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*Committee on Legal Affairs*

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**2013/0407(COD)**

28.1.2015

## **DRAFT OPINION**

of the Committee on Legal Affairs

for the Committee on Civil Liberties, Justice and Home Affairs

on 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  
(COM(2013)0821 – C7-0427/2013 – 2013/0407(COD))

Rapporteur: Pascal Durand

PA\_Legam

## SHORT JUSTIFICATION

The Commission proposal is based on Article 82(2)(b) of the Treaty on the Functioning of the European Union and seeks, in particular, to guarantee a minimum level of protection for the principle of presumption of innocence in all Member States and to enhance accused persons' right to be present at their trials.

The proposal therefore focuses mainly on the principle of presumption of innocence, the burden of proof, the right not to incriminate oneself and not to cooperate, the right to remain silent, the right to be present at one's trial and the right to a retrial.

The Committee on Legal Affairs first considered this proposal at the end of the seventh parliamentary term, when a number of amendments were adopted unanimously. In general, the new rapporteur welcomes the approach adopted at the time and endorses almost all of those amendments, in particular those seeking to prevent the reversal of the burden of proof to the detriment of suspects or accused persons and to ensure that evidence gathered in breach of the principle of presumption of innocence is inadmissible. The rapporteur also tables a number of additional amendments seeking to clarify the scope of the presumption of innocence, in particular as regards public references to guilt before conviction (see Article 4 of the proposal), and thereby to ensure that suspects or accused persons enjoy a sufficiently high level of protection throughout the EU.

## AMENDMENTS

The Committee on Legal Affairs calls on the Committee on Civil Liberties, Justice and Home Affairs, as the committee responsible, to take into account the following amendments:

### Amendment 1

#### Proposal for a directive

#### Recital -1 (new)

*Draft legislative resolution*

*Amendment*

***(-1) Article 11 of the UN Universal Declaration of Human Rights adopted in 1948 states that everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence. Article 48 of the Charter of Fundamental Rights of the European Union establishes the right to presumption of innocence and the right of defence. Article 6 of the Convention for***

*the Protection of Human Rights and Fundamental Freedoms establishes the right to a fair trial.*

Or. fr

## **Amendment 2**

### **Proposal for a directive**

#### **Recital 1**

##### *Text proposed by the Commission*

(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.

##### *Amendment*

(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, ***and to ensure that a common high level of protection and the procedural safeguards linked thereto are available to suspects and accused persons throughout the EU, without prejudice to the higher protection standards which may be in use in a given Member State.***

Or. fr

##### *Justification*

*If the purpose of this directive is to establish a common set of minimum standards, then any higher protection levels or more effective procedural safeguards in use in Member States should always prevail.*

## **Amendment 3**

### **Proposal for a directive**

#### **Recital 2**

##### *Text proposed by the Commission*

(2) By establishing minimum rules on the protection of procedural rights of suspects

##### *Amendment*

(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.***

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.

Or. fr

*Justification*

*Although the directive may have an indirect impact on the free movement of citizens, there is nothing in the proposal that is specifically directed towards achieving the above goal.*

**Amendment 4**

**Proposal for a directive  
Recital 13**

*Text proposed by the Commission*

(13) The presumption of innocence is violated if, without the accused's having previously been proved guilty according to law, ***a judicial decision or a public statement by*** judicial or other public authorities ***presents*** the suspects or accused persons as ***if they were convicted***.

*Amendment*

(13) The presumption of innocence is violated if, without the accused's having previously been proved guilty according to law, judicial or other public authorities ***make a statement or perform an action that is likely to present*** the suspects or accused persons as ***guilty***.

