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From: Presidency  
To: Working Party on Substantive Criminal Law

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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 Friends of the Presidency on 27 October

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**Introduction**

Delegations will find attached a revised version of the draft Directive, taking account of the comments made during the meeting of the Friends of the Presidency and of the Working Party on Substantive Criminal Law on Monday 27 October 2015.

Modifications have been underlined. It is understood that all delegations have a scrutiny reservation on these modifications.

## Specific comments

The Presidency has tried to take into account all the comments and suggestions that emerged from the last Working Party with reference to the entire proposal. Member States will find below the main changes made to the text.

### New elements related to Article 8(4) :

In Article 8, the Presidency has tried to strike a balance between, on the one hand, remaining close to the Framework Decision on in absentia and, on the other hand, making the text more readable and providing greater flexibility to Member States.

Taking as basis a proposal presented by Romania and taking account of comments made by other delegations, the Presidency has modified paragraph 4, reversing its perspective: “ ... *a decision that was taken following the absence of the suspect or accused person at the trial can be executed, ... if the suspect or accused person ...*”. Hence, the substance of the revised paragraph is the same as the one of the Framework Decision, but the perspective provided by the wording is reversed and put in a more positive way.

### New elements related to Article 8(6):

The new text of Article 8(6) now refers to offences that are not serious. This text has been put in brackets, because the revised recital (21a) now clearly explains that someone has the right to be present at a trial if there is a trial and that a trial is carried out through one or more hearings. This means that this right cannot apply if no hearing is foreseen, as notably happens in proceedings concerning offences that are not serious and that are therefore conducted in a simplified manner (solely or in part in writing). The recital also contains a definition of offences that are not serious.

The Presidency invites Member States to consider whether paragraph 6 should be maintained in the text or if it can be deleted, in the light of recital 21a.

### Other new elements:

Recital 13: the notion of “public authority acting in the exercise of its functions” has been further explained;

Recital 13a: this new recital explains, as requested by COM and some Member States, the content of Article 4(4).

There are a few other changes of the text resulting from requests of Member States, which have always been marked by underlined and are often explained in the footnotes.

### **Conclusion**

The Presidency invites delegations to examine the text carefully so as to allow the Working Party to make substantial progress at the next meeting, which is scheduled for 4 November 2014.

Delegations who wish to send comments in advance can do so through [olimpia.monaco@giustizia.it](mailto:olimpia.monaco@giustizia.it) and [steven.cras@consilium.europa.eu](mailto: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 proceedings<sup>1</sup>**

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,<sup>2</sup>

Having consulted the Committee of the Regions,<sup>3</sup>

Acting in accordance with the ordinary legislative procedure,

Whereas:

**(1a) Articles 47 and 48 of the Charter of Fundamental Rights of the European Union (the Charter), Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the ECHR) and Article 14 of the International Covenant on Civil and Political Rights (the ICCPR) enshrine the principle of the presumption of innocence and the right to a fair trial.**

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<sup>1</sup> NL has a Parliamentary scrutiny reservation on the entire Directive.

<sup>2</sup> Opinion of 25 March 2014 (SOC 498).

<sup>3</sup> See renunciation letter of 14 April 2014.

**(1b) The Union has set itself the objective of maintaining and developing an area of freedom, security and justice. According to the Presidency conclusions of the European Council in Tampere of 15 and 16 October 1999, and in particular point (33) thereof, the principle of mutual recognition of judgments and other decisions of judicial authorities should become the cornerstone of judicial cooperation in civil and criminal matters within the Union because enhanced mutual recognition and the necessary approximation of legislation would facilitate cooperation between competent authorities and the judicial protection of individual rights.**

**(1c) Pursuant to Article 82(1) of the Treaty on the Functioning of the European Union (TFEU), ‘judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions...’**

**(1d) The implementation of the principle of mutual recognition of decisions in criminal matters presupposes that Member States trust in each other’s criminal justice systems. The extent of the mutual recognition is very much dependent on a number of parameters, which include mechanisms for safeguarding the rights of suspects or accused persons and common minimum standards necessary to facilitate the application of the principle of mutual recognition.**

(1) [transferred to recital 4a]

(2) [transferred to recital 5]

- (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.**
- (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').<sup>4</sup> 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).<sup>5</sup> 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.**

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<sup>4</sup> OJ C 295, 4.12.2009, p. 1.

<sup>5</sup> OJ C 115, 4.5.2010, p.1.

