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Enhancing the Right to be Present

Editors:
dr. George Dimitrov
dr. Noémia Bessa Vilela


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June 2020

Enchancing the Right to be Present

GEORGE DIMITROV & NOÉMIA BESSA VILELA

Abstract This monograph is the final output of PRESENT project. The Project addresses the direct need of training and receiving insight on the changes that are going to be incorporated in the legislation of European Union Member States (MS) in order to transpose Directive (EU) 2016/343. The PRESENT partnership unites 6 partners from 6 countries (Bulgaria, Austria, Romania, Slovakia, Cyprus and Portugal) with diverse focus and a wealth of expertise. Implemented under the coordination of Law and Internet Foundation, the PRESENT project hás provided training to legal practitioners, prosecutors, and judges, who will then contribute to the enhancement of the right to be present, as delineated in the Directive in each country. Further, the PRESENT project has provided a comprehensive comparative analysis for all partner countries' legislation in respect to the right to be present of suspected or accused persons in criminal proceedings. The project was implemented with the support of the JUSTICE Programme of the European Commission under Grant Agreement 760482.

Keywords: • enchancing the right to be present • PRESENT project • legislation • suspected or accused persons • criminal proceedings • EU

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Content

Right to be Present and Presumption of Innocence in Cyprus Law

NIKITAS HATZIMIHAIL

Abstract This Report studies the legal status of persons suspected and accused of committing a crime in the light of Directive 2016/343/EU and its implementation in 2018 into Cyprus law, that is with regard their rights to silence and not to incriminate themselves, the scope of the presumption of innocence and their right to be present and the regulation of trials in absentia. It is noted that Cyprus criminal procedure follows the English common law legal tradition, which adopts the system of adversarial criminal trial and places strong emphasis on the accused being present in order for the Court to obtain jurisdiction over an accused person. The European Convention on Human Rights discourse has also had a very strong influence on the Cyprus constitution and case law. The strong connection of the rights discussed, which are seen as emanating from the presumption of innocence and the principle of fair trial, must also be noted. In 2018, Cyprus introduced new general provisions on the right to silence and not to incriminate oneself, which replicate the Directive's provisions but also affirm constitutional principles elaborated by the case law of the Supreme Court of Cyprus and supported by the European Convention on Human Rights. With regard to trials in absentia, it was decided that the existing common-law regime may actually be more protective of accused persons than a more formal legislative system and thus serve better the purpose of the Directive.

Keywords: • right to be present • presumption of inocence • common-law regime • Cyprus

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1 Introduction

From the point of view of comparative law, Cyprus is a mixed legal system in the sense that both major European legal traditions co-exist, each in control of specific legal fields (Hatzimihail, 2013). Unlike other mixed legal systems, in Cyprus the English common law tradition dominates the core subjects of private law (including contracts and torts), as well as criminal law and procedural law across the board (Hatzimihail, 2015). For the purposes of this study, Cyprus should be regarded as a common-law jurisdiction.

The common-law background (and orientation) of the criminal justice system is an important reason why a study of Cyprus can contribute a distinct perspective to the PRESENT project. This is so especially if one considers the very rich Anglo-American case law on matters pertaining to the presumption of innocence, the right to silence and not to incriminate oneself and on the right of the accused to be present and be effectively heard at court. Another reason lies in the relatively small size of the jurisdiction, which allows a more comprehensive view of how the norms in question actually operate (Hatzimihail, 2017). On the other hand, this small size, together with the relatively undeveloped doctrinal discussion, present certain challenges for both doctrinal and empirical research into Cyprus criminal procedure law and practice. This realisation also helps underline the importance of PRESENT research on Cyprus: in evaluating the pre-implementation state of affairs and in tracing the potential influence of the implementing legislation on Cyprus legal practice, there is a contribution to be made to both better understanding and reforming the administration of criminal justice in the island and to fulfilling the objectives underlying the broader European Area of Justice, Freedom and Security and especially Directive 2016/343.

The purpose of this country report is to present and evaluate the state of play in Cyprus law and the criminal justice system with regard to the treatment of persons suspected and accused of committing a crime. This entails, on the one hand, a study of the law immediately prior to the introduction of Directive 2016/343 into the Cyprus legal system and, on the other hand, an evaluation of the changes that have possibly been brought– or are expected to be brought – by the Directive and its national implementation. As will be seen, the Directive was implemented only very recently and the short-term changes it has ushered in are minimal.

This is essentially a doctrinal study that takes due account of the results of empirical research conducted and material consulted. **Section 2** provides the context necessary for understanding Cyprus law. The state of affairs prior to the implementation of the Directive is described in **Sections 3** and **4**, regarding the presumption of innocence and the right to be present respectively. **Section 5** presents the actual legislative implementation of the Directive, the policy debates during the implementation process and speculates about long-term trends.

2 The Context

The emphasis of this Study is on doctrinal analysis, with due consideration of the results of the empirical research conducted and material consulted. It is imperative therefore to first explain in more detail the theory and operation of sources of Cyprus law, before proceeding with consideration of the remaining material. Prior to that, however, the basic features of the Cyprus criminal justice system must be outlined.

2.1 Criminal Processes in Cyprus

Cyprus has a two-instance judicial system. At the trial level, criminal jurisdiction vests either the District Court (a single judge sitting) for less serious offenses or the Assizes Court (Κακουργοδικείο), which is essentially a panel composed of three senior judges of the District Court for felonies. On the contrary there is no jury system or any kind of lay participation in criminal justice.

Arts 20 and 24 of the Courts of Justice Law 1960 define the jurisdiction, for criminal cases, of the Assizes Court and the District Court respectively. The Assizes Court is conceptually the principal criminal court, even though it adjudicates only serious cases, essentially felonies. According to Art. 24, the criminal jurisdiction of the District Court as such, i.e. in single-judge bench, to "judge summarily all offenses punishable with imprisonment for a term not exceeding five years or with a fine not exceeding fifty thousand [Cyprus] pounds" i.e. approximately €80.000. The term comes from the colonial-era legislation, where jurisdiction was limited to even pettier offenses (e.g. imprisonment of up to a year).

Appeals to the Supreme Court are allowed in all cases (Art 25(2) of the Courts of Justice Law 1960), with no leave to appeal required (unlike some common-law jurisdictions; Cyprus court costs are also relatively low, again unlike some common-law jurisdictions). Even though the Supreme Court is primarily a common-law appellate court, focused on questions of law, it has the ability even to review facts and rehear evidence (Art. 25(3): ".. the Supreme Court … shall not be bound by any determinations on questions of fact made by the trial court and shall have power to review the whole evidence, draw its own inferences, hear or receive further evidence and, where the circumstances of the case so require, re-hear any witnesses already heard by the trial court, and may give any judgment or make any order which the circumstances of the case may justify").

Cyprus criminal process follow the system of adversarial criminal trial. Cyprus has a body of full-time professional prosecutors, consisting of government lawyers working within the Law Office of the Republic (Kyprianou, 2010). The Attorney-General of the Republic is the head of the Law Office and has the final say over all prosecutions. Cyprus has a unitary Police force, whose roots go back to the colonial era and whose scope even extends to fire-brigade and coastguard duties (unlike other Southern European countries who have separate police forces for cities or the countryside). Police handles all

investigations – there is no institution of investigating magistrates – and even prosecutions of petty offenses.

2.2 Sources of Cyprus Criminal Law

Cyprus criminal law and procedure follow the English common law tradition(Papacharalambous, 2015; Hatzimihail, 2013). The starting point however for both substantive and procedural criminal law consists of "codes" – colonial-era legislation seen as codifying the English common law and interpreted in accordance with the evolving English case law. In the case of criminal procedure, the paramount source is the Criminal Procedure Law (Cap. 155) This Law (in Greek: περί Ποινικής Δικονομίας Νόμος, Κεφ. 155) was originally enacted during the British colonial rule of Cyprus (1878-1960), taking its essential form by 1948 with subsequent modifications to this day. Most of its fundamental provisions dealt with below have remained intact, although some modifications have been made, as noted in the appropriate point in our text. Compared to a Continental Code of Criminal Procedure, the Criminal Procedure Law does not contain a "general part" or expressly states principles – the first such express principles were in fact only added, in the very beginning of the Law, by the legislation implementing Directive 2016/343 in 2018. The Law has however survived, with the necessary adjustments, to this day. It is clearly oriented towards judges, legal practitioners and police officers with an eye for leaving some discretion to the judge, as is common in the common-law tradition. As will be seen, in some cases such discretion has allowed the system to operate effectively in the interests of the accused.[1]

The other important piece of legislation for our subject is the Rights of Suspect Persons, Arrested Persons and Persons Held in Custody Law 2005. The Law was originally enacted as the Rights of Arrested Persons and Persons Held in Custody Law; it was amended in 2014 and 2017 in order to implement Directives 2012/13 and 2013/48. The reference to "Suspect Persons" in its summary title was actually added by the legislation implementing Directive 2016/343.

The other major source of written law is the Constitution of the Republic of Cyprus (1960). The Constitution includes a chapter on the bill of rights, whose provisions are influenced by or often replicate the provisions of the European Convention on Human Rights. This is notably the case with regard to Articles 11-12 and 30 of the Constitution which correspond (in this order) to Articles 5, 7 and 6 of the Convention. Both the Constitution and the European Convention have higher legal force than legislation. But the influence of both is deeper than simply as a control mechanism of legislative excesses.

[1] See in Section V below the argument made (including notably by the Supreme Court) in the legislative discussion about implementing the Directive, i.e. that under the existing system where the judge simply has discretion to proceed with the trial in the absence of the accused, such discretion is less likely to be exercised for a trial in absentia than in a more formal system with conditions.

In the absence of general principles expressly pronounced in the colonial-era (or subsequent) legislation, but also the lack of influential scholarly publications, the Constitution has become an integral part of the criminal justice discourse in its core. Constitutional doctrine with regard to fundamental rights has been built upon ECHR doctrine and case law.

Case law is an important element of this system, and references to case law abound in the following pages. It must be noted that, even though Cyprus criminal procedure falls squarely within the English legal tradition, references to English case law are reserved for specific, novel or controversial cases (unlike other fields shaped by English common law, such as contracts and commercial law), and this explains why English reference works were not used more in this report. In contrast to this, a body of Cyprus appellate case law has been developed by the Supreme Court – sitting either as criminal appeals court or as a constitutional court – since independence. This case law interprets the Criminal Procedure Law and examines the practices of police and lower courts. It has also elucidated the constitutional provisions pertinent to the subject.

