provision - which could for example be inserted between paragraphs 1 and 1a of Article 8 - in which reference to the Framework Decision is made. Such text could read as follows:

Member States may provide that a trial, which can result in a decision on guilt or innocence, may be held in the absence of the suspect or accused person, in the cases and in accordance with the conditions set out in Council Framework Decision 2009/299/JHA.

Option 4: only keeping a recital

Paragraphs 2 and 3 are deleted, and the issue is only dealt with in a recital. A possible drafting for such recital is set out in recital 23, and reads as follows:

Member States may provide that a trial, which can result in a decision on guilt or innocence, may be held in the absence of the suspect or accused person. In such a case, the Member States should act within the conditions set out in relevant European and international law, in particular Council Framework Decision 2009/299/JHA (...).

13. Member States are invited to consider the above options and to indicate at the next meeting of the Working Party which of these options, or any other option, is most suitable to them.

Conclusion

14. Member States are invited to consider the revised text of the Presidency, set out in the Annex, in view of the next meeting of the Working Party, which is scheduled to take place on 29 September 2014.
15. Delegations who have drafting suggestions are kindly invited to submit these in due time to the Presidency (olimpia.monaco@giustizia.it) and to the General Secretariat (steven.cras@consilium.europa.eu).

(draft)

**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 proceedings³**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 82(2)(b) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national Parliaments,

Having regard to the opinion of the European Economic and Social Committee,⁴

Having consulted the Committee of the Regions,⁵

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) The purpose of this Directive is to enhance the right to a fair trial in criminal proceedings by laying down minimum rules concerning certain aspects of the presumption of innocence and the right to be present at the trial.
- (2) By establishing minimum rules on the protection of procedural rights of suspects or accused persons, this Directive should strengthen the trust of Member States in the criminal justice systems of other Member States and can thus help to facilitate mutual recognition of decisions in criminal matters. Such common minimum rules should also remove obstacles to the free movement of citizens throughout the territory of the Member States.

³ NL has a Parliamentary scrutiny reservation on the entire Directive.

⁴ Opinion of 25 March 2014 (SOC 498).

⁵ See renunciation letter of 14 April 2014.

- (3) **Although the Member States are parties to the European Convention for the Protection of Human Rights and Fundamental Freedoms and the International Covenant on Civil and Political Rights, experience has shown that this in itself does not always provide a sufficient degree of trust in the criminal justice systems of other Member States.** ⁶
- (3a) **On 30 November 2009, the Council adopted a Resolution on a Roadmap for strengthening the procedural rights of suspected or accused persons in criminal proceedings ('the Roadmap').⁷ Taking a step-by-step approach, the Roadmap calls for the adoption of measures regarding the right to translation and interpretation (measure A), the right to information on rights and information about the charges (measure B), the right to legal advice and legal aid (measure C), the right to communicate with relatives, employers and consular authorities (measure D), and special safeguards for suspects or accused persons who are vulnerable (measure E).**
- (3b) **On 11 December 2009, the European Council welcomed the Roadmap and made it part of the Stockholm programme — An open and secure Europe serving and protecting citizens (point 2.4).⁸ The European Council underlined the non-exhaustive character of the Roadmap, by inviting the Commission to examine further elements of minimum procedural rights for suspects and accused persons, and to assess whether other issues, for instance the presumption of innocence, need to be addressed, in order to promote better cooperation in that area.**
- (4) [...] The EU agenda on procedural rights is designed to operate as a whole: only when all its components are implemented will its benefits be felt in full. [...]

⁶ Recitals 3, 3a and 3b have been inspired by the text of Directive 2013/48/EU on the right of access to a lawyer. It seems appropriate to mention the Roadmap also in this instrument.

⁷ OJ C 295, 4.12.2009, p. 1.

⁸ OJ C 115, 4.5.2010, p.1.