Or. fr

*(See amendment to Article 4(1).)*

*Justification*

*In addition to public statements and official decisions, the disclosure of information by judicial, administrative or other public authorities could also undermine the presumption of innocence.*

## Amendment 5

### Proposal for a directive Recital 15

*Text proposed by the Commission*

*Amendment*

***(15) However, in some cases shifting the burden of proof to the defence should not be incompatible with the presumption of innocence as long as certain safeguards are guaranteed: it should be ensured that presumptions of fact or law are confined within reasonable limits, which take into account the importance of what is at stake, and that they are rebuttable, for example by means of new evidence on extenuating circumstances or on a case of force majeure.***

***deleted***

Or. fr

*(See amendment to Article 5(2).)*

#### *Justification*

*Reversal of the burden of proof in criminal proceedings which require intention to be demonstrated is unacceptable, and this issue cannot be dealt with by establishing the general principle that the burden of proof may be reversed for the benefit of the prosecution.*

## Amendment 6

### Proposal for a directive Recital 17

*Text proposed by the Commission*

*Amendment*

***(17) Any compulsion used to compel the suspect or accused person to provide information should be limited. To determine whether the compulsion did not violate those rights, the following should be taken into account, in the light of all circumstances of the case: the nature and***

***deleted***

*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.*

Or. fr

#### *Justification*

*The idea of compelling a suspect or an accused person to provide information is simply unacceptable, in particular if it is done for the purpose of assisting the prosecution.*

#### **Amendment 7**

#### **Proposal for a directive**

#### **Recital 18**

##### *Text proposed by the Commission*

(18) The right not to incriminate oneself and not to cooperate 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.

##### *Amendment*

(18) The right not to incriminate oneself and not to cooperate 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. **However, this should only apply to** material acquired pursuant to a warrant, material in respect of which there is a legal obligation of retention and production upon request, and breath, blood and urine samples and bodily tissue for the purpose of DNA testing.

Or. fr

(See amendment to Article 6(2).)

*Justification*

*For reasons of legal certainty – which is of key importance in criminal law –, non-extension of the principle of presumption of innocence to other potentially self-incriminating elements should apply only in clearly identified cases.*

**Amendment 8**

**Proposal for a directive  
Recital 22**

*Text proposed by the Commission*

(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.

*Amendment*

(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 *and* unequivocally waive that right.

Or. fr

*Justification*

*A tacit waiver cannot be unequivocal by definition, as it is unspoken.*

**Amendment 9**

**Proposal for a directive  
Recital 26**

*Text proposed by the Commission*

(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

*Amendment*

(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.

this Directive should *both consist of an appropriate damage compensation mechanism and* have 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.

Or. fr

*(See amendment to Article 10(2).)*

*Justification*

*The remedies to breaches of rights that are established in this proposal must be effective and must seek to give full redress to the suspects or accused persons.*

**Amendment 10**

**Proposal for a directive  
Recital 29 a (new)**

*Text proposed by the Commission*

*Amendment*

***(29a) The transposition of this Directive should contribute to the creation of an area of freedom, security and justice within the Union. Consequently, implementation of this Directive may not have the effect of undermining the obligation incumbent on public authorities to uphold the fundamental rights and legal principles enshrined in Article 6 of the Treaty on European Union, including the rights of persons subject to criminal proceedings.***

Or. fr

*(See amendments to Article 12, title and subparagraph 1a (new).)*

*Justification*

*Effective enjoyment of fundamental rights is the ultimate guarantee of a sufficiently high level of protection of the rights and procedural safeguards afforded to suspects and accused persons within the EU. Fundamental rights must not be jeopardised by indiscriminate*

*application of this directive.*

## **Amendment 11**

### **Proposal for a directive Article 2**

#### *Text proposed by the Commission*

This Directive applies to natural persons suspected or accused in criminal proceedings until the final conclusion of those proceedings.

#### *Amendment*

This Directive applies to natural persons suspected or accused in criminal proceedings, ***irrespective of their nationality or place of residence, including where the proceedings are brought by the European Public Prosecutor's Office referred to in Article 86(1) of the Treaty on the Functioning of the European Union***, until the final conclusion of those proceedings, ***namely when a final and unappealable judicial decision has been handed down.***

Or. fr

#### *Justification*

*This amendment seeks to emphasise that the directive is not for the benefit of EU citizens alone and to clarify the scope of the proposal in the light of the future establishment of the European Public Prosecutor's Office.*

## **Amendment 12**

### **Proposal for a directive Article 3**

#### *Text proposed by the Commission*

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

#### *Amendment*

Member States shall ensure that suspects or accused persons are presumed innocent until proven guilty by ***a final judgment delivered*** according to law ***in a public trial***

*at which they have had all the guarantees necessary for their defence.*

Or. fr

### **Amendment 13**

#### **Proposal for a directive Article 4 – paragraph 1**

*Text proposed by the Commission*

Member States shall ensure that, before a final conviction, **public statements and official decisions from** public authorities **do not refer to** the suspects or accused persons as if they were convicted.