2.3 Distinctive features of the common-law tradition in criminal trials

It is very important to note that the Cyprus criminal justice system, being a creature of the common-law tradition, is grounded upon the **adversarial model of criminal trial**. Compared to a continental system following the inquisitorial model of criminal trial, the adversarial one places an even more important role in having the accused person present his or her own case, with the help of a qualified legal counsel (Langbein, 2003). One may argue either that the adversarial system better protects the rights of the defendant or, quite the contrary, that there is no distinction between investigators and the prosecution. It is true that, compared to a Continental inquisitorial process, there are fewer procedural stages between investigation and trial at court, but there are equivalent mechanisms for disposing of cases, by granting prosecution considerable leeway in deciding whether to prosecute. For better or for worse, there is no fiction of a neutral prosecutor – even the architecture of the court room on the one hand points to direct opposition between prosecution and defense and on the other hand elevates the accused person to the status of opposing party vis-à-vis the prosecution. For such a system to work, it is even more important than in an inquisitorial system for the accused to be present at trial and to be able to present his or her case. This explains in part the reluctance of common-law courts, and more specifically Cyprus courts, to try a case in absentia.
Another conceptual reason for this reluctance is that common law doctrines on jurisdiction have remained more attached to traditional notions about obtaining jurisdiction, according to which the court had to physically obtain jurisdiction over the defendant, notably by serving to the defendant in person the summons. Service of summons is thus paramount for obtaining jurisdiction, rather than a technical means of ensuring that defendants are informed of the case against them.

3 Cyprus Law before the Implementation of Directive (EU) 2016/343

3.1 Fundamental principles

The **right to fair trial** is explicitly protected by Article 30 of the Constitution in terms virtually identical to Article 6 of the European Convention on Human Rights (Paraskeva, 2015).

Moreover, Article 12 of the Constitution, which corresponds to Article 7 of the European Convention on Human Rights, is dedicated to the rights of the accused. Article 12(5) essentially sets out procedural safeguards that correspond to the spirit of the principle of fair trial. Article 12(4) consecrates the **presumption of innocence**. As will be elaborated below, other fundamental principles and rights, such as the right to silence and the right not to incriminate oneself are regarded as deriving from the principle of presumption of innocence. In a sense, these rights are interconnected but they also have their distinct identity, something that will become even more apparent now that both right to silence and right not to incriminate oneself are governed by distinct legislative provisions in the Criminal Procedure Law.

3.2 Procedural position of suspect and accused

Despite the penchant of the English legal tradition for legislative definitions, no express statutory definition of what constitutes either a "suspect" or an "accused" may be found in the Constitution or legislation. This actually makes sense: in practice, the very nature of labelling someone as a suspect is an early, fluid step in the criminal process: it first comes into being in the mind of the police investigator, before it is externalised into speech, but things are fluid until that moment.

Effectively, however, we can determine what is a **suspect** person in Cyprus law by a closer look to the provisions on criminal arrest, i.e. Articles 9 ff. of the Criminal Procedure Law. The criterion appears to be **reasonable suspicion**, whether for an arrest without a warrant or for the issue of an arrest warrant.

In the former case, an arrest may be made by either a police officer or even an individual who "suspects upon reasonable grounds" or "reasonably suspects" the person arrested of having committed an offense, provided certain other conditions are also met (Art. 14 and 15). There is also the possibility of arrest of any person who commits an offense in the presence of the arresting police officer, private person or Judge (Arts. 14, 15 and 16 respectively). In that case, reasonable suspicion has been elevated to certainty. These provisions have remained unchanged since the colonial era and derive directly from the common law.

In the latter case, the judge must be "satisfied" by a written affidavit that "reasonable suspicion" exists that the person has committed an offense (or else if such arrest is

necessary to prevent an offense from being committed, or an escape). (Art. 18). The "reasonable suspicion" clause was inserted by L. 10(I)/1996. Under the original colonial-era provision, the criterion was simply whether the judge "considers that such warrant is necessary or desirable."

Case law has elaborated on the meaning of "reasonable suspicion." Suspicion must be genuine and not used for other purposes (Merthodja v. Police, 1987; Parpas v. Republic 1988; Stamataris v Police, 1983). It must also be reasonable, in the sense that it emanates from – and is justified by – the evidence in possession of the Police (Stamataris v Police, 1983). Suspicion must also appear truthful, in the sense that the evidence on which prosecution relies for its case must be sufficient for an objective observer to be convinced that the specific suspect could have committed the specific offense (Nikolaides v Police, 1999).

The effective determination of what constitutes **an accused person** is clearer: a person is characterised as "accused" at the moment of formal indictment, i.e. when the "criminal charge" (κατηγορητήριο) is filed in the competent Court. The presumption of innocence is obviously not affected, but, at that moment, the investigation has been completed and *suspicion* is converted into *accusation*.

The content of these concepts does not change during the process. Once reasonable suspicion is created, a person is a suspect and remains so until the conclusion of the investigation and the indictment when that person becomes the accused – and remains thus defined until the end of the trial. Even if convicted, the accused person who appeals his or her conviction remains the accused-appellant in the appellate process.

According to Article 24 of the Criminal Procedure Law, which dates back to the colonial period, a Court can only remand the arrested person in custody, in order to enable the investigation to be completed, for a period "not exceeding eight days at any one time". The Constitution in 1960 affirmed this rule and added further conditions: the person arrested must be brought before the judge within twenty-four hours from his arrest (Art. 11(5)); custody may not exceed three months in total and the judge must rule each time and her judgment is subject to appeal (Art. 11(6)).

The physical presence of the suspect is necessary (Charalambous v. The Police, 1974). Suspect must be present. It is unclear whether it is sufficient for the suspect's lawyer to appear in lieu of the suspect.

3.3 Presumption of innocence

The burden of proof for establishing guilt lies with the prosecution (*Police v Chrysanthou*; *Costis Panayi Kefalos v. The Queen*).

No Cypriot authority exists on the temporal scope of the presumption of innocence, but it has been argued that the presumption extends to the appellate process. A judgment is supposed to have immediate effect (Art 47 of the Courts of Justice Law), but this does not necessarily mean that its effect can also negate the presumption. The European Court of Human Rights decision in Konstas v Greece, 2011 has been forcefully cited as authority in Cyprus courts. In a recent case, however, the full bench of the Supreme Court was split 6-6 as to whether to allow an appeal against a criminal conviction by the Assizes Court and let the conviction stand (Loizidis v Republic, 2014). A petition alleging violation of the presumption is currently pending before the European Court of Human Rights.

Presumption of innocence also informs the stance of courts in those instances where the accused is at court but the prosecutor fails to appear for some reason: the Court has discretionary power to dismiss the case and acquit the defendant, if it seems fit (Kyriakides v Lumian Ltd, 2000). This does not apply to the absence of witnesses for the prosecution (Attorney-General v Spanias, 1993)

3.4 Right to silence and to not incriminate oneself

Prior to the implementation of the Directive 2016/343, Cyprus law contained no express statutory provision protecting the right to remain silent (δικαίωμα σιωπής) and the right not to incriminate oneself (δικαίωμα μη αυτοενοχοποίησης). Both are however strongly entrenched in the criminal justice system. They were essentially elaborated by Cyprus case law, which built on the basis of both the constitutional discourse of fundamental rights and the English common-law tradition, which is strong on this point.

The Supreme Court has repeatedly held that both the right of silence, and the right not to incriminate oneself, derives from the principle of the presumption of innocence and lies at the core of the right to a fair trial (*Republic v Avraamidou*, 2004; Psyllas v Republic, 2003; *President of the Republic v House of Representatives*, 1994). The constitutionally prescribed right to freedom of speech and expression has also been invoked as an indirect safeguard of the right of silence, at least insofar it underlies statutory interpretation (*Kirkos v Cyprus Securities Commission*, 2006; Paraskeva, 2005). Courts have held that the right to silence or no self-incrimination does not extend over evidence that the accused has abandoned, such as in an ashtray (Yannidis v Police, 2002). But the right not to self-incriminate oneself extends over instances where the police used indirect means, such as offering the suspect a drink with a straw in order to involuntary obtain a DNA sample (Psyllas v Republic, 2003).

4 The Right to be Present in Cyprus Law

The right of the accused to be present at the trial is guaranteed by the Constitution in Article 11(2)(c) and Article 30(3), which replicate respectively the provisions of Article 5(1)(c) and Article 6(3) of the European Convention on Human Rights. These

constitutional provisions notwithstanding, the right to be present was consecrated during the colonial era, in Article 63 of the Criminal Procedure Law, which remains in force, unchanged:
(1) The accused shall be entitled to be present at the Court during the whole of the trial so long as he conducts himself properly.
(2) If an accused does not conduct himself properly, the Court may, in its discretion, direct him to be removed and kept in custody and proceed with the trial in his absence making such provision as in its discretion appears sufficient for his being informed of what passed at the trial and for the making of his defence.
(3) The Court may, if it thinks proper, permit the accused to be out of Court during the whole or any part of the trial, on such terms as it may think fit.

Under Article 12(5) of the Constitution, the accused has the right to defend himself in court in person and exercise his rights to call and examine defense witnesses as well as cross examining the witnesses of the prosecution.

4.1 Interrelation between the right to be present at trial and other fundamental human rights in Cyprus Law

Cyprus courts must exercise due diligence in securing the presence of the accused by properly summoning him or her and they must take measures to discourage his unjustified absence from the hearing. While Article 6 § 1 (neither Article 12 or 30 of the Cyprus Constitution) cannot be construed as conferring on an applicant the right to obtain a specific form of service of court documents such as by registered post, in the interests of the administration of justice, the applicant should be notified of a court hearing in such a way as to not only have knowledge of the date, time and place of the hearing, but also to have enough time to prepare his or her case and to attend the court hearing (Korchagin v Russia, 2006, par. 65).

In Cyprus, the accused has the right to be present in his trial according to his constitutional rights on the basis of Articles 12 and 30 of the Constitution and Article 6 of the European Convention on Human Rights but, at the same time, the accused has also an obligation to attend the trial unless the Court has allowed him to be absent on the basis of sections 45(1) and 63(3) of the Criminal Procedure Law.

This issue was examined by the Supreme Court in *Republic v. Demetriades* (1973) where President Triantafyllides said, *inter alia*:

> *"In view of the fundamental rights of an accused person to have a fair trial in every respect, which is safeguarded by Article 30 of our Constitution – as well as by Article 6 of the European Convention on Human Rights, which was ratified by Cyprus by the European Convention on Human Rights (Ratification) Law, 1962, (Law 39/62) – we are of the opinion that, as is also expressly laid down in section 63 of CAP. 155, an accused person has a right to be present at his trial and, so long as he conducts himself properly, nobody can deprive him of such right.*

> *We are, further, of the opinion that (...) an accused person has, also, a duty to be present at his trial; and this duty is not incompatible with his aforesaid right to be present at his trial; and this duty is not incompatible with the aforesaid right to be present at his trial, because that right is a "right to be present" and not a "right to be or not to be present". Such duty arises not only because of the nature of the criminal trial – (which, being an essential process for the application of the criminal law, concerns the State and every citizen, and it not only a mere contest of private interests, as is a civil action) – but, also, by necessary inference from the provisions of section 63(3) of CAP.155, as well as from those of section 45(1) of the same Law regarding the power to "dispense with personal attendance of the accused" at a summary trial; as stated earlier on in this Decision, section 63 refers to both summary trials and trials on information, and so the said provisions of section 45(1) may properly be taken into account, in addition to those of section 63(3), in reaching our conclusion as to the duty of an accused person to be present at his trial (...)".*

The principle of an oral and public hearing is particularly important in the criminal context, where a person charged with a criminal offence must generally be able to attend a hearing at first instance. Hence, at first instance, the concept of a fair trial means that a person charged with a criminal offence should be entitled to attend the hearing (Colozza v. Italy, 1985, par. 27-29).

