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Subject:	Commission Staff Working Document Executive Summary of the Impact Assessment accompanying the 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

Delegations will find attached Commission document SWD(2013) 479 final.

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COMMISSION STAFF WORKING DOCUMENT

EXECUTIVE SUMMARY OF THE 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**

{ COM(2013) 821 final }
{ SWD(2013) 478 final }
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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

1. PROBLEM DEFINITION

General problems:

1. There is insufficient protection of fundamental rights of suspected and accused persons as a result of insufficient protection of the principle of presumption of innocence in the EU. The existence of common minimum standards in Article 48 of the Charter of Fundamental Rights of the European Union ('the Charter') and Article 6(2) of the Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR') appears insufficient to protect this principle in practice. Case law of the European Court of Human Rights ('the ECtHR') shows that violations of this principle have steadily and repeatedly taken place. Presumption of innocence is an overarching principle which is complementary to other procedural rights, including those already dealt with by Union law. The overall objective of is to ensure the right to a fair criminal trial. There is no such fair trial where the presumption of innocence is not respected
2. Insufficient protection of fundamental rights causes insufficient mutual trust between Member States in the quality of their respective judicial systems. This hampers the smooth functioning of mutual recognition of judgments and judicial cooperation.

Specific problems:

1. Insufficient protection against **public references to guilt by law enforcement and judicial authorities** before conviction. Authorities sometimes refer to suspects or accused persons, in statements or in official decisions, as being guilty of a crime before a court's final decision.
2. Insufficient protection of the principle that the **burden of proof lies on the prosecution and that any doubt on the guilt should benefit the accused**; in particular, **insufficient protection in practice in cases where the burden of proof is shifted to the defence**.
3. **Insufficient protection of the right not to incriminate oneself, including the right not co-operate and the right to remain silent**. The legal systems of some Member States allow that an exercise of the right not to incriminate oneself, not to cooperate and the right to remain silent can be used as evidence against suspected or accused person; there are often no effective and dissuasive remedies in case of breaches.

4. Insufficient protection of the **right to be present at trial**¹ - a judgment and any decision which could lead to deprivation of liberty requires the presence of the accused person. Not all Member States have appropriate remedies in case of breach.

Affected group of people

Potentially all suspects and accused persons in criminal proceedings in the EU are affected. Around 10 million criminal proceedings take place in the EU every year. 10 EU Member States were found by the ECtHR in violation of the right to be presumed innocent between 1.1.2007 and 31.12.2012, in a total of 26 cases.

Why is public intervention necessary?

The current insufficient protection of certain aspects of presumption of innocence affects mutual trust between judicial authorities - and consequently the smooth functioning of the European area of justice. The ECtHR principles and mechanisms have not resulted in sufficient protection in practice, as demonstrated by case law of the ECtHR. Further changes on the basis of the existing legal framework are unlikely in near future.

If the EU takes legislative action, the full panoply of EU redress mechanisms according to the Treaty will be available to ensure Member States comply with the right to be presumed innocent contained in EU legislation. Certain changes in some Member States' legislation are deemed necessary in full respect, however, of the subsidiarity and proportionality principles.

2. ANALYSIS OF SUBSIDIARITY

Enhancing mutual trust between judicial authorities: It is precisely because of its importance for the smooth functioning of the European area of Criminal Justice that, in the Stockholm Programme² the European Council invited the Commission to address the issue of presumption of innocence.

Movement of persons: Persons involved in criminal proceedings outside their home country should be confident they are protected by a European general right to be presumed innocent. The EU Charter contains such right; however, the Charter can only be invoked in an individual case if the matter is related to the application of EU law by the Member State.

Limits of the ECtHR: The ECtHR alone cannot ensure an appropriate protection. Some aspects of presumption of innocence have not been recently or extensively considered by the ECtHR (e.g. the precise consequences and remedies of a violation). The redress procedure at the ECtHR is not satisfactory as it intervenes only *ex post*, after exhaustion of all internal remedies, and suffers from an important backlog of cases awaiting disposal.