- (5) Three measures have been adopted to date, namely Directive 2010/64/EU of the European Parliament and of the Council ⁹, Directive 2012/13/EU of the European Parliament and of the Council ¹⁰ and Directive 2013/48/EU of the European Parliament and the Council ¹¹.
- (6) This Directive should apply only to criminal proceedings. Administrative proceedings leading to sanctions such as competition, trade, tax, **tax surcharge**, financial services proceedings and other investigations by administrative authorities in relation to these proceedings, and also civil proceedings are not covered by this Directive. ¹²
- (7) This Directive should facilitate the practical application of the right to be presumed innocent and all its different aspects and also of the right to be present at one's trial, with a view to safeguarding the right to a fair trial.

⁹ 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 L 280, 26.10.2010, p.1).

¹⁰ 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 L 142, 1.6.2012, p.1).

¹¹ Directive 2013/48/EU of the European Parliament and the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and 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 (OJ L 294, 6.11.2013, p. 1).

¹² SE requested modifying the text as follows:

*"This Directive should apply only to criminal proceedings. Administrative **or thereto related** proceedings leading to sanctions such as competition, trade, tax, **tax surcharge**, financial services proceedings and other investigations by **judicial or** administrative authorities in relation to these proceedings, and also civil proceedings are not covered by this Directive."*

The Presidency suggests accepting the reference to tax surcharge, but not accept the other suggested modifications.

- (8) This Directive should apply to natural persons who are suspected or accused of having committed a criminal offence. It should apply **from the moment when a person is suspected or accused of having committed a criminal offence, or an alleged criminal offence, and therefore** even before **suspects or accused** persons are made aware by the competent authorities of a Member State, by official notification or otherwise, that they are suspected or accused of having committed a criminal offence. **The Directive should apply at any stage of the criminal proceedings until the final determination of the question whether the suspect or accused person has committed the offence concerned, including, where applicable, the resolution of any appeal or other judicial remedy concerning that question. For the purpose of this Directive, actions before the European Court of Human Rights in Strasbourg or before a national constitutional court do not fall within the meaning of any appeal or other judicial remedy concerning the question whether the person has committed the offence.**
- (9) This Directive acknowledges the different needs and levels of protection of certain aspects of the right to be presumed innocent as regards natural persons and legal persons. Such protection as regards natural persons is reflected in abundant case law of the European Court of Human Rights. The Court of Justice of the European Union has, however, recognised that the rights flowing from the presumption of innocence do not accrue to legal persons in the same way as to natural persons.
- (10) In the current state of development of national legislations and of case law at national level and at the level of the Court of Justice it is premature to legislate at Union level on the right to be presumed innocent of legal persons.
- (11) Protection of the right of legal persons to be presumed innocent should be ensured by the existing legislative safeguards and case law, the evolution of which in the future should determine an assessment of the need for Union action.

- (12) "Law enforcement or judicial authorities" for the purposes of this Directive refers to public authorities which, according to national law, exercise powers in the realm of criminal proceedings.
- (13) The presumption of innocence is violated if, without **suspects or** accused **persons** having previously been proved guilty **according to law, public statements** refer to those persons as if they were **guilty. For the purposes of this Directive "public statements by public authorities" should mean any statement whose content is referable to a criminal offence, and which originates either from an authority involved in the criminal proceedings concerning that offence (such as judicial authorities, and police and other law enforcement authorities) (...) or from another public authority acting in the exercise of its functions (such as government officials) (...). It's understood that this Directive does not apply to statements made by media which fall outside the control of the State.**
- (13a) **When a person has been proved guilty in accordance with a decision of a competent judicial authority but the decision concerned is subject to appeal, public statements may only refer to the person concerned as being guilty on condition that it is mentioned that the decision concerned is subject to appeal.**
- (14) The burden of proof is on the prosecution, and any doubt should benefit the accused. Thus, the presumption of innocence will be infringed where the burden of proof is shifted from the prosecution to the defence, without prejudice to any possible *ex officio* fact findings powers of the court and without prejudice to the independence of the judiciary when assessing the suspect's or accused's guilt. ¹³

¹³ EL stated that in Greece, not only the prosecution but also judges are charged with seeking both inculpatory and exculpatory evidence. Therefore, EL suggested modifying recital 14 as follows:

(14) The burden of proof is on the prosecution, and any doubt should benefit the accused. Member States may determine that the prosecution and judges are charged with seeking both inculpatory and exculpatory evidence. The presumption of innocence will be infringed where the burden of proof is shifted from the prosecution to the defence, without prejudice to any possible ex officio fact findings powers of the court and without prejudice to the independence of the judiciary when assessing the suspect's or accused's guilt.