Without being present, it is difficult to see how a defendant could exercise the specific rights set out in sub-paragraphs (c), (d) and (e) of paragraph 3 of Article 6 of the ECHR (which corresponds to Article 12 of the Cyprus Constitution), i.e., the right to "defend himself in person" (Article 12.5 (c) of the Constitution), "to examine or have examined witnesses" (Article 12.5 (d) of the Constitution) and "to have the free assistance of an interpreter if he cannot understand or speak the language used in court" (Article 12.5 (e) of the Constitution).

In the interests of a fair and just criminal process it is of capital importance that the accused should appear at his trial (*Lala v The Netherlands*, 1994; *Lorenzo v Italy*, 2004). The duty to guarantee the right of a criminal defendant to be present in the courtroom – either during the original proceedings or in a retrial – ranks as one of the essential requirements of Article 6 (*Stoichkov v. Bulgaria*, 2005, par. 56).

Although this is not expressly mentioned in paragraph 1 of Article 6 (neither in Articles 12 and 30 of the Cyprus Constitution), the object and purpose of the Article taken as a whole show that a person "charged with a criminal offence" is entitled to take part in the hearing. Moreover, sub-paragraphs (c), (d) and (e) of paragraph 3 (which corresponds to sub-paragraphs (c), (d) and (e) of paragraph 5 of Article 12 of the Cyprus Constitution) guarantee to "everyone charged with a criminal offence" the right "to defend himself in person", "to examine or have examined witnesses" and "to have the free assistance of an

interpreter if he cannot understand or speak the language used in court", and it is difficult to see how he could exercise these rights without being present (Colozza v. Italy, 1985). Moreover, the right to be present at the hearing allows the accused to verify the accuracy of his or her defence and to compare it with the statements of victims and witnesses (*Medenica v. Switzerland*, 2002, par. 54).

In the case of *Sejdovic v. Italy*, (2006) the European Court has held that where a person charged with a criminal offence had not been notified in person, it could not be inferred merely from one's status as a "fugitive", which was founded on a presumption with an insufficient factual basis, that the defendant had waived the right to appear at trial and defend oneself. Moreover, a person charged with a criminal offence must not be left with the burden of proving that he was not seeking to evade justice or that his absence was due to force majeure. At the same time, it is open to the national authorities to assess whether the accused showed good cause for his absence or whether there was anything in the case file to warrant finding that he had been absent for reasons beyond his control (*Sejdovic v. Italy*, 2006, par. 87).

In the case of *Sanader v. Croatia* (2015), the European Court held that the requirement that an individual tried in absentia, who had not had knowledge of his prosecution and of the charges against him or sought to evade trial or unequivocally waived his right to appear in court, had to appear before the domestic authorities and provide an address of residence during the criminal proceedings in order to be able to request a retrial, was disproportionate. This was particularly so because once the defendant is under the jurisdiction of the domestic authorities, he would be deprived of liberty on the basis of the conviction in absentia. In this regard, the Court stressed that there can be no question of an accused being obliged to surrender to custody in order to secure the right to be retried in conditions that comply with Article 6 of the Convention. It explained, however, that this did not call into question whether, in the fresh proceedings, the applicant's presence at the trial would have to be secured by ordering his detention on remand or by the application of other measures envisaged under the relevant domestic law. Such measures, if applicable, would need to have a different legal basis – that of a reasonable suspicion of the applicant having committed the crime at issue and the existence of "relevant and sufficient reasons" for his detention

Bail

Article 5(4) of the European Convention provides:

> *Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.*

Article 11(7) of the Cyprus Constitution provides:

> *Every person who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.*

As it can be seen from the text of the two relevant paragraphs, their provisions are almost identical. Article 5(4) of the European Convention and Article 11 § 7 of the Cyprus Constitution, both generally require that a detained person or his legal representative be permitted to participate in an adversarial oral hearing (*Allen v. United Kingdom*, 2010), and the European Court has frequently found states in violation of the Convention where bail has been considered in the absence of both (for example: *E.M.K. v. Bulgaria*, 2005). The European Court has said that the judge determining bail "must himself or herself hear the detained person before taking the appropriate decision" (*T.W. v. Malta*, 1999), but this appears to mean the hearing of representations from the defendant or his lawyer, rather than hearing oral evidence.

If the proceedings are adversarial like in Cyprus then the defendant must know the nature of the prosecution objections to his release, and be given the opportunity to comment on them (Farhad Aliyev v. Azerbaijan, 2010). The representations made should be oral rather than in writing (Kotsaridis v. Greece, 2004), and a representative from the defence should be physically present to hear any representations made by the prosecution (Wloch v. Poland, 2000).

The European Court in the case of *Grauzinis v. Lithuania*, (2000, par. 34) held that given what was at stake for the applicant, i.e. his liberty, as well as the lapse of time between the various decisions, and the re-assessment of the basis for the remand, the applicant's presence was required throughout the pre-trial remand hearings in order to be able to give satisfactory information and instructions to his counsel.

Equally, a right to be present could be established where the defendant relied on matters exclusively within her own knowledge, such as conditions of prison detention (Mamedova v. Russia, 2006) or where the case called for an assessment of the defendant's character, personality, predisposition to further offences or mental state (*Duda v. Poland*, 2006).

4.2 Right to be present as a foundation of the jurisdictional rules

Under Art. 46(1)(a) of the Criminal Procedure Law, summons addressed to an individual "shall be served either by delivering it to him personally or by leaving it with some adult person living with him or being in charge of the place in which he resides or of the place of his business or occupation."

The court may order the serving to be done with alternative means only if the primary way of serving described above is deemed impossible: this latter provision of Art. 46(1A) was only added by L. 42(I)/2014 to cover extreme cases but is used very sparingly.

4.3 A "functional right" (or obligation)

So the right to be present also includes a negative right to be absent, which can only be exercised with the permission of the Court under Art. 45(1) or 63 of the Criminal Procedure Law. The accused can therefore not simply waive his right to be present, by informing the court that he simply would prefer not to be present at trial and he wishes to stay at home instead (Loizou & Pikis, 1975, 79). The accused's claim to absolute freedom to be "out of Court" must be balanced against the public interest of ensuring a fair trial and having all sides presented before the court of law. In a recent case, Psara-Miltiadou J. spoke precisely of a dual nature (right and obligation) of the accused's right to be present (Gregoriou v Registration Board of Real Estate Agents, 2016).[1] Likewise e.g. Georgiou v Fytoria Solomou Ltd (2015).

In such a case, a distinction must be drawn as to whether the accused is under custody or not. if the accused is not under custody, the Court "may issue either a summons or a warrant to compel the attendance of the accused before the Court," according to Art. 44(1) of the Criminal Procedure Law (Socratis, alias Kokkalos v. The Police, 1967). It is also possible that the accused be allowed by court order not to appear himself but be represented by counsel or even to respond in writing in accordance with Article 45(1).
If the accused is under custody but nonetheless refuses to present himself before the Court, the Court may continue the trial in his absence but should nonetheless "proceed as if there was entered a plea of not guilty, because, in view of the presumption of innocence, it is up to the prosecution to prove his guilt according to law" (Republic v. Nicos Demetriades, 1973). In such a case, it has been held that "it would be desirable to serve him with a copy of the charges so that he can have full knowledge of the offence or offences in respect of which he will be tried, and, also, to inform him of his right to be defended by counsel, as well as of his right to ask, in a proper case, for free legal assistance." (Republic v. Nicos Demetriades, 1973).

4.4 Discretionary power

The court has the discretionary power of the court to order the continuation of the process. In the words of Triantafyllides, P. in Republic v Demetriades (1973):

> *There exists express provision—subsection (3) of section 63—that a trial Court "may, if it thinks proper, permit the accused" to be out of Court during the whole or part of the trial; the part of subsection (3) which we have put in quotes shows that such subsection, when construed according to its natural meaning, envisages a situation in which the permission of the Court for the accused to be out of Court is sought by or on behalf of the accused on grounds which, when put forward, are found by the trial Court to be such as to render the granting of its permission a proper course in the circumstances, on such terms as it may think fit; it cannot, therefore, be said that under subsection (3) there can be dealt with every situation where the accused is absent from the trial and so it may become necessary, where subsection (3) is not found to be applicable, to resort to trial in the absence of the*

accused, in the exercise of the relevant inherent discretionary powers of the trial Court.

And further below:

«We are, therefore, of the opinion that the proper answer to question (b) is that when an accused, who is in custody and who is to be tried on information, is not in the dock at the commencement of his trial, because of his having persistently refused to attend and because the authorities concerned did not take measures to bring him to Court against his will, the trial Court may, by a verbal direction, order that the accused shall be brought up, and of course then the said authorities would have to implement such direction; but the Court may, also, in exceptional circumstances—even if they do not come within section 63(3)—decide, in the exercise of its inherent powers (see the Abrahams case, supra, referred to in the case of Jones,(supra), to proceed with the hearing in the absence of the accused, irrespective of whether or not he is represented by counsel. Our Criminal Procedure Law, Cap. 155, provides, expressly, for trial in the absence of the accused in relation only to certain summary cases—by section 89—but that, in view of section 3 of Cap. 155, does not exclude resorting to the aforesaid inherent powers.»

This notion of inherent discretionary power is drawn from the English common law. Republic v Demetriades, 1973 cites R v Jones, 1972 with further reference to R v Abrahams (1895).[2]

Such discretionary power is however exercised with great restraint. In the words of the English court in R v Jones, 1972:

Considerations of practical justice in my opinion support the existence of the discretion which the Court of Appeal held to exist. To appreciate this, it is only necessary to consider the hypothesis of a multi-defendant prosecution in which the return of a just verdict in relation to any and all defendants is dependent on their being jointly indicted and jointly tried. On the eve of the commencement of the trial, one defendant absconds. If the court has no discretion to begin the trial against that defendant in his absence, it faces an acute dilemma: either the whole trial must be delayed until the absent defendant is apprehended, an event which may cause real anguish to witnesses and victims; or the trial must be commenced against the defendants who appear and not the defendant who has absconded. This may confer a wholly unjustified advantage on that defendant. Happily, cases of this kind are very rare. But a system of criminal justice should not be open to manipulation in such a way.»

In a pertinent English case, the accused did not show up on the third day of the hearings and his counsel withdrew. The Court found that this was on purpose, and moreover two prosecution witnesses were foreigners in a case involving conspiracy and theft at the London Heathrow Airport, so it was impossible to guarantee there would still be there to testify if the court adjourned (R v O'Nione, 1986).