3. OBJECTIVES OF EU INITIATIVE

The **general objectives** are:

- (1) to guarantee a high-level of protection of fundamental procedural rights in criminal procedure;
- (2) to enhance mutual trust, thus improving judicial cooperation.

The **specific objectives** are to ensure that:

¹ Apart from certain well-defined exceptions ("**in absentia decisions**").

² OJ C 115, 4.5.2010, p. 1.

- (1) suspects or accused are presumed innocent during the entirety of criminal procedure until proved guilty according to law, and treated as such by Member States' judicial authorities.
- (2) authorities dealing with judicial cooperation and involved in the execution of a criminal sanction, of an investigation measure or of a European Arrest Warrant issued in another Member State are confident that the underlying decision was taken in the Member State of origin in full respect of presumption of innocence.

The **operational objectives** are to ensure that:

- (1) no suspect or accused is referred to as guilty by judicial authorities before a final judgement;
- (2) the burden of proof of the culpability of a suspect or accused is on the prosecution and that any doubt shall benefit that person;
- (3) the right not to incriminate one-self, including the right not to cooperate and the to remain silent, of suspects or accused are appropriately protected at any stage of the procedure;
- (4) the judgment is taken in the presence of the accused person, except in specific cases ("in absentia decisions").

4. POLICY OPTIONS

Four options have been considered:

- (1) Option 1 - retention of the *status quo* - no action at EU level.
- (2) Option 2 – non-legislative option: drafting guidelines and training on good practice, sharing information on possible best practices and improved monitoring.
- (3) Option 3 - two legislative options:
 - (a) Option 3a) - **Directive** setting minimum rules confirming the ECtHR *acquis* as regards each of the specific problems and establishing appropriate effective remedies in case of breach.
 - (b) Option 3b) - **Directive** as under option 3a, but setting minimum rules which provide for a higher level of protection than the ECtHR *acquis* (except for the absence of public references to guilt by judicial authorities, where it is not possible to go beyond the ECtHR principle) through limiting or even excluding the possibility of having exceptions to the general principles.

5. ASSESSMENT OF IMPACTS

5.1. Effectiveness in achieving policy objective

- (1) Option 1 – level of protection would remain the same, no improvement of mutual trust.
- (2) Option 2 - low incentive to Member States to address problems, given the absence of legislative provision.
- (3) Options 3a) and 3b)
 - (a) Increased mutual trust through common minimum standards; fewer delays in judicial cooperation, reduced costs of associated delays, aborted proceedings, re-trials and appeals; in option 3b) mutual trust would be further strengthened.

- (b) Legislative option is enforceable contrary to non-legislative or status quo options.
- (c) Suspects or accused benefit from minimum standards on presumption of innocence and would benefit from appropriate remedies; in option 3b), suspects or accused persons benefit from higher minimum standards.
- (d) Effective redress mechanism against Member States in case of breach.
- (e) Lesser miscarriages of justice, improving not only the general perception of justice by the suspect and accused, by victims, by judicial authorities, by defence lawyers and by the general public, but also reducing the costs resulting from insufficient protection of this right for Member States (cost of internal appeal procedures).

5.2. Social impact and Fundamental Rights

- (1) Option 1 - no improvement.
- (2) Option 2 - Likely to be only variable improvement between Member States given the absence of any enforcement method.
- (3) Option 3a) and 3b)
 - (a) Increased protection of fundamental rights of suspects or accused through increased clarification of Article 48 of the EU Charter.
 - (b) Gradual culture change in the prosecution and judicial authorities on the respect of the right to be presumed innocent.
 - (c) Possible non-respect of proportionality and subsidiarity principles if all aspects of option 3a) and 3b) are put in place.
 - (d) Risk of codifying ECtHR jurisprudence, which is constantly evolving, through a binding legislative EU instrument. If case law develops towards a stronger protection, a binding Directive establishing the present level of protection would not be up to date.
 - (e) For 3b), adverse effect on administration of justice could occur as the rights of individuals would be strengthened to such an extent which could eventually harm efficiency of investigation and prosecution.