*Amendment*

Member States shall ensure that, before a final conviction, **no actions are performed or statements made by judicial, political or administrative or other** public authorities **that are likely to present** the suspects or accused persons as if they were convicted.

Or. fr

*Justification*

*In additional to public statements and official decisions, the disclosure of information by judicial or other public authorities could also undermine the presumption of innocence.*

### **Amendment 14**

#### **Proposal for a directive Article 4 – paragraph 2**

*Text proposed by the Commission*

Member States shall ensure that appropriate measures are taken in the event of a breach of **that** requirement.

*Amendment*

Member States shall ensure that appropriate measures, **such as compensation and, where appropriate, a retrial,** are taken in the event of a breach of **the** requirement **laid down in this article.**

Or. fr

*(See amendment to Article 4(1).)*

## Amendment 15

### Proposal for a directive Article 5 – paragraph 1

*Text proposed by the Commission*

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 ex officio fact finding powers of the trial court.

*Amendment*

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 ex officio fact finding powers of the trial court ***and to the right of the defence to present evidence in accordance with the applicable national rules.***

Or. fr

## Amendment 16

### Proposal for a directive Article 5 – paragraph 2

*Text proposed by the Commission*

***2. Member States shall ensure that any presumption, which shifts the burden of proof to the suspects or accused persons, is of sufficient importance to justify overriding that principle and is rebuttable.***

***In order to rebut such a presumption it suffices that the defence adduces enough evidence as to raise a reasonable doubt regarding the suspect or accused person's guilt.***

*Amendment*

***deleted***

Or. fr

*(See amendment to Recital 15.)*

*Justification*

*The reversal of the burden of proof in criminal proceedings is hard to accept, and this issue requires careful thought.*

## Amendment 17

### Proposal for a directive

#### Article 5 – paragraph 3 a (new)

*Text proposed by the Commission*

*Amendment*

**3a. The benefit of any doubt shall be enjoyed by the natural persons suspected or accused in criminal proceedings.**

Or. fr

## Amendment 18

### Proposal for a directive

#### Article 6 – paragraph 1

*Text proposed by the Commission*

*Amendment*

1. Member States shall ensure that suspects or accused persons have the right not to incriminate themselves **and not to cooperate** in any criminal proceeding.

1. Member States shall ensure that suspects or accused persons have the right not to incriminate themselves in any criminal proceeding.

Or. fr

## Amendment 19

### Proposal for a directive

#### Article 6 – paragraph 2

*Text proposed by the Commission*

*Amendment*

2. The right referred to in paragraph 1 shall not extend to the use in criminal proceedings of material **which may be** obtained from the suspects or accused persons **through the use of** lawful **compulsory powers but which has an**

2. The right referred to in paragraph 1 shall not extend to the use in criminal proceedings of **the following** material, **provided that it is** obtained from the suspects or accused persons **by** lawful

*existence independent of the will of the suspects or accused persons.*

*means:*

*(a) material acquired pursuant to a warrant;*

*(b) material in respect of which there is a legal obligation of retention and production on request;*

*(c) breath, blood and urine samples and bodily tissue for the purpose of DNA testing.*

Or. fr

*(See amendment to Recital 18.)*

#### *Justification*

*For reasons of legal certainty – which is crucial in criminal law –, non-extension of the principle of presumption of innocence to other potentially self-incriminating elements should apply only in clearly identified cases.*

## **Amendment 20**

### **Proposal for a directive Article 6 – paragraph 4**

#### *Text proposed by the Commission*

4. Any evidence obtained in breach of this Article shall not be admissible, ***unless the use of such evidence would not prejudice the overall fairness of the proceedings.***

#### *Amendment*

4. Any evidence obtained in breach of this Article shall not be admissible.

Or. fr

#### *Justification*

*The exception provided for in the proposal could go against the overall purpose of consolidating the principle of presumption of innocence and the rights linked thereto.*

## Amendment 21

### Proposal for a directive Article 7 – paragraph 4

*Text proposed by the Commission*

4. Any evidence obtained in breach of this Article shall not be admissible, ***unless the use of such evidence would not prejudice the overall fairness of the proceedings.***