In Republic v Uddin (2017) the Nicosia Assizes Court went into great lengths and a full exposition of authorities previously used, in a case of organized use and exploitation of illegal immigrant workers involving multiple defendants, where one of the Bangladeshi defendants suddenly did not show up, having been released on bail, and the warrant was not executed. The decision is a very good example of how cautious the judges are in this regard.

4.5 Protection of vulnerable persons

Cyprus law prior to the implementation of the Directive provided certain procedural safeguards for vulnerable persons suspected or accused in criminal proceedings. According to Article 30(2) of the Constitution, which reprises Article 6(1) of the European Convention on Human Rights, "the press and public may be excluded from all or part of the trial by decision of the court, where … the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

5 Transposition of Directive (EU) 2016/343 into Cyprus law

The transposition of the Directive 2016/343 into Cyprus law did not change any of the pre-existing principles of Cyprus criminal procedure. In parliamentary debates, the Law Office of the Republic took the position that the new provisions affirmed the existing constitutional principles, as elaborated further in case law, and dealt with the specificities in the application of these constitutionally- and case-law prescribed presumptions and rights (House of Representatives, 2018). There has so far been no instance of having to apply the new provisions, nor any contrary opinions in our interviewees, so there is little reason to question this position, but only time will tell.

5.1 Presumption of innocence and its corollary rights

In terms of formal legislative change, a major one has been the promulgation of statutory provisions, just below Article 3 of the Criminal Procedure Law, which reaffirm the **presumption of innocence** principle (Art 3A),[3] and the **right to silence** and to **non-self-incrimination** (Art 3C).[4] These provisions essentially replicate the respective provisions of the Directive, i.e. Arts 7 respectively. Even in the few instances where a different word has been used in the Greek text of the statute than in the Greek version of the Directive, there is no difference in meaning. A technical difference in the implementing legislation is that, unlike Article 7 of the Directive, Cyprus has opted to define legislatively what the right not to incriminate oneself consists of, in Art. 3C(2)(b). That provision, however, replicates the definition of the Directive's Recital 25.

A corollary amendment has been the one of the Rights of Suspect Persons, Arrested Persons and Persons Held in Custody Law 2005: Article 3, which elucidates the content

of the arrested persons' "right to information and communication with an advocate and relatives", now includes the right to non-self-incrimination among the facts and rights of which the arrested person must be informed by the police upon his or her arrest (the violation of which shall incur, among other penalties, civil liability against the Republic and individuals: Art 36). In fact, the more serious change – symbolical but with long-term consequences – has been the

Beyond that, which falls more into "best practice" territory than actual change in the law, these implementing provisions are not brining anything new to the legal system – nor are they perceived by anyone as doing so. This explains why there was not much discussion about them during the implementation process. In the medium to long term, the conceptual framework may be altered in two ways. First, whereas up to now the Constitution was the starting point of the doctrinal discussion, now statute takes up that role. Second, in the existing doctrinal discourse the right to silence and not to incriminate oneself were treated as an integral aspect of the presumption of innocence (Paraskevas, 2015) but now they may start being treated more distinctly. One must also consider that, Article 3 being an interpretation clause (default incorporation of English criminal procedure law and practice in Cyprus), these are the first substantive provisions of the entire Code. So in the long run these new provisions will revitalize the doctrine of criminal procedure in practice.

5.2 Public references to guilt

In contrast to Articles 3A and 3C, there was some discussion as to the sibling provision of Article 3B ("Public statements of a public authority"), which implements the Directive's Article 4 ("Public references to guilt").[5] Article 3B(1) essentially replicates the first sentence of the Directive's Article 4(1). Art 3B(2) implements the second sentence of the Directive's 4(1) in a way corresponding to the peculiarities of the Cyprus legal system. A lengthy Art 3B(3) attempts to regulate in detail what may or not be included in the statutory prohibition and by whom: definitions of "public authority" and "public statement of public authority" follow the definitions of the Directive's Recital ; definitions of "officer", "office or function or position" try to bridge the Directive's conceptual framework with the one in Cyprus and include a long list of officers and offices (from the President of the Republic to contract workers providing service to a government service!). Notable – and telling – is the absence from the list of the House of Representatives (especially if one considers the Konstas v Greece case, in which it were statements by cabinet members in parliament that led to the condemnation of Greece). The original Bill actually included the President (Speaker) and members of the House of Representatives in the list, but the reference was stricken down in the committee stage in parliament (House of Representatives, 2018).

5.3 Right to be present and trials in absentia

On the contrary, there was no legislative action with regard to **trial in absentia**. As was previously explained, trial in absentia is a very rare phenomenon in Cyprus criminal justice, but the courts do have the power to decide to thus proceed. The original Bill, as prepared by the Law Office of the Republic, included a provision allowing trial in absentia provided the two conditions set out in Article 8(2) of the Directive were met. In a memorandum submitted to the legislature, the Supreme Court objected by noting that such a provision would effectively eliminate the court's discretion. Such discretion is of common-law origin and is exercised with great attention and restraint, as the court's duty is to secure a fair trial: existing case law has achieved the necessary balancing between the accused person's right to be present and the general public interest of concluding trials within reasonable time, by establishing a number of factors to be taken into account. The legislature decided to omit this provision "so that the case law of Cypriot courts, which regulates adequate the court's pertinent authority, may continue to apply" (House of Representatives, 2018).

There is truth in this statement. Cyprus courts have been truly very cautious in exercising their jurisdiction in absentia, but they are jealous of guarding their discretionary power to exercise jurisdiction in extreme circumstances. The idea of such discretion meaning from the courts' inherent powers under the common law tradition finds much resonance. It is likely that an express provision replicating the Directive's conditions will have the opposite effect, i.e. that judges would feel compelled to try cases even in absentia more frequently than under the pre-existing regime.[6]

6 Conclusion

Compared perhaps to other, larger, Member States, Cyprus appears to have been in better shape prior to the introduction of the Directive. As a result, the Directive's legislative implementation proceeded relatively smoothly. Cyprus introduced new general provisions on the right to silence and not to incriminate oneself, which replicate the Directive's provisions but also affirm constitutional principles elaborated by the case law of the Supreme Court of Cyprus and supported by the European Convention on Human Rights. With regard to trials in absentia, it was decided that the existing common-law regime may actually be more protective of accused persons than a more formal legislative system and thus serve better the purpose of the Directive.

This state of affairs may be attributed in part to Cyprus criminal procedure following the English common law legal tradition, which adopts the system of adversarial criminal trial and places strong emphasis on the accused being present in order for the Court to obtain jurisdiction over an accused person. Cyprus is a relatively young jurisdiction but its judiciary and the legal profession have been imbued with a sense of the vitality of procedural due process. Moreover, unlike some common-law jurisdictions that place legal or financial barriers to appeal, in Cyprus appeal is readily available to the Supreme Court.

Another important factor probably has to do with the fact that Cyprus is a small jurisdiction, in terms of both territory and population, with a relatively compact judicial system (and police). The population had been relatively homogeneous (which meant that the social distance between the professional elite that sits in or pleads before appellate courts and the usual suspects was not as great as in other places) and procedural abuses were relatively easy to spot and correct. Things have been of course changing, and the massive flows of lower-income immigrants from both EU Member States and third countries is beginning to challenge the system. As a result, the formal legislative enactment of the constitutional principles further elaborated by the case law comes at a very opportune time.

Notes:

[1] "*Είναι γεγονός ότι η παρουσία ενός κατηγορουμένου σε μια δίκη μπορεί ταυτόχρονα να νοηθεί και σαν δικαίωμα και σαν υποχρέωση. Η διφυής αυτή φύση διέπεται από τις αρχές που αφορούν την προστασία της έννομης τάξης η οποία καθορίζεται από την ανάγκη σεβασμού της δικαστικής διαδικασίας ως προαπαιτούμενο για την ύπαρξη της. Επίσης διέπεται από τις αρχές προστασίας του ατομικού δικαιώματος της παρουσίας ενός ατόμου σε διαδικασία που τον αφορά, ποινικής υφής, με τις συνέπειες που μπορεί αυτή να έχει"*

[2] The following passage from the opinion of Williams J.

It will thus be seen that in my opinion in all cases whether of felony or misdemeanor, whether the accused be on bail or in custody, whether he be represented by counsel or not, he has a right to be present, subject only to one qualification, and that is, that he does not abuse that right. If he abuses that right for the purpose of obstructing the proceedings of the Court by unseemly, indecent, or outrageous behaviour, the Judge may have him removed and proceed with the trial in his absence, or he may discharge the jury, but subject to that qualification the right of being present remains with the accused as long as he claims it. When he waives it, then the discretion of the Judge comes into play. To take an extreme case by way of illustration: Suppose an accused person to be out on bail, to appear and take his trial for either a felony or misdemeanor, and that when his trial comes on he is found to have absconded. By so doing, I take it, the accused has clearly waived his right to be present, and the Crown might elect to go on with the trial in the prisoner's absence, but then the presiding Judge has to exercise his discretionary power; if in such a case the accused was not represented by counsel in Court, or even if he were so represented, his presence was necessary for the proper conduct of his defence by his counsel, the Judge would, I apprehend, certainly exercise his discretion by postponing the trial. In short, it seems to me that the Judge's discretion is very much at the root of the whole matter, subject to the accused's right, when he has not forfeited the right, does nothing to forfeit it, or does not waive it, to be present' ".

[3] The provision is as follows:

Άρθρο 3Α [
(1) Οποιοδήποτε πρόσωπο είναι ύποπτο ή κατηγορούμενο για τέλεση αξιόποινης πράξης, θεωρείται αθώο μέχρις ότου αποδειχτεί ένοχο σύμφωνα με νόμο.
(2) Οι διατάξεις του εδαφίου (1) του παρόντος άρθρου εφαρμόζονται σε φυσικό πρόσωπο κατά την ποινική διαδικασία, από τη στιγμή κατά την οποία αυτό είναι ύποπτο ή κατηγορούμενο για τέλεση αξιόποινης πράξης, μέχρι την ολοκλήρωση της διαδικασίας που συνίσταται στην έκδοση τελικής δικαστικής απόφασης.

[4] Άρθρο 3Γ [Δικαίωμα σιωπής και δικαίωμα μη αυτοενοχοποίησης]
(1) Ο ύποπτος ή ο κατηγορούμενος έχει το δικαίωμα σιωπής σε ότι αφορά την αξιόποινη πράξη για την οποία είναι ύποπτος ή διώκεται.