- (15) **Member States may use presumptions of facts or law [concerning the criminal liability of a person who is suspected or accused of having committed a criminal offence¹⁴]. Such presumptions should be confined within reasonable limits that take into account the importance of what is at stake, they should respect the rights of the defence, and they should be rebuttable, for example by means of new evidence on extenuating circumstances or on a case of force majeure. However, Member States may decide that in minor offences, such as minor road traffic offences, which can not lead to a criminal record, the presumptions concerned are not rebuttable.**
- (16) The right not to incriminate oneself is an important aspect of the presumption of innocence. Suspects or accused persons should not be forced, when asked to make a statement or answer questions, to produce evidence or documents or to provide information which may lead to incriminate themselves.
- (17) (transferred to recital 20a)
- (18) The right not to incriminate oneself should not extend to the use in criminal proceedings of material which may be obtained from the suspect or accused person through the use of lawful compulsory powers but which has an existence independent of the will of the suspects or accused persons, such as material acquired pursuant to a warrant, material in respect of which there is a legal obligation of retention and production upon request, breath, blood and urine samples and bodily tissue for the purpose of DNA testing.
- (19) The right to remain silent is an important aspect of the presumption of innocence. It should serve as protection from self-incrimination.
- (20) The right not to incriminate oneself and the right to remain silent should apply as regards questions material to the offence that someone is suspected or accused of having committed and not, for example, as regards questions relating to the personal identification of a suspect or accused person.

¹⁴ Suggestion by the Presidency for clarification of the text.

- (20a) (...) **The right not to incriminate oneself and the right to remain silent imply that competent authorities should not compel suspects or accused persons to provide information if these persons do not wish to do so.** In order to determine whether compulsion, which was nevertheless used to compel the suspect or accused person to provide information, violated the right not to incriminate oneself or the right to remain silent, the following should be taken into account, in the light of all circumstances of the case: the nature and degree of compulsion to obtain the evidence, the weight of the public interest in the investigation and punishment of the offense at issue, the existence of any relevant safeguards in the procedure and the use to which any material so obtained is put. However, the degree of compulsion imposed on suspects or accused persons with a view to compelling them to provide information relating to charges against them should not destroy the very essence of their right not to incriminate one-self and their right to remain silent, even for reasons of security and public order.
- (20b) **Member States should ensure that the exercise of the right not to incriminate oneself or the right to remain silent should not be used against a suspect or accused person at a later stage of the proceedings and should not be considered as evidence that the person concerned has committed the offence concerned. This should be without prejudice to national rules or systems which allow a court or a judge to take account of the silence of the suspect or accused person as an element of corroboration (...) of evidence obtained by other means.**¹⁵
- (20c) **Member States should ensure that in the assessment of statements made by suspects or accused persons or of evidence obtained in breach of the right not to incriminate oneself or the right to remain silent, the rights of the defence and the fairness of the proceedings are respected.**
- (21) The right to a fair trial is one of the basic principles in a democratic society. The right of an accused person to be present at the trial is based on that right and should be guaranteed throughout the Union.

¹⁵ COM has a preference for the deletion of the last sentence of this recital. Alternatively, it suggests replacing "corroboration of evidence" by "corroboration of facts".

- (22) However, the right of the accused person to be present at the trial is not absolute. Under certain conditions the accused person may, expressly or tacitly but unequivocally, waive that right.
- (22a) **Competent authorities in the Member States should also be allowed to temporarily exclude a suspect or accused person from the trial when this is necessary in the interest of the criminal proceedings. This could, for example, be the case when a suspect or accused person disturbs the hearing and must be escorted out on order of the judge, or when it appears that the presence of a suspect or accused person prevents the proper hearing of a witness.**
- (23) [**Member States may provide that a trial, which can result in a decision on guilt or innocence, may be held in the absence of the suspect or accused person. In such a case, the Member States should act within the conditions set out in relevant European and international law, in particular Council 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.**¹⁶]¹⁷
- (24) This Directive should not regulate the forms and methods, including procedural requirements, that are used to achieve the results specified as regards the right to be present at one's trial, which are a matter for the national laws of the Member States.
- (25) When considering whether the way in which the information is provided is sufficient to ensure the person's awareness of the trial, particular attention could, where appropriate, also be paid to the diligence exercised by the person concerned in order to receive information addressed to him or her.