5.3. Impact on the legal system of Member States

- (1) Option 1 - divergences between Member States' systems would remain as they continue to evolve along strictly national lines.
- (2) Option 2 – limited – no legislative reforms can be foreseen as they will be left to the good will of national legislatures.
- (3) Option 3a) and 3 b): Several Member States would have to change their legislation depending on the specific problem.

5.4. Financial and economic impact³

- (1) Option 1 - No immediate financial burden, but no reduction of current costs of ECtHR procedures and domestic appeals, re-trials, financial compensation due to breach of suspects' right to be presumed innocent neither.
- (2) Option 2 - Costs for workshops, training and sharing of best practices estimated to be below **8 million euro per annum for each of the aspects** of presumption of innocence, except for the drafting of guidelines (one-off cost of 47.520 euros). If put in place for all four aspects, a high level of synergies would reduce the total costs.
- (3) Option 3a) - In the long term, the below estimated financial impact should gradually reduce as the right should be more respected, thus reducing the use of remedies. There could be training costs for defence lawyers, police and judicial officers. The estimated costs below are per annum and in all Member States altogether.
 - (a) Absence of public references to guilt - costs for an additional remedy (re-trial) for all Member States except AT, FI, LT, PL and SE are: 240.000 euros. No substantial costs for other specific remedies (removal of judge, right to damages).
 - (b) Burden of proof is on the prosecution / any doubt on the guilt benefits the accused - . costs of additional remedy (re-trial) in all Member States except AT, FR and UK: between 92.000 and 920.000 euros.
 - (c) Right not to incriminate one-self, including the right not to cooperate and the right to remain silent - If additional remedy is re-trial (currently available only in AT, FI, FR, HU): between 98.000 and 980.000 euros; if additional remedy is non-admissibility to the court of evidence obtained in breach of this right, the costs would incur the increase of prosecution activity in BE, BG, CY, EE, ES, HR, IE, LT, LV, NL, PL, SE (estimated between 7.500 and 75.000 euros).
 - (d) Right to be tried in one's presence - costs of additional remedy (re-trial) for BE, BG, HU and LV: 523.000 euros.
- (4) Option 3b)
 - (a) Absence of public references to guilt – same as option 3a).
 - (b) Burden of proof is on the prosecution / any doubt on the guilt benefits the accused: - increase in prosecution activity in those Member States where the burden of proof can be currently reversed (as these cases would be limited under 3b) in BE, HR, FR, HU, IE, PT, ES, SE and UK). The likely scenario estimates the costs to 2,9 million euros.
 - (c) Right not to incriminate one-self, right not to cooperate and right to remain silent - increase in prosecution activity in those Member States where this right is not absolute (this system would be abolished under option 3b) in BE, CY, UK, FI, FR, IE, LV, NL and SE). The likely scenario estimates the costs to 27 million euros.
 - (d) Right to be tried in one's presence - costs would entail additional resources of police to ensure that a suspect or accused is physically brought to trial (currently tried in his absence under existing law) in all Member States except

³ In relation to policy Options 3a) and 3b), there would be an additional estimated cost of **1,3 million euros** per annum resulting from the monitoring system to be implemented in Member States in view of fulfilling reporting obligations and collecting relevant data

CY, IE and DE. The savings would entail costs of all possible re-trials (if all persons are to be present at the trial, no extra remedy would need to exist for in absentia trials). The total cost is estimated between 5.5 million euros and 22 million euros.

6. COMPARISON OF OPTIONS / PREFERRED OPTION

The preferred option is a combination of **parts of options 2, 3(a) and 3(b)**. It **fully respects the principles of subsidiarity and proportionality** by proposing a **differentiated level of EU intervention** for each aspect of presumption of innocence, depending on several factors: (i) impact on the smooth functioning of mutual recognition instruments: particular attention should be given to those aspects which create concrete and tangible rights for the citizens – rather than general principles of procedural criminal law; (ii) stronger EU intervention is required for aspects which are not adequately protected by national laws and where problems go beyond the practical application of these laws, and (iii) stronger EU intervention is required for those aspects where ECtHR jurisprudence does not provide a standard which is sufficiently high in a common area of criminal justice.