- (4) Three measures on procedural rights in criminal proceedings have been adopted to date, namely 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**<sup>6</sup>, Directive 2012/13/EU of the European Parliament and of the Council of **22 May 2012 on the right to information in criminal proceedings**<sup>7</sup>, and 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**.<sup>8</sup>
- (4a) 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.
- (5) 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.

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<sup>6</sup> 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).

<sup>7</sup> 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.)

<sup>8</sup> Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty (OJ L 294, 6.11.2013, p. 1).

- (6) This Directive should apply only to criminal proceedings. Administrative proceedings, **including administrative proceedings that can lead** to sanctions, such as proceedings relating to competition, trade, financial services, or tax, **including tax surcharge**, and investigations by administrative authorities in relation to such proceedings, **as well as** civil proceedings, are not covered by this Directive.
- (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.
- (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 and that decision has become definitive. This means that legal actions and remedies which only can come into play when the decision concerned has already become enforceable, such as actions before the European Court of Human Rights in Strasbourg, do not fall within the scope of application of this Directive.**
- (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) [deleted]
- (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, police and other law enforcement authorities) or from another public authority acting in the exercise of its functions (such as Ministers and other persons that are politically responsible for police and other law enforcement authorities, as well as the spokespersons of these authorities). It's understood that this Directive does not apply to statements made by media (...).
- (13a) The obligation not to refer to suspects or accused persons as guilty should not prevent public authorities from publicly disseminating information on the criminal proceedings when this is necessary for reasons relating to the criminal investigation (such as when video material is released, and the public is asked to help in identifying the alleged perpetrator of the criminal offence) or for the public interest (such as when information is provided to parents of children who possibly are victims of an alleged sexual offender). In any case, the manner and context in which the information is disseminated should not create the impression that the person is guilty before he or she has been proved guilty according to law.

- (13b) When a person has been proved guilty according to law 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. 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.
- (14a) In various Member States not only the prosecution, but also judges and competent courts are charged with seeking both inculpatory and exculpatory evidence. Member States who do not have an adversarial system may maintain their current system provided it complies with this Directive and with other relevant European and international law.**
- (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 offence. Such presumptions should be confined within reasonable limits, taking into account the importance of what is at stake and maintaining the rights of the defence. The means employed have to be reasonably proportionate to the legitimate aim sought to be achieved. The presumptions should be rebuttable, for example by means of new evidence on extenuating circumstances or on a case of force majeure; in any case, the presumptions may only be used if the person concerned is not left without any means of defence.<sup>9 10</sup>

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<sup>9</sup> The language of this recital has been made closer to the case law of the ECHR, see e.g. the case *Falk v. Netherlands*, 19 October 2004. Instead of the words in the last line, "is not left without any means of defence", COM suggested using the wording of the case *Salabiaku v. France*, 7 October 1988, point 28, where reference is made to "respect of the rights of the defence".

<sup>10</sup> COM and FR asked putting more text of the *Falk* case, but the Presidency considers that it is difficult to see how that can be done: the current text already copies all relevant text from that judgment.

- (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. **The right to remain silent should be without prejudice in minor offences, such as minor road traffic offences, to the conduct of proceedings, or certain stages thereof, in writing and/or without questioning of the suspect or accused person by the police or other law enforcement or judicial authorities in relation to the offence concerned, provided this is in conformity with the right to a fair trial.**<sup>11</sup>
- (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.

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<sup>11</sup> Presidency suggestion in connection with Article 6(5). COM expressed concerns on this new wording.

- (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.**<sup>12</sup>
- (20b)<sup>13</sup> **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, provided the rights of the defense are respected.**<sup>14</sup>
- (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.**

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<sup>12</sup> Following a request by DE, the following text was deleted:  
*"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."*

<sup>13</sup> NL suggested putting the text of this recital (also) in the operative part of the text.

<sup>14</sup> COM has a preference for the deletion of the last sentence of this recital, as it would give Member States a wider margin than allowed under the ECHR. The new underlined words of the Presidency aim to address this concern.

- (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.
- (21a) **The right to be present at one's trial can only be exercised if a trial is held. A trial is carried out, because of its nature, through one or more hearings. This means that the right to be present at one's trial cannot apply if no hearing is foreseen in accordance with national rules of procedure, it being understood that these rules should be in conformity with the standards of the Charter of Fundamental Rights and of the ECHR, as interpreted in the relevant case-law. This is the case, for example, if the proceedings concern offences that are not serious and which are conducted in a simplified manner following, solely or in part, a written procedure or in which no hearing is foreseen. Should be considered as offences that are not serious those offences which do not carry a significant degree of stigma and do not form part of the hard core of criminal law.**<sup>15</sup>
- (22) 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 in the interest of securing the smooth operation or the proper course 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.**

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<sup>15</sup> See ECHR *Jussila v. Finland*, 23 November 2006, point 43.