¹⁶ OJ L 81, 27.2.2009, p. 24.

¹⁷ This recital may need to be reconsidered in the light of the outcome on Article 8.

- (26) The principle of effectiveness of Union law requires that Member States put in place adequate and effective remedies in the event of a breach of a right conferred upon individuals by Union law. An effective remedy available in the event of a breach of any of the principles laid down in this Directive should have, as far as possible, the effect of placing the suspects or accused persons in the same position in which they would have found themselves had the breach not occurred, **with a view to preserving the right to a fair trial and the right to defence.**
- (27) In order to monitor and evaluate the effectiveness of this Directive, Member States **are encouraged to** collect data with regard to the implementation of the rights set out in this Directive. Such data could include data recorded by law enforcement and judicial authorities as regards the remedy applied where there has been a breach of any of the aspects of the right to presumption of innocence covered by this Directive and a breach of the right to be present at one's trial.
- (28) This Directive upholds the fundamental rights and principles recognised by the Charter of Fundamental Rights of the European Union and the European Convention for the Protection of Human Rights and Fundamental Freedoms, including the prohibition of torture and inhuman and degrading treatment, the right to liberty and security, respect for private and family life, the right to the integrity of the person, the rights of the child, integration of persons with disabilities, the right to an effective remedy and the right to a fair trial, the presumption of innocence and the rights of the defence.
- (29) As this Directive establishes minimum rules, Member States may extend the rights set out in this Directive in order to provide a higher level of protection. Such higher level of protection should not constitute an obstacle to the mutual recognition of judicial decisions that those minimum rules are designed to facilitate. The level of protection should never fall below the standards provided by the Charter of Fundamental Rights of the European Union or the European Convention for the Protection of Human Rights and Fundamental Freedoms, as interpreted in the case law of the Court of Justice and of the European Court of Human Rights.

- (30) Since the objectives of this Directive, namely setting common minimum rules for certain aspects of the right to presumption of innocence and for the right to be present at trial in criminal proceedings, cannot be sufficiently achieved by the Member States but can rather, by reason of the scale of the measure, be better achieved at Union level, the Union may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.
- (31) In accordance with Articles 1 and 2 of Protocol 21 on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union and without prejudice to Article 4 of that Protocol, those Member States are not taking part in the adoption of this Directive and are not bound by it or subject to its application.
- (32) In accordance with Articles 1 and 2 of Protocol No 22 on the position of Denmark, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, Denmark is not taking part in the adoption of this Directive, and is not bound by it or subject to its application,

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER 1

Subject matter and Scope

Article 1

Subject matter

This Directive lays down minimum rules concerning:

- (a) the right to the presumption of innocence in criminal proceedings, **and certain aspects related thereto;**
- (b) the right to be present at trial in criminal proceedings.

Article 2 ¹⁸ ¹⁹

Scope

[see also the comments in the cover note]

This Directive applies to natural persons who are suspected or accused in criminal proceedings. It applies from the moment when a person is suspected or accused of having committed a criminal offence, or an alleged criminal offence, until the final determination of the question whether the person has committed the offence concerned, including, where applicable, the resolution of any appeal or other judicial remedy concerning that question.²⁰

¹⁸ See also recital 8.

¹⁹ Some Member States requested inserting a general exemption for minor offences.