(2)(α) Ο ύποπτος ή ο κατηγορούμενος έχει το δικαίωμα της μη αυτοενοχοποίησης.
(β) Το δικαίωμα της μη αυτοενοχοποίησης συνίσταται στη μη υποχρέωση του υπόπτου ή κατηγορουμένου να προσκομίσει αποδεικτικά στοιχεία ή έγγραφα ή να παράσχει πληροφορίες που μπορεί να οδηγήσουν στην αυτοενοχοποίησή του, όταν αυτός καλείται να προβεί σε δήλωση ή να απαντήσει σε ερωτήσεις.
(γ) Η άσκηση του δικαιώματος της μη αυτοενοχοποίησης δεν εμποδίζει τις αρμόδιες αρχές από τη συγκέντρωση αποδεικτικών στοιχείων τα οποία μπορούν να ληφθούν νόμιμα από τον ύποπτο ή κατηγορούμενο μέσω άσκησης εξουσιών νόμιμου καταναγκασμού και τα οποία υφίστανται ανεξάρτητα από τη βούληση του υπόπτου ή κατηγορουμένου.
(3) Η άσκηση από τον ύποπτο ή κατηγορούμενο του δικαιώματος σιωπής ή/και της μη αυτοενοχοποίησης δεν χρησιμοποιείται εναντίον του ούτε θεωρείται από μόνη της απόδειξη ότι ο ύποπτος ή ο κατηγορούμενος έχει διαπράξει την αξιόποινη πράξη:
Νοείται ότι οι διατάξεις του παρόντος εδαφίου δεν επηρεάζουν τις διατάξεις του περί Αποδείξεως Νόμου αναφορικά με την εκτίμηση των αποδεικτικών στοιχείων από τα δικαστήρια.

[5] Άρθρο 3Β [Δημόσιες δηλώσεις δημόσιας αρχής]

(1) Τηρουμένων των διατάξεων του εδαφίου (2), μέχρι την έκδοση τελικής απόφασης για την ενοχή ύποπτου ή κατηγορούμενου προσώπου, δεν επιτρέπεται σε δημόσια δήλωση δημόσιας αρχής και σε δικαστική απόφαση, με εξαίρεση τις τελικές δικαστικές αποφάσεις περί της ενοχής, το ύποπτο ή κατηγορούμενο πρόσωπο να αναφέρεται ως ένοχο.
(2) Οι διατάξεις του εδαφίου (1) -
(α) Δεν επηρεάζουν τη συνταγματική εξουσία του Γενικού Εισαγγελέα της Δημοκρατίας να κινεί, να διεξάγει, να επιλαμβάνεται και να συνεχίζει ή να διακόπτει οποιαδήποτε διαδικασία ή να διατάσσει δίωξη εναντίον οποιουδήποτε προσώπου στη Δημοκρατία για οποιοδήποτε αδίκημα,
(β) δεν επηρεάζουν τις προκαταρκτικές ή/και ενδιάμεσες αποφάσεις που λαμβάνονται από δικαστικές ή/και αστυνομικές αρχές και βασίζονται σε υπόνοιες, ενδείξεις και/ή ενοχοποιητικά στοιχεία και δεν εμποδίζουν τις δημόσιες αρχές να προβαίνουν σε δημόσια μετάδοση πληροφοριών σχετικά με την ποινική διαδικασία, όταν αυτό είναι απολύτως απαραίτητο για λόγους σχετικούς με την ποινική έρευνα ή το δημόσιο συμφέρον.
(3) Για τους σκοπούς του παρόντος άρθρου-
«δημόσια αρχή» σημαίνει οποιαδήποτε από τα ακόλουθα πρόσωπα, αρχές ή δικαστήρια:
(α) Αστυνομικές αρχές και πρόσωπα που διεξάγουν ανακρίσεις·
(β) δικαστήριο που ασκεί ποινική δικαιοδοσία· και
(γ) οποιοδήποτε κρατικό αξιωματούχο·
«αξιωματούχος» σημαίνει πρόσωπο το οποίο αναλαμβάνει ή ανέλαβε οποιοδήποτε λειτούργημα, αξίωμα ή θέση·
«δημόσια δήλωση δημόσιας αρχής» σημαίνει οποιαδήποτε δημόσια δήλωση που αναφέρεται σε ύποπτο ή κατηγορούμενο πρόσωπο ως ένοχο και η οποία προέρχεται από δημόσια αρχή ως ορίζεται στο παρόν άρθρο·
«λειτούργημα ή αξίωμα ή θέση» σημαίνει οποιοδήποτε λειτούργημα ή αξίωμα ή θέση για τα οποία ο μισθός ή η αντιμισθία ή η αποζημίωση ή η χορηγία καταβάλλεται από τη Δημοκρατία ή από νομικό πρόσωπο δημοσίου δικαίου ή οργανισμό δημοσίου δικαίου, και περιλαμβάνει-
(α) τον Πρόεδρο της Δημοκρατίας,
(β) το Γενικό Εισαγγελέα της Δημοκρατίας,
(γ) το Βοηθό Γενικού Εισαγγελέα της Δημοκρατίας,
(δ) τον Πρόεδρο του Ανωτάτου Δικαστηρίου,
(ε) δικαστή του Ανωτάτου Δικαστηρίου,
(στ) το Γενικό Ελεγκτή,
(ζ) το Βοηθό Γενικού Ελεγκτή,
(η) το Διοικητή της Κεντρικής Τράπεζας της Κύπρου,

(θ) το Γενικό Λογιστή,
(ι) το Βοηθό Γενικού Λογιστή,
(ια) Υπουργό,
(ιβ) Υφυπουργό,
(ιγ) τον Κυβερνητικό Εκπρόσωπο,
(ιδ) πρόσωπο που εργάζεται με σύμβαση εργοδότησης για αγορά υπηρεσιών σε κυβερνητική υπηρεσία,
(ιε) πρόσωπο που κατέχει θέση Επιτρόπου ή Εφόρου ή Προέδρου ή Μέλους Αρχής ή άλλου Σώματος ή άλλου αξιωματούχου και του οποίου το λειτούργημα ή αξίωμα ή θέση προβλέπεται ή καθιδρύεται δυνάμει του Συντάγματος ή οποιουδήποτε νόμου της Δημοκρατίας.

[6] This assumption is confirmed both by interviews with experienced members of the legal profession and by the analysis of judicial behaviour of at least one author of this study.

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What lies ahead in the future for the Information and Communication Technologies' Use in the Criminal Procedure?

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Abstract This paper presents a brief overview of the legislative *status quo* in Bulgaria concerning the use of information and communication technologies in the area of criminal proceedings. The paper looks into the Criminal Procedure Code provisions, the pertinent case-law practice and soft law instruments to present a comprehensive overview both from legislative and practical perspective. Since the paper aims to identify the ways forward, it focuses on a couple of EU initiatives that indicate the potential for development, predominantly driven by the support to cross-border judicial cooperation in criminal matters.

Keywords: • criminal procedure • criminal proceedings • e-Justice • e-evidence • videoconference • fundamental rights

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1 Introduction

The rapid development of technologies in the recent decades has changed dramatically the social relations not only in Bulgaria, but throughout the world. The law, being a reactive science, has to adapt to these changes in order to allow citizens and companies alike to enjoy the same level of comfort and flexibility when it comes to the interaction with the government. But how this would translate when it comes to a sensitive area as the fight against crime and justice?

This paper examines whether and if so, how the advent of technologies has influenced (or not), the legal foundations of criminal justice in Bulgaria. It investigates the many dimensions – departing from soft law, going through classic legal- and case-law analysis, to arrive at mapping the possible future developments one can expect in the area of fundamental rights and criminal procedures. The authors have strived to provide a comprehensive narrative when it comes to outlining the Bulgarian *status quo*, describing the level of e-Justice in Bulgaria, the relevant legal provisions and their practical implementation, and identifying drivers for further change in this realm on a EU level.

2 Methodology

2.1 Overview

This paper is structured into 8 interrelated sections. Section 1 "Introduction" sets the tone for the reader noting at the subject matter. The present Section 2 "Methodology" provides an overview of the integral parts of the paper and highlights their main objectives, alongside a presentation of the research methods applied.

Sections 3 to 5 contain the core of the paper. Section 3 provides an argumentation why ICTs are more and more important for the judicial system in general. The section further refers to the national context, presenting the efforts that took place in Bulgaria in view of ICTs introduction to the judicial system, notably the e-Justice. Since the subject matter of the paper is the crosslink between ICTs and criminal procedure, Section 3 also deals as to what is the role of ICTs in such a context.

Section 4 investigates the *status quo* – how ICTs are currently regulated and applied across the criminal procedure chain in Bulgaria. The section outlines the applicable legal bases, examines the current practices through case law analyses, namely evidence collection and cross-border judicial cooperation.

Section 5 aims to predict the future use and uptake of ICTs using European Union's initiatives to make informed predictions. The section is divided into sub-sections: one examining likely scenarios based upon ongoing efforts in the field of judicial cooperation, and one zooming on the initiative for a new legal framework regarding digital evidence.

Section 6 concludes the paper, summarizing the main findings of each of the core chapters. The section further provides some general observations in terms of what type of legislative changes could be expected in the near future as a result of the broader application of ICTs in the area of criminal justice.

2.2 Approaches used

The current paper is a result of the combination of methods. Firstly, literature review was conducted aiming to examine how Information and Communication Technologies (ICTs) are viewed trough the prism of criminal procedure, and on the other hand – to assess viable paths for the enhance of ICTs use in the judicial system. Additionally, the authors carried out legal and policy analysis construing the pertinent provisions from Bulgarian legislation alongside strategic documents from national importance. Last but not least, this paper also benefited from case law analysis which contributed to the better understanding of the law and its practical application filling in any possible gaps.

It should be noted that the current paper uses the term **ICTs** in the meaning of technologies that provide access to information through the use of telecommunications. They represent a wide range of methods for transmitting large spectrum of different types of information. The list of technologies that fall under the understanding of ICT is non-exhaustive and permanently growing. It ranges from the still widespread usage of phone lines to the use of cloud service and Artificial Intelligence.

Another broadly used term in this paper is "e-evidence". For the purpose of this paper, e-evidence is to be construed as data (comprising the output of analogue devices or data in digital format) that is manipulated, stored or communicated by any man-made device, computer or computer system or transmitted over a communication system (Dholam, 2017).

3 Why Information and Communication Technologies needs to be reviewed from criminal procedure point of view?

3.1 Information and Communication Technologies and their relevance to the Bulgarian law

ICTs have changed radically how people live, communicate, work and learn. They are continuously transforming the economy by making it more flexible and independent and have their impact in the advancement of the legislation procedures. Nowadays ICTs combine a large number of components: Cloud computing, Software, Hardware, Transactions, Communications technologies, Data and Internet access (Rose, 2019). This widespread ICTs influenced social relations as well, and even have given a whole new connotation of certain fundamental rights – e.g. the right to privacy and the freedom of expression have new meanings in a digital environment.

ICTs have been adopted not only in the daily life of citizens but also optimised the functions of public bodies, enabling more and more electronic governmental services. When it comes to the judicial system, however, at a first glance it seems like the integration of ICTs is obsolete. Nevertheless, the citizens grown accustomed to more and more services available in electronic form have similar expectation when it comes to judicial proceedings as well. Additionally, ICTs provide opportunities for the judicial system to function in a more efficient manner and better organise internal procedures.