**(22b) Under certain circumstances, a decision on the guilt or innocence of the suspect or the accused person can be handed down despite the absence of the person concerned at the trial. This can be the case when the suspect or accused person has been informed in due time of the trial and of the consequences of an unexcused non-appearance, but the person nevertheless doesn't appear. For the purpose of this Directive, the fact that the suspect or accused person has been informed in due time of the scheduled date and place of the trial means that this person either has been summoned in person or by other means has 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. The fact that the suspect or accused person has been informed of the consequences of an unexcused non-appearance, means notably that the person has been informed that a decision might be handed down if he or she does not appear for the trial.**<sup>16</sup>

**(22c) A trial, which can result in a decision on guilt or innocence, can also be held in the absence of the suspect or accused person, if the latter is represented at the trial by a lawyer, (...) who was appointed either by the suspect or accused person, or by the State.**

**(22d) Suspects or accused persons should always have the right to request a new date for a trial if, for reasons beyond their control, they were unable to be present.**

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<sup>16</sup> COM has a scrutiny reservation on the new wording of Article 8 and on the accompanying (new and revised) recitals.

(23) [ <sup>17</sup> ]

(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.

(25a) **Under certain conditions, suspects or accused persons who were not present at the trial should have the right to a new trial or another legal remedy that allows a fresh determination of the merits of the case, including examination of new evidence, and that may lead to the original decision to be reversed.**

(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 **rights** 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.**

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<sup>17</sup> The former text contained a recital referring to the FD on trials in absentia. This recital 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 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 (OJ L 81, 27.2.2009, p. 24)."*

- (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*

**[provisionally agreed]**

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* <sup>18</sup>

*Scope*

**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 definitive.**

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<sup>18</sup> See also recital 8.

## CHAPTER 2

### Right to the presumption of innocence

#### *Article 3*

#### *Presumption of innocence*

#### **[provisionally agreed]**

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

#### *Article 4*<sup>19</sup>

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

1. **Member States shall take the necessary measures**<sup>20</sup> **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**<sup>21</sup> (...<sup>22</sup>) in the event of a breach of the **obligation set out in paragraph 1 not to refer to the person as guilty**.
4. **The obligation set out in paragraph 1 not to refer to the person as guilty shall not prevent public authorities from publicly disseminating information on the criminal proceedings when this is**<sup>23</sup> **necessary for reasons relating to the criminal investigation or for the public interest.**<sup>24</sup>

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<sup>19</sup> See also accompanying recitals 13,13a and 13b.

<sup>20</sup> COM, supported by DE and ES, suggested deletion of the words "take the necessary measures to", in order to make the provision stronger. Other Member States objected.

<sup>21</sup> COM objected to the replacement of the word "taken" by "available", since it would dilute the text. Member States generally supported this change.

<sup>22</sup> The words "under national law" were deleted. COM opposed.

<sup>23</sup> COM objected the deletion of the word "strictly" before "necessary". Member States generally supported this deletion.

<sup>24</sup> Following a request by COM, explicative recital 13a was inserted in the text.

*Article 5*  
*Burden of proof*<sup>25</sup>

1. Member States shall ensure that the burden of proof in establishing the guilt of suspects or accused persons is on the prosecution, **and any doubt is to benefit the suspect or accused person.** This is without prejudice to any obligation on the judge or the competent court to seek both inculpatory and exculpatory evidence.
  
2. 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. Such presumptions shall be rebuttable; in any case, they may only be used if the suspect or accused person is not left without any means of defence.<sup>26</sup>

[3] [deleted]

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<sup>25</sup> See accompanying recitals 14, 14a and 15.

<sup>26</sup> COM prefers putting at the end " .... may only be used provided the rights of the defence are respected".

*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 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.** <sup>27</sup>
4. [deleted <sup>28</sup>]
5. **The right to remain silent shall be without prejudice, in minor offences, to the conduct of proceedings, or certain stages thereof, in writing and/or without questioning of the suspect or accused person by the police or other law enforcement or judicial authorities in relation to the offence concerned, provided this is in conformity with the right to a fair trial.**

*Article 7 - Right to remain silent*

[merged into Article 6]

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<sup>27</sup> See recital 20b.