²⁰ The conclusion of the proceedings could alternatively be defined as the moment when a decision has become enforceable. The drafting could read as follows:

*This Directive applies to natural persons who are suspected or accused in criminal proceedings. It applies from the moment when a person is suspected or accused of having committed a criminal offence, or an alleged criminal offence, until the final determination of the question whether the person has committed the offence concerned **and that decision has become enforceable.***

CHAPTER 2

Right to the presumption of innocence

Article 3

Presumption of innocence

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

Article 4 ²¹

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

1. Member States shall **take the necessary measures to ensure that**, before suspects or accused persons have been proven guilty **according to law**, public statements by public authorities do not refer to the suspects or accused persons as if they were guilty.
2. [text transferred to recital 13]
3. Member States shall ensure that appropriate measures are (...) **available** ²² **under national law** in the event of a breach of the **obligation set out in paragraph 1**.
4. **The obligation set out in paragraph 1 shall not prevent public authorities from publicly disseminating information on the criminal proceedings when this is (...) ²³ necessary for reasons relating to the criminal investigation or for the public interest.**

²¹ See also accompanying recitals 13 and 13a.

²² Change made following a suggestion by NL, who stated that in view of the modification of paragraph 1, which was unanimously agreed, the text of paragraph 3 should be changed in order to avoid a repetition of measures to be "taken", and provide a text that could be meaningful in practice. COM objects, since it would dilute the text.

²³ COM objects the deletion of the word "strictly".

Article 5 ²⁴

Burden of proof (...)

1. Member States shall ensure that the burden of proof in establishing the guilt of suspects or accused persons is on the prosecution. This is without prejudice to any (...) fact finding powers of the **competent** court. ²⁵ ²⁶

²⁴ See accompanying recitals 14 and 15.

²⁵ The second sentence was changed following a request by EL, who stated that in Greece, not only the prosecution but also judges are charged with seeking both inculpatory and exculpatory evidence. EL also presented an alternative solution by modifying recital 14 (see over there), but the Presidency suggests not accepting that solution.

²⁶ DE expressed concerns in relation to the concept of the "burden of proof " similar to those raised by EL. DE informally suggested the following alternative text for paragraph 1: "*Member States shall ensure that all facts allowing to establish the guilt of a suspect or accused person are proven by the prosecution or determined by the competent court.*" The Presidency considers that the DE suggestion is addressed, at least to a certain extent, by the redrafting of paragraph 1. The Presidency also considers that the expression "burden of proof" is appropriate. If this expression causes problems, however, one could envisage to use wording such as "*the task of proving the facts and any other elements allowing to establish the guilt of suspects or accused persons is on the prosecution*".

- 1a. **Member States may, within reasonable limits, use presumptions of facts or law [concerning the criminal liability of a person who is suspected or accused of having committed a criminal offence ²⁷]. Such presumptions shall, in principle, ²⁸ always be rebuttable and may only be used while respecting the rights of the defence.**
2. [deleted]
3. [deleted]

²⁷ Suggestion by the Presidency for clarification of the text.

²⁸ NL presented the following drafting suggestion for Article 5(1a): (preferred option)
"Member States may use presumptions of fact and law. Such presumptions may only be used within reasonable limits, which take into account what is at stake and maintain the rights of the defence."

This text would be accompanied by the following recital:

"In employing presumptions of fact and law, the Member States are required to strike a balance between the importance of what is at stake and the rights of the defence. The means employed have to be reasonably proportionate to the legitimate aim sought to be achieved."

As an alternative, NL presented the following drafting suggestion for Article 5(1a): (second best), which the Presidency suggests to take on board in Article 5(1a) and recital 15:

"Member States may, within reasonable limits, use presumptions of fact and law. Such presumptions shall in principle be rebuttable and may only be used while respecting the rights of the defence."

This text would be accompanied by the following recital:

"Member States may decide that in minor offences, such as minor road traffic offences, [which can not lead to a criminal record,] the presumptions concerned are not rebuttable."

To be noted that COM opposes the idea that in certain cases presumptions are not rebuttable. NL provided the following explanation:

"Having regard to the case law of the ECHR concerning the employment of presumptions of fact and law (eg. *Salabiaku v. France*, *Janosevic v. Sweden* and *Falk v. The Netherlands*), NL notes that the requirement that the prosecution bears the burden of proof is not absolute. The ECHR has held that presumptions of fact and law operate in every criminal-law system and are not prohibited in principle by the Convention. In its impact assessment (p. 21-22), the Commission correctly notes that, in employing presumptions of fact and law, the Member States are required to strike a balance between the importance of what is at stake and the rights of the defence. However, the Commission's conclusion that this means that 'a presumption should always be rebuttable', in our opinion is too restrictive an interpretation of the ECHR's case law. In this regard we refer to the above mentioned Falk case, in which the ECHR noted that the fine for a traffic offence could be challenged, but made no mention of a requirement that the presumptions employed should always be rebuttable. Our draft incorporates the wording of the ECHR, used in the cases mentioned above, thus minimising the risk of diverging case law between the ECHR and the ECJ."