3.2 Electronic Justice Concept in Bulgaria

The national concept for electronic justice is an integral part of the overall comprehensive electronic government strategy of 2012 and thus is not considered as novelty in Bulgaria. The concept faced several challenges including both political disputes as well as challenges in the legislative adoption, but now it is viewed as a component of the ongoing reform in the judicial system. The aim of the concept is to achieve the same level of effectivenesss of procedural rights exercise in electronic form as the one currently attached to procedural rights exercised in the paper-based environment by amending the current legislation. Thus, the national concept for electronic justice aims to ensure that procedural rights are equally protected in electronic and paper-based format.

The term e-Justice itself covers a complex of organisational, financial, technological, educational, and legislation measures aimed at the effective usage of information and communication technologies in the judicial system. In particular, it includes the objectives to ensure the opportunity for citizens to exercise their procedural right in an electronic form, to ensure the issue of judicial acts in electronic form from the relevant authorities and to facilitate the internal processes organisation and the exchange of electronic documents between the different participants in the judicial system. (Dimitrov, 2015).

The introduction of the e-Justice system as part of the e-Government is crucial for the boost of public trust in the governmental institutions. This could not be done solely with the introduction of a single legislative act or with amendments to the existing ones. It represents a long process that needs to take into consideration the legislative characteristics of the Bulgarian legal system, the current condition of the judicial system and its readiness to undergo a reform of such scale.

The concept for e-Justice, accepted and ratified by the Council of Ministers in 2012 defines e-Justice as a precondition so that ICTs are used at full extend to ensure effectiveness and transparency of the judicial system as well as to enable natural and legal persons to exercise their rights. (Concept for E-Justice, 2012). The concept also provides an overview of what would be the main advantages of the introduction of the e-Justice system:

- First, the **e-Justice system is to be paperless**. The concept states that the judicial system is to work entirely without the use of paper documents. Apart from the positive economic effects, the paperless system will prevent the loss of documents and will accelerate the exchange of information between judicial authorities. This should be implemented for evidence likewise as an effective way for the preservation of the integrity and storage of the documents, especially when it comes to e-evidences. One crucial exception should be made regarding the criminal procedure – paper evidence relevant to the criminal proceedings because of the traces left on them as a result of the crime must be archived in the manner provided by the Criminal Procedure Code. For the system to be secure and reliable certain security and organizational measures should be implemented which will guarantee the right to fair trial and other basic human rights. Additionally, digitising the judicial system will further the efforts related to statistics, and thus will enhance evidence-based policy-making.
- The introduction of opportunities for exercising procedural rights and manifesting procedural acts in electronic form must be **a right of citizens and legal entities and not an obligation** of them. In any way, they should not be obliged to exercise their rights electronically. The e-Justice system should only broaden the ability to exercise ones' right, and not only alter the way in which rights can be exercised. They should not be deprived from the possibility of exercising their rights in the classical way by submitting paper documents.
- Next, the e-Justice system must ensure **guaranteed operational knowledge and information security.** The concept envisages the creation of a Unified Centralised Information System maintained and supported by the Supreme Judicial Council in Bulgaria for each of the judicial authorities. This way, judicial authorities would be able to exchange information between each other without using any other internal systems or websites. This system should be compatible with the Unified System for Exchange of Electronic Documents which is part of the e-governance system. This would support the faster exchange of information between governmental authorities. The e-Justice system is to be also compatible with the Unified Information System for Combating Crime. The latter was created in 2013 as a system that contains information for the opening of pre-trial criminal proceedings, including all acts handed down by the prosecution and investigative bodies, information of the trial phase of the criminal proceedings encompassing all three instances, the execution of criminal penalties, as well as an analysis of all or thematically selected proceedings.
- One of the main advantages of the e-Justice system is that it is more **economical**. The introduction of the e-Justice system and a United Information System will resolve the difficulties and cut down the expenses related to maintaining several different information systems. It will also exclude the need for the persons concerned to go to the courthouse in order to receive certain documents, thus making access to judicial institutions and justice in general easier.

- Another major advantage identified in the e-Justice concept is the enhanced **transparency** of the actions of the judicial authorities which the system will bring to citizens and legal entities alike. With the added instruments they will be able to observe the motion of their documents, why they are delayed and if they are rejected - for what reason and what needs to be changed so they could be accepted. Transparency is vital for achieving better access to justice and it must also cover cases involving Bulgarian citizens living in other states.
- Finally, the e-Justice system will contribute for the better **flexibility** of the judicial system. The introduction of e-procedural acts and the usage of the centralized system will lead to better and easier exercise of the procedural rights and freedoms of the participants in the respective judicial proceedings. The e-Justice system would contribute to acceleration of the litigation process and potentially provide a solution of a major problem met in the Bulgarian judicial system – the relative slow speed of the judicial proceedings.

Based on the e-Justice concept, the possibility for performing procedural acts in electronic environment was introduced in the civil and administrative proceedings in 2016. In terms of the criminal proceedings, the implementation faces several challenges. The full implementation of ICTs in the criminal procedure could be only carried out after the necessary legislative amendments have been adopted and their use has been established in the practice of the justice authorities. The Bulgarian Criminal Procedure Code (BCPC) introduces limited possibilities for the use of ICTs related to the submission of evidence and the conduct of procedural acts involving witnesses. However, judges and prosecutors managed to increase their application, aware of the possibility that ICTs offer them in order to achieve better efficiency in the criminal procedure, as observed in the recent case-law practice.

3.3 Why Criminal Procedure requires the usage of Information and Communication technologies? What has changed over time?

In view of the rapid advancement of ICTs and the dynamics of the social relations and particularly the introduction of ICTs in several areas of the Bulgarian legal system, their regulation in the context of the criminal procedure is inevitable. Their implementation and usage is likely to affect positively certain areas in the Bulgarian criminal procedure, some of which currently face several problems such as digital forensics and international cooperation.

The BCPC provides a rich complex of rights for the accused and defendant in the two stages of the criminal proceedings which enable them to guarantee their legitimate interests. The use of ICTs in this direction could help to ensure the exercise of these rights. One of the most central rights (also established at EU level by Directive 2016/343) is the right of the accused to be present at his/her criminal trial. A number of other rights of the accused person derive from it – to provide explanations, to ask questions, to make

evidence claims, to have the last word in the proceedings and to hear his/ her verdict. All of those rights are established in the BCPC and could be further enhanced with the usage of ICTs in the form of video conference which could be used not only for the examination of witnesses, but also to ensure the participation of the accused in the proceedings provided that they are not located on the territory of Bulgaria, or is in other way impeded to be physically present.

The successful prevention of and fight against crime requires an effective and functioning criminal justice system. The introduction of ICTs in this direction could lead to a solution with the problem of the efficiency of the criminal proceedings in Bulgaria. Statistical data shows that the trust in the criminal justice system in Bulgaria remains low. Less than half of the adult population gives a positive assessment for the work of Law Enforcement Authorities, and for the court authorities - one in every five citizens. (Public Trust in Criminal Justice – Assessment tool for Criminal Policy, 2011) The low level of public trust in the Court and police is also determent by the high level of corruption in this institution. (ibid.). The use of ICTs could lead to a solution to this problem by providing access to information in order to reduce corruption by increasing transparency of institutions and raising citizen's awareness. On the one hand, the legal possibilities for participants in the criminal procedure to effectively exercise their rights could potentially benefit the right to fair trial. On the other hand – the massive use of ICTs enables better data collection, the evidence-based policy-making and public trust as it renders the efforts in the criminal law chain more visible, and enhances the feeling of accountability of the law enforcement, the prosecution and the judiciary.

As it was mentioned above, the introduction of ICTs could lead to a solution of the significant problem of slow criminal proceedings in Bulgaria. This is a problem that results a breach of the requirement of a fair trial established by the European Convention of Human Rights (ECHR). As it is stated in Article 6 para. 1 of the ECHR, judicial proceedings are to be conducted within a reasonable time. The purpose of the criterion "reasonable time" under Art. 6, para 1 is to ensure that within reasonable and due time and by a conviction (or a judicial decision) the end to the precarious situation in which a person is located from the moment of indictment would be put. The requirement for a reasonable period is the subject of many judgments of the European Court of Human Rights, against the Republic of Bulgaria, notably Dimitrov and Hamunov v. Bulgaria (Margaritova, 2015). The wider of ICTs might speed up pending criminal cases by enabling better evidence collection, enhanced scheduling and faster exchange of information between the competent Courts in the context of the three-instance judicial system in Bulgaria.

Finally, the use of ICTs can support international cooperation in criminal matters in resolving a cross-border cases. ICTs could be implemented within the framework of international legal aid in the exchange of information and the summoning of witnesses and accused persons by electronic means via e-mail, questioning by delegation through

the video conference and carrying out a joint investigation and Procedural actions at a distance.

4 How Information and Communication Technologies are currently used in the Criminal Procedure? Sharing the Bulgarian experience.

Although the strategy for e-Justice is yet to be implemented in its full capacity in Bulgaria, the criminal procedural law does include provisions that address, to a limited degree, the use of ICTs under the framework of the criminal procedure. They mostly refer to means for collection of evidence both oral and material but are also in line with the relevant EU provisions for judicial cooperation in criminal matters in cross-border cases.

4.1 Legal Bases for ICT usage.

The BCPC establishes the main legal bases for the use of ICTs as outlined above. The Bulgarian case law also gives further clarification on the requirements for the lawful usage of ICTs. In relation to the two most frequently used cases of their exercise in the criminal proceedings, one may establish the following requirements.

First, the use of **videoconference** is one of the possible usage of ICTs for questioning accused persons or witnesses. The relevant provisions that establishes the legal basis for their use are Art. 115, para 2, BCPC, Art. 138, para. 7 BCPC and Art. 139, para 7 BCPC which regulate the legal possibility of questioning the accused or a witness by delegation[7] or via videoconference in cases where they are located abroad. Art. 474 of the BCPC further provides the requirements and procedures of these investigative measures. However, after thorough analysis of those provisions, it is evident that questioning by videoconference or by delegation is only admissible in cases where the conduct of the investigative measure would not hinder the ascertain of the objective truth of the case. Further, according to the provisions of Art. 474, para 1 and para. 6-8 from the BCPC, the interrogation via videoconference of the accused may be held only with their prior consent. Lastly, there exists an additional requirement which is linked to international cooperation in criminal matters and is applicable to the questioning of a witness or an accused person by the judicial authorities of another country. Article 474, para 1 of the BCPC states that questioning of the accused/witness by another country could be only conducted if this does not defy the main principles of the Bulgarian law[8].