- (1) **Absence of public references to guilt** - – option 3a but without any specific remedy, given that the legislative situation in Member States is acceptable and that this aspect is only to a lesser extent linked to the functioning of the European Area of Justice.
- (2) **Burden of proof and any doubt on the guilt should benefit the accused** – option 3a but without any specific remedy, given that it is already sufficiently protected in Member States' legislation.
- (3) **Right not to incriminate one-self, right not to cooperate and right to remain silent** – combination of options 3a) and 3b):
 - lay down the general principles deriving from ECtHR case law and establish a specific remedy in case of breach – non-admissibility of evidence (option 3a));
 - allow for exceptions from the right not to cooperate according to ECtHR case-law (option 3a));
 - not allowing adverse inferences to be drawn from the exercise of these rights (option 3b));
- (4) **Right to be present at trial** – option 3a), including establishing a specific remedy (retrial).
- (5) **Horizontal**: Implementation would be supported by horizontal measures on **monitoring, evaluation and training** (parts of option 2).

Given the lack of reliable data available figures are provided tentatively. All Member States would be affected to a varying degree. In the most likely scenario, the costs of the preferred option would be the following:

- no costs arise (except for training, evaluation and monitoring) as regards the two first aspects of presumption of innocence;
- prohibiting inferences to be drawn from silence: 27 million euros per annum for 9 Member States altogether;
- for non-admissibility of evidence obtained in breach of the right not to cooperate, the estimated cost is between minimum 7.500 and maximum 75.000 euros per annum for 12 Member States altogether;

- for the right to be present at trial, the estimated costs are 523.00 euros per annum for 4 Member States altogether;
- An additional estimated amount of 1,3 million euros per annum is excepted, resulting from the monitoring system and reporting obligations to be fulfilled by Member States.

The total costs per Member State are as follows (*minimum / maximum*⁴): **AT** 305.164, **BE** 1.847.230 / 1.851.762, **BG** 126.521 / 126.985, **HR** 127.099 / 128.386, **CY** 266.173 / 267.655, **CZ** 158.698, **EE** 56.703 / 56.983, **FI** 640.664, **FR** 8.783.153, **DE** 6.630.288, **EL** 190.790, **HU** 231.851, **IE** 590.601 / 592.155, **IT** 480.388, **LV** 281.997, **LT** 93.657 / 94.047, **LX** 207.765 / 208.203, **MT** 82.850, **NL** 6.590.604 / 6.599.749, **PL** 373.953 / 382.782, **PT** 226.718, **RO** 144.338, **SK** 961.808, **SI** 133.248, **ES** 643.779 / 668.089, **SE** 1.589.620 / 1.591.443, **UK** 9.664.550 / 9.678.626.

7. MONITORING AND EVALUATION

The preferred option will create only a comparatively limited number of Member States' obligations (which, to some extent, mirror existing ECHR and constitutional or legal obligations in many Member States), it is expected that an eighteen month deadline would provide sufficient time to effect necessary changes to national laws and practice.

The Directive will stipulate that Member States should report on the effective implementation of legislative or non-legislative measures. Member States should be encouraged to collect relevant data to assist in this process as there is currently a lack of reliable data.

The Commission envisaged carrying out specific empirical study with an emphasis on data collection 3-5 years into the implementation of the instrument⁵, to gain in-depth quantitative and qualitative insights into the effectiveness of the proposal. All data collected would enable the Commission to evaluate the actual compliance in Member States more robustly than using the means hitherto available.

⁴ Not all Member States are concerned with maximum/minimum costs, as they would not be affected by certain measures which they already have in place.

⁵ OJ C 291, 4.12.2009, p. 1.