*Amendment*

4. Any evidence obtained in breach of this Article shall not be admissible.

Or. fr

*Justification*

*The exception provided for in the proposal could go against the overall purpose of consolidating the principle of presumption of innocence and the rights linked thereto.*

## Amendment 22

### Proposal for a directive Article 8 – title

*Text proposed by the Commission*

Right to be present at one's trial

*Amendment*

Right to be present at one's trial ***and in absentia decisions***

Or. fr

*Justification*

*Since Article 8 of the proposal also relates to decisions handed down in absentia, its title should be amended accordingly.*

## Amendment 23

### Proposal for a directive Article 8 – paragraph 2 a (new)

*Text proposed by the Commission*

*Amendment*

***2a. Member States shall ensure that no decision is handed down in absentia if, in duly justified cases, the suspects or accused persons can offer a valid excuse for not attending their own trial.***

Or. fr

*Justification*

*The proposal does not seem to cover those cases where – for duly justified reasons such as serious illness or the death of a family member – the suspects or accused persons are not able to attend their own trial and thus run the risk being convicted in absentia.*

#### **Amendment 24**

**Proposal for a directive**

**Article 8 – paragraph 3 a (new)**

*Text proposed by the Commission*

*Amendment*

***3a. Provided that the conditions laid down in this Article are met, Member States shall be free to make use of simplified procedures in criminal proceedings concerning minor offences. Member States shall notify to the Commission any exceptions provided for in their national law in this connection.***

Or. fr

*Justification*

*Without prejudice to the principle of presumption of innocence, the duration and complexity of criminal proceedings should be proportionate to the seriousness of the offence. Steps should nonetheless be taken to ensure that simplified procedures are not used where this is unwarranted.*

## Amendment 25

### Proposal for a directive Article 8 – paragraph 3 b (new)

*Text proposed by the Commission*

*Amendment*

**3b. A ‘minor offence’ within the meaning of paragraph 3(a) means any offence under national law punishable by a penalty less severe than a custodial sentence under the law of the Member State in which the criminal proceedings are being conducted.**

Or. fr

## Amendment 26

### Proposal for a directive Article 10 – paragraph 2

*Text proposed by the Commission*

*Amendment*

2. The remedy shall have, **as far as possible**, the effect of placing 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.

2. The remedy shall **both consist of an appropriate damage compensation mechanism and** have the effect of placing 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.

Or. fr

*(See amendment to Recital 26.)*

#### *Justification*

*The remedies to breaches of rights that are established in this proposal must be effective and must seek to give full redress to the suspects or accused persons.*

## **Amendment 27**

### **Proposal for a directive Article 10 – paragraph 2 a (new)**

*Text proposed by the Commission*

*Amendment*

***2a. Any use of force not necessary to secure the person of the accused shall be punished.***

Or. fr

*Justification*

*As accused individuals are presumed to be innocent, judgment must be exercised when it comes to taking them into custody and, more generally, when it comes to taking any action to secure their person.*

## **Amendment 28**

### **Proposal for a directive Article 12 – title**

*Text proposed by the Commission*

*Amendment*

***Non-regression clause***

***Level of protection***

Or. fr

*(See amendments to Recital 29a and Article 12, subparagraph 1a (new).)*

*Justification*

*Given that the title of this article sounds rather obscure and does not reflect the content of the provision, it has been amended in line with the title of Article 53 of the Charter of Fundamental Rights of the European Union, which introduces a similar principle.*

## **Amendment 29**

### **Proposal for a directive Article 12 – paragraph 1 a (new)**

*Text proposed by the Commission*

*Amendment*

***This Directive shall not have the effect of modifying the obligation to uphold the fundamental rights and legal principles enshrined in Article 6 of the Treaty on European Union, including the rights of persons who are subject to criminal proceedings. Any obligations incumbent on public authorities in this respect shall remain unaffected.***

Or. fr

*Justification*

*Effective enjoyment of fundamental rights is the ultimate guarantee of a sufficiently high level of protection of the rights and procedural safeguards afforded to suspects and accused persons within the EU. Fundamental rights must not be jeopardised by indiscriminate application of this directive.*