Of substantial interest is the requirement to ascertain the objective truth. Although this requirement is established as a principle of criminal procedure, there is no legal definition of "objective truth". The principle is related to the Court's duty to find the facts that are objectively true. The Court assesses, on the basis of all the circumstances of the case, whether the hearing by videoconference will affect the uncover of the objective truth and decides whether or not to allow the conduction of this investigative manner.

In relation to the **collection and admission of evidence**, the BCPC does not contain any legal provisions regulating specific requirements for the usage of ICTs in the criminal procedure. Here, their implementation needs to follow the main requirements in the law regarding this matter. The main legal requirement regarding the collection of evidence is that they are to be collected through one of the investigative methods exhaustively listed in Art. 136, para 1 BCPC – interrogation, expertise, inspection, search, seizure, investigation experiment, identification of persons and objects and special investigative actions. If certain evidence is not collected using one of those methods, it is not admissible by the Court and it would not be taken into consideration when solving the case. In order for the evidence to be admissible there are two more cumulative conditions - the evidence has to be linked to the subject of proof and it must contribute to clarifying the circumstances of that subject.

4.2 Existing issues of ICTs' use under Criminal Procedure in Bulgaria.

As stated in the previous section, currently, the BCPC envisages the use of ICTs in the framework of an ongoing criminal proceeding in two major cases – on the one hand, ICTs are one of the methods facilitating evidence collection, in particular facilitating witness' hearings (i.e. Art. 139, para 7, 8, 9 and 10), and on the other – they are regulated in view of the submission and assessment of electronic evidence (Art. 125).

4.2.1 ICTs as a bridge to better evidence collection

When it comes to the first case of ICTs use in ongoing criminal proceedings – remote hearing of a witness, a brief review of the current court practice in Bulgaria reveals that the provisions of Art. 139 dealing with the remote hearings are rarely used. In particular, Art. 139, para 7 BCPC which regulates cases where a witness is to be heard remotely via videoconference or teleconference provided that the respective witness is outside the territory of Bulgaria is widely unrecognised[9]. The same observation could also be made with regards to the next provision - Art. 139, para 8 BCPC providing for remote hearing of a witness located within the territory of Bulgaria. With regards to the latter, it is interesting to note that this provision finds its most frequent application in cases where undercover agents are delivering oral evidence with respect to a criminal case[10]. The most recent amendment in the direction of using video-/ tele-conference as a method for collection of oral evidence has been added in 2017 as part of Directive 2012/29/EC national transposition. This particular provision is introduced essentially with the aim to provide a higher level of protection to victims with special protection needs (i.e. minors, victims of violent or sexual crime, victims of human trafficking, Art. 22, para 3, Directive 2012/29/EC). The provision of Art. 139, para 10 stipulates that such a victim might be heard using ICTs as means so that the harmful consequences for them are led to the bare minimum, and thus the victim could more easily overcome the trauma suffered (Kozhuharova, 2018)[11]. Similarly to the rest of the provisions dealing with remote hearing, the potential of this ones also remains unexplored, to an extent where relevant

court practice on the application of the provision in question is yet to be developed. At the same time, it should be reiterated that benefitting from the presented provisions in this section would contribute to the better and more efficient criminal justice as they provide valuable addition to the Court's arsenal for evidence collection.

4.2.2 Perception of e-evidence in Bulgaria

Examining the second case where the BCPC envisages the use of ICTs, one first needs to bear in mind that this does not represent a direct implementation of new technologies with the goal to digitise the judicial system, but is rather related to the progress of the social relations which inevitably entail the wider of use of technology in the everyday life. To this end, the need for collection and examination of evidence in electronic form (or e-evidences) is ever growing. Before the Bulgarian legislation and practice in this regard could be presented in the current paper, firstly the nature of e-evidence needs to be clarified.

Circling back to the Bulgarian *status quo*, it is worth noting that the BCPC does not explicitly regulate e-evidence. Interpreting the provisions of the Code that deal with evidence, one can make an assessment that e-evidence are treated as material evidence (Art. 125 BCPC), in particular as "computer information data". Special provisions are, however, available when it comes to metadata collection – Art. 159a BCPC, and when it comes to evidence collection through special investigative means – Art. 172 – 177 BCPC.

Looking at the classical case where evidence is contained within an electronic device, there is but one provision in the BCPC that details how this type of information is to be submitted to the court. Art. 135 BCPC lays down that e-evidence, in particular "computer information data", is to be submitted to the court via a paper document as a medium for the information. This poses practical challenges (Mluchkov, 2018) as it might result in information overload, since often computer systems would contain a large volume of information, which would make it difficult to zoom in on the piece(s) of evidence, relevant to the subject matter of the case. Again, the national court practice in this regard is rather scarce, so one cannot make an evaluation as to how the Bulgarian Court treats e-evidences.

For the purpose of comprehensiveness of the current paper, the provisions of Art. 159a BCPC are also to be presented herewith. They deal explicitly with the collection of metadata by digital service providers upon the request of the law enforcement authority or the prosecution office. It should be noted that in Bulgaria, metadata could be requested in limited amount of cases – where a serious intentional crime is being investigated[12]. Then, in order to oblige the respective service provider to grant access to the metadata, a court order needs to be issued to that end. The review of the case-law practice when it comes to the application of Art. 159a BCPC demonstrates that the provision is well recognised by the judicial community in Bulgaria, and is applied in numerous cases[13], not

only to the so-called computer crimes[14]. Thus, one might conclude that in the future more and more cases would consider that role e-evidence play, as nowadays most crimes include a digital dimension (Dholam, 2017).

Last but not least, information on the regime of the special investigative means is to be presented. Due to the sensitive nature of the latter, there is no publicly available information as to what the methodology or the technique used to collect evidence is. The BCPC only goes to the length to stipulate the rules that need to be respected so that the special investigative means are implemented in a lawful manner. The primordial prerequisite in this regard is that the special investigative means could be applied only (1) pursuant a Court order (art. 174 BCPC); and (2) to cases listed *numerus clausus* (art. 172, para 2 BCPC). Digital service providers could be obliged to support the application of special investigative means – art. 172, para 3 BCPC, when it comes to collection and recording of digital data. The BCPC is lagging behind the development of ICT technologies and the law regulates the data as "computer information data". During the preparation of the current paper no case law was found confirming the assumptions of the authors that this provision could be construed to include in its scope electronic data in general, and not solely "computer information data".

4.2.3 Use of ICTs in the context the European Investigation Order.

The historic interpretation of the BCPC leads to the conclusion that most of the novelties introduced in the legislation are either the result of the practice of the European Court of Human Rights, in particular the decisions against the Republic of Bulgaria (see Dimitrov and Hamunov v. Bulgaria), or transposition of *EU acquis* (Kozhuharova, 2018). When speaking of ICTs penetration in the criminal procedure, the ever-evolving EU secondary legislation plays a vital role. In this regard, the adoption of the Directive 2014/41/EU regarding the European Investigation Order in criminal matters (EIO Directive) is to be noted.

In Bulgaria, the EIO Directive is transposed in 2018 via the adoption of a dedicated legal act – the Act on the European Investigation Order (EIO), which implements the Directive almost in verbatim. Although this legal act is still rather new, there is already case law practice available[15] - both in the direction where the EIO has been issued in Bulgaria, and where the EIO requires the national authorities to conduct procedural acts on behalf of their European colleagues. This development comes to confirm that ICTs adoption in the criminal procedure is facilitated and fastened by *EU acquis* aiming at the more transparent and efficient criminal justice.

5 Plausible future developments related to Information Technologies' use in the Criminal Procedure

Observing the pace technology develops, and noting EU ambition to provide for a higher level of security and protection to its citizens through regulating these new societal relations, it is without a doubt that novel legislative solutions might be expected in the field of criminal matters, and in particular when it comes to the criminal proceedings. This necessity is sparked by two factors: 1) new types of crime emerge and this needs to be reflected in the respective material law, and 2) the digital dimensions to both cyber and non-cyber crimes give birth to the necessity to collect and examine new types of evidence, which might entails the introduction of changes in the respective procedural codes. Although the EU does not have the competence to adopt legal acts with direct effect on a member state level in the area of criminal matters, the Union has been quite proactive in developing soft law instruments and Directives to enhance the judicial cooperation by establishing minimum standards. Speaking of ICTs wide application in the criminal procedures, there are two notable initiatives of the European Commission that might set the tone for evolution in this field in the coming years: e-Evidence exchange and the Procedure of Production and Preservation Orders

5.1 e-Evidence exchange

The first initiative in this regard are the European Commission efforts in facilitating the exchange of electronic evidence between the judicial authorities in the member states. What is particularly relevant to ICTs implementation in the criminal procedure, is that Art. 13 of the EIO Directive itself does not specify how evidence is to be exchanged. In this relation, one has to note the cross-border IT system for exchange of judicial documentation that is currently being established. In the beginning of 2018, the European Commission launched a consultation procedure (inception impact assessment) in view of the introduction of a Cross-border e-Justice in Europe Regulation, also known as e-CODEX. The inspiration behind this process lies in the results of the successful implementation of an EU-supported project - e-Justice Communication via Online Data Exchange (e-CODEX) where the technical foundations of a system for e-evidence exchange were laid down[16]. The concept of the e-CODEX system envisages support to exchange of e-documents in relation to both ongoing civil and criminal procedures (European Commission, 2018). Having such a system in place will allow the prompt judicial cooperation in cross-border criminal matters cases but will also facilitate the practical implementation of ICT technologies in the criminal procedure.

Furthermore, the inception impact assessment reports on the identified potential for the better implementation of fundamental rights. On the one hand, EU citizens will have easier access to legal remedies to effectively protect the procedural rights they are entitled to regardless of their location essentially empowering them to enforce the respective rights on the territory of the whole EU without the need to travel and incur costs, and on

the other – the access to justice will be speeded up as digitization will render the process less time consuming (ibid.).

5.2 EU efforts on establishing the Procedure of the Production and Preservation Orders

In April 2018 the European Commission published a draft Regulation (on European Production and Preservation Orders for electronic evidence in criminal matters) and a draft Directive (laying down harmonised rules on the appointment of legal representatives for the purpose of gathering evidence in criminal proceedings) with the aim to establish a new legal regime throughout the EU when it comes to electronic evidence seizure and obtain. The idea behind this initiative is to enable the judicial authorities to directly obtain evidence from a digital services provider without the need to pass through burdensome and time-consuming administrative procedures. The legislative package introduces two types of procedures, namely:

- European Production Order - a binding decision by an issuing authority of a Member State compelling a service provider offering services in the Union and established or represented in another Member State, to produce electronic evidence.
- European Preservation Order - a binding decision by an issuing authority of a Member State compelling a service provider offering services in the Union and established or represented in another Member State, to preserve electronic evidence in view of a subsequent request for production. (Proposal for a Regulation of the European Parliament and of the Council on European Production and Preservation Orders for electronic evidence in criminal matters, 2018))

What is particularly interesting, is the territorial scope of the draft legal instrument. Similarly, to the General Data Protection Regulation, this Regulation is applicable to service providers who offer services on the territory of the EU. In practice, this means that service providers would not be able to deny the request for provision of e-evidence on the ground that the requesting Member State does not have jurisdiction to issue such. Thus, evidence is to be provided regardless of the location of the service provider and the data centres they use. This would enable the judicial authorities to have access to all evidence that are relevant to a particular case.