<sup>28</sup> See however recital 20c. COM objects the deletion.

## CHAPTER 3

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

#### Article 8

#### *Right to be present at one's trial* <sup>29</sup> <sup>30</sup>

1. Member States shall ensure that suspects or accused persons have the right to be present at their trial.
2. Member States may provide that a trial, which can result in a decision on guilt or innocence of the suspect or accused person, can be held in the absence of the latter, provided that:
  - a) the suspect or accused person has been informed in due time of the trial and of the consequences of a (...<sup>31</sup>) non-appearance; or
  - b) the suspect or accused person is represented at that trial by a lawyer, who was appointed either by the suspect or accused person, or by the State.
3. [transferred to recital 22d]

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<sup>29</sup> See also accompanying recitals 21, 21a, 22, 22a, 22b, 22c, 22d and 23.

<sup>30</sup> COM has a scrutiny reservation on the reformulation of Articles 8 and 9 and the accompanying recitals.

<sup>31</sup> Following a suggestion by BE, the word 'unexcused' was deleted. See also recital 22d, which addresses the situation of a non-appearance which is caused by reasons beyond the control of the suspect or accused person.

4. **Member States may provide that a decision that was taken following the absence of the suspect or accused person at the trial can be executed, although the conditions of paragraph 2 were not met, if the suspect or accused person, after being informed of the decision and being expressly informed about the right to a new trial in accordance with Article 9:**
- (a) **does not expressly contest the decision; or**
  - (b) **does not request a new trial within the applicable time frame.** <sup>32</sup>
5. **Member States may provide for the possibility** to temporarily exclude a suspect or accused person from the trial when this is necessary in the interest of **securing the smooth operation or the proper course of** the criminal proceedings.

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<sup>32</sup> DE, CY, NL, RO requested deleting this provision. As a compromise, RO proposed the following alternative wording:

*“4. Member States may decide that a decision which has been taken following the absence of the suspect or accused person at the trial can be executed. In that case, the Member State has to provide in the national law the right to contest the decision or to request a new trial, within the time frame provided by the national law. The suspect or accused person has to be informed, immediately after being served with the decision, about the right to contest the decision or to request a new trial“.*

Explanation provided by RO:

This option allows the execution only if the national law provides the right to contest the decision or to request a new trial, within the time frame provided by the law. It is a kind of “reversal of the burden of the proof” – the same hypothesis put in a different manner. MS are obliged to provide the contestation or the new trial, in case of in absentia trial. The goal is accomplished because the result is the same, ie the suspect or accused person, in absentia cases, have the necessary remedies in order to not execute a conviction in absentia. This compromise solution is not very intrusive for the national law as the previous version of the text and ensure to more legal certainty for court decisions.

The new text is a Presidency suggestion taking account of the proposal by RO. To be noted also that ‘applicable’ is the wording used in the Framework Decision on trials in absentia.

6. [ The right to be present at one's trial shall be without prejudice, in relation to offences which are not serious, to the conduct of proceedings, or stages thereof, in writing, provided this is in conformity with the right to a fair trial. ]<sup>33</sup>

#### Article 9

#### Right to a new trial<sup>34</sup>

[provisionally agreed]

Member States shall ensure that where the suspects or accused persons were not present at the trial referred to in Article 8(1), and the conditions laid down in Article 8(2) were not met, the person concerned has the right to a new trial **or other legal remedy** which allows a fresh determination of the merits of the case, including examination of new evidence, and which may lead to the original decision to be reversed.

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<sup>33</sup> See accompanying recital 21a, as modified. The Presidency invited Member States to reflect if this text could be deleted, maintaining only recital 21a. See also the cover note.

<sup>34</sup> See accompanying recital 25a.



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

*Article 10*

*Remedies*

**[provisionally agreed]**

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*

**[provisionally agreed]**

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. <sup>35</sup>

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<sup>35</sup> See recital 27.

*Article 12*

*Non-regression clause*

**[provisionally agreed]**

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

**[provisionally agreed]**

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by **[36]** months after publication of this Directive <sup>36</sup>. 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.

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<sup>36</sup> COM proposed 18 months as the period for implementation. Several Member States requested putting a longer period (24 or 36 months). The Presidency suggests putting at this stage 36 months and to assess this position during the negotiations with the European Parliament.

*Article 14*

*Entry into force*

**[provisionally agreed]**

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*

**[provisionally agreed]**

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

Done at Brussels,

*For the European Parliament*

*The President*

*For the Council*

*The President*

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