Article 6

Right not to incriminate oneself and to remain silent

1. Member States shall ensure that suspects **and** accused persons have the right not to incriminate themselves.
- 1a **Member States shall ensure that suspects and accused persons have the right to remain silent when questioned, by the police or other law enforcement or judicial authorities, in relation to the offence that they are suspected or accused of having committed.**
2. **The exercise of the right not to incriminate oneself or of the right to remain silent shall not prevent gathering evidence** which may be obtained through the use of lawful compulsory powers but which has an existence independent of the will of the suspects or accused persons.
3. The exercise of the right not to incriminate oneself or **of the right to remain silent** shall not be used against a suspect or accused person at a later stage of the proceedings and shall not be considered **as evidence that the person concerned has committed the offence which he is suspected or accused of having committed.** ²⁹
4. [deleted] ³⁰

Article 7

Right to remain silent

[merged into Article 6]

²⁹ See recital 20b.

³⁰ See however recital 20c.

CHAPTER 3

Right to be present at one's trial

Article 8

Right to be present at one's trial ³¹

[see also the comments in the cover note]

1. Member States shall ensure that suspects or accused persons have the right to be present at their trial. ^{32 33}
- 1a. **Paragraph 1 is without prejudice to provisions in national law which allow competent authorities to temporarily exclude a suspect or accused person from the trial when this is necessary in the interest of the criminal proceedings.** ³⁴
2. [deleted] ³⁵
3. [deleted]

³¹ Reference is made to the cover note, in which four options of dealing with this Article, as regards trials in absentia, are set out.

³² See also accompanying recital 23.

³³ DE presented the following alternative drafting for paragraph 1 at the meeting of CATS (see also the cover note):

1. *Member States shall ensure that suspects or accused persons have the right to be present at the trial aiming at assessing the question of their guilt. **The effective exercise of this right shall, at least, require that the suspect or the accused***
 - a) *is summoned to the hearing in due time and in due form;*
 - b) *is informed of the consequences of unexcused non-appearance; and*
 - c) *has the right to request a new hearing date if, for compelling reasons for which he is not responsible, he is prevented from participating in the hearing.*

³⁴ See also accompanying recital 22a.

³⁵ COM objects the deletion of paragraphs 2 and 3.

Article 9
Right to a retrial

Member States shall determine in their national law the conditions under which suspects and accused persons, whose right to be present at their trial has been breached or who were not present at their trial for a reason beyond their control, have the right to a new trial, or another legal remedy, at which they can be present and which allows a fresh determination of the merits of the case, including examination of new evidence, and which may lead to the original decision to be reversed.

CHAPTER 4
General and final provisions

Article 10
Remedies

1. Member States shall ensure that suspects or accused persons have an effective remedy if their rights under this Directive are breached.
2. [Transferred to recital 26].

Article 11
Data collection

Member States shall by [...] and every three years thereafter, send to the Commission **available** data showing how the rights set out in this Directive have been implemented.³⁶

³⁶ See recital 27.

Article 12
Non-regression clause

Nothing in this Directive shall be construed as limiting or derogating from any of the rights and procedural safeguards that are ensured under the Charter of Fundamental Rights of the European Union, the European Convention for the Protection of Human Rights and Fundamental Freedoms, or other relevant provisions of international law or the law of any Member State which provides a higher level of protection.

Article 13
Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by [18 months after publication of this Directive³⁷]. They shall **immediately inform the Commission thereof**.

When Member States adopt those measures, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

³⁷ Some Member States requested putting a longer period for implementation of this Directive (24 or 36 months).

Article 14
Entry into force

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

Article 15
Addressees

This Directive is addressed to the Member States in accordance with the Treaties.

Done at Brussels,

For the European Parliament
The President

For the Council
The President