Currently, cases requiring the seizure of such information have to follow the procedures as established by the relevant Mutual Legal Assistance Treaty. These procedures are however heavier in terms of their administration, they require more time for implementation, and do not necessarily cover all jurisdictions that might be concerned by such a case.

The proposals for the Regulation and the Directive are still at a very early stage of development. They are yet to pass by the European Parliament and to be agreed upon

with the Council of the EU. Still, their inception is indicative of the direction criminal matters would develop in the future.

Going back to the national context of this paper, this entails another 'push' of the EU towards the evolution of the national legislation. In reality, the Bulgarian criminal procedure would have to change so it accommodates the rules set on pan-EU level.

6 Conclusion

This paper presented a brief overview of the *status quo* in Bulgaria when it comes to the variety of legal instruments regulating the penetration and use of ICTs in the criminal procedure. To this end, soft law instruments, as the strategy of e-Justice were firstly presented as to provide contextual information. Although no reform to this end has happened in practice in Bulgaria, this policy document demonstrates that the Bulgarian legislator has deemed as early as 2012 that there is a need to introduce changes in the judicial system, so it corresponds better to the development of technology in the everyday life of people. This is particularly relevant to the field of criminal matters due to two reasons: First, many crimes nowadays happen with some connection to ICTs, thus, the Penal Code must be adapted to new forms of crimes and the Code of Criminal Procedures must be adapted to accept new evidence. Second, there exist capabilities of ICTs to support the timely access to justice. The associated transparency with ICTs introduction is also noted as a positive outcome of the to-be implemented reform, ultimately contributing to the increase of the citizens towards the judicial system.

The paper shows that even there is no reform yet, ICTs are present in the criminal procedure, mostly in relation to the collection of evidence, both material and oral. The paper describes the e-evidence currently used in the Bulgarian court, using as a foundation legal and case-law analysis. Further, the paper presents the recent case-law in that direction, noting that some the provisions (notably those referring to the use of remote hearings) remain unused, while those referring to electronic evidence are with more robust application.

It is particularly interesting to note that most of these changes are actually a result of EU-driven policies and are related to the transposition of a variety of directives aimed to support judicial cooperation in criminal matters. To this end, at its very end this paper looks beyond the *status quo* at the EU horizon. The authors have distinguished two main fields where further developments are to be expected – the introduction of an IT system for e-evidence exchange with regards to the easier cross-border cooperation, and the establishment of a new legal regime when it comes to the seizure of e-evidence regardless the location of the service provider, so that EU law corresponds to the current dynamics of the societal relations.

Notes:

[7] The Bulgarian Criminal Procedural Code (BCPC), Art. 108, provides that an accused or a witness might be interrogated by the Court which was jurisdiction in the location where the former is residing.
[8] See Judicial ruling 127/15.01.2013, Sofia District Court.
[9] Some of the cases where it was applied – Judicial Decision 151/ 15.07.2010, criminal case 223/2010, Plovdiv Regional Court, Judicial Decision 10/11.04.2017, criminal case 322/2016, Appellate Specialised Criminal Court
[10] This is notably distinguishable in the court practice of the Supreme Court of Cassation, i.e. Judicial Decision 457/19.01.2015 Г, criminal case 1225/2014; Judicial Decision 201/ 07.05.2015, criminal case 365/2015; Judicial Decision 304/23.01.2017, criminal case 1204/2016; Judicial Decision 14/13.02.2017, criminal case 1225/2016.
[11] More information of Directive 2012/29/EC transposition in Bulgaria, could be found in E-PROTECT Country report on the transposition of Victims' Directive in Bulgaria, available at: http://api.childprotect.eu/media/5c13c9ae212ca.pdf
[12] According to the Bulgarian Criminal Crime, a serious crime is a crime that is punishable by at least 5-year deprivation of liberty.
[13] I.e. the reviewed cases included extortion via dissemination of untruthful statements online, Judicial Decision 15/11.07.2018, criminal case 330/2017, Appellate Specialised Criminal Court .
[14] The Bulgarian Criminal Code include a number of crimes, clustered under the term "Computer crime" which refer to illegal access and hacking of computer/ information systems.
[15] The practice mostly derives from judicial rulings of appellate and cassation level, i.e. Judicial Ruling 574/ 08.10.2019, Plovdiv Appellate Court; Judicial Ruling 509 /27.08.2019, Plovdiv Appellate Court; Judicial Ruling 145/ 02.09.2019, Appellate Specialised Criminal Court,
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LEX LOCALIS

Being Present in the Administrative Criminal Law: Regulation on Presence of the Hungarian Petty Offence Procedure

ISTVÁN HOFFMAN

Abstract The petty offences have a dual nature in majority of the European continental legal systems: they are on the crossroads of administrative and criminal law. A similar model evolved in Hungary after the 19th century. The Hungarian regulation on petty offences has moved between administrative and criminal law. Although art 6 of the ECHR is interpreted broadly by the ECtHR, the European Union legislation (the Directive 343/2016/EU) cannot be applied in the Hungarian petty offence procedures. Despite this narrow approach of the EU legislation, the main guarantees of the Directive are prevailed by the major petty offence cases. If the procedures can result a detention nature punishment (in Hungary: *elzárás* – custodial arrest) the guarantees of the presence of the defendants mainly prevails. In more administrative – thus minor – cases in Hungary simplified and administrative nature procedural rules are applied. However, the significance of the administrative criminal law is decreasing in Hungary, especially the rise of the 'administratisation' of the liability for minor infringements.

Keywords: • petty offence • right to fair trial • presence in criminal cases • Hungary • procedure • dual nature • practice of ECtHR • Directive 343/2016/EU

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1 Introduction and methods

The petty offences are crossroads cases between administrative and criminal law, therefore the analysis of the procedural regulation on them can result a comparison of the approaches of the different legal systems and the different legal regulations. Hungary has a continental legal system – which approach survived the age of the Soviet law, as well (Kühn, 2019: 187-188). The Continental – Civil Law – approach was the base of the evolution of the Hungarian regulation, which was influenced strongly by the Soviet Law after 1945. The administrative nature of the Hungarian petty offence law was strengthened by it, thus the had real mixed nature which has been transformed after 2012: the petty offences became the field of administrative criminal law (Nagy, 2012: 218).

The analysis of the relation of the Hungarian petty offence procedures in the light of the presence of the persons subject to proceedings can show the challenges of the European regulation and its limitations. The primary method of the review is jurisprudential, but the social impacts of the regulation will also be partly analysed. Because of the paradigm shift of the Hungarian legislation after 2012, the article will contain a short historical outlook, as well. By this method the challenges on the Hungarian petty (minor) offence system and the answers of the Hungarian legislation could be observed.

2 Short historical outlook – the beginning of the modern Hungarian criminal and criminal procedure law

The modern Hungarian criminal and criminal procedure law begun to evolve from the late 18th, early 19th century. The National Commissions which were elected by the Parliament in 1791 begun to evolve drafts for the codification of the Hungarian law, especially the criminal and the civil law. Although these drafts were not codified, the codification process continued during the 19th century. One of the most important draft was the draft of 1843/44 on the criminal and on criminal procedure law (Mezey, 1996: 213). Parallel to the codification process a new type of offense have been evolved in the Hungarian legal system, the minor offences *(áthágás, kihágás)*. This new type of offense had just partly criminal nature, because typically they were sanctions for the infringement of the administrative regulations (for example regulations on public health, building inspections, traffic control) (Nagy, 2000: 19). The regulation on the substantive law of the petty offences was codified during the codification of the Hungarian criminal law in the late 19th century. The Hungarian criminal law used a trichotomous system among the criminal acts. The most serious criminal acts were the crimes *(bűntett)*. A less serious category was the misdemeanour *(vétség).* These two types of criminal acts were regulated by the Criminal Code, by the Act V of 1878. The third category of the trichotomy, the petty offences *(kihágás)* were regulated separately, the substantive law was regulated by the Act XL of 1879 on the Criminal Code for the Petty Offences. Although there was an Act of Parliament on the petty offences, but their administrative nature could be observed by the model of the regulation. Petty offences could be introduced and regulated by

administrative bodies: by the decree of the ministers and by municipal decrees. The crossroad nature of the regulation could be seen by the procedural rules which were fragmented. The procedural legislation was based on the activities of administrative bodies, because mainly decrees of ministers (and not the Act of Parliament) were passed. A standardisation has taken place in the early 20th century: new, standardised rules were passed in 1909 on the procedure of the police bodies in the field of petty offences (Decree of the Minister of Interior No. 65.000/1909 on the Regulation of Police Criminal Activities). The dual nature of the petty offences remained after the codification: firstly, the Criminal Code on Petty Offences were based on the German *Polizei* concept, thus the petty offences were partly minor offences, partly infringement of the administrative regulations (Nagy, 2000: 22-23).

After the World War II the Hungarian Criminal law was transformed by the new Soviet-type regime. The former trichotomous system was changed and in 1950 a dichotomous model was institutionalised, only crimes and petty offences were regulated. In 1953 a new sanction was introduced, the *szabálysértés*, which was an administrative act, and its procedure was considered as an administrative one. In 1955 the petty offences as criminal acts were abolished. Although majority of the former petty offences were transformed into the new category, but it was institutionalised as an administrative act, therefore the guarantees of these procedures were merely administrative. In 1968 the legal regulation of the administrative petty offences, the *szabálysértés* was codified by the Act I of 1968. Although the major rules on them were regulated by an Act of Parliament, majority of the petty offences were regulated by administrative decrees. The *szabálysértés* became a general form of the administrative sanctions, but the criminal elements and roots remained (Szatmári, 1961: 90). The procedure became more administrative several guarantees of the criminal procedures were regulated by the new Act.

After the fall of Soviet-type regime in Hungary it was necessary to recodify the legal regulations on the petty offences. The Hungarian petty offences are interpreted as criminal case by the European Court of Human Rights (ECtHR). And because of the administrative nature the Act I of 1968 was not consistent to the European Convention on Human Rights (ECHR). Therefore, a reservation was made by the Republic of Hungary during the Hungarian access to the European Convention of Human Rights (ECHR). Therefore the criminal nature of the substantive and the procedural law on petty offences were strengthened by the recodifications of the Hungarian law on petty offences in 1999 (Nagy, 2000: 80) and in 2012 (Nagy, 2012: 220-221).

3 Between criminal and administrative law: the petty offences in the Hungarian legal system

As it has been mentioned the petty offences have a dual nature in the current Hungarian legal system. Marianna Nagy summarised this dual nature, that the petty offences – which are regulated by the Act II o 2012 – are administrative criminal acts, those acts which

have a minor threat to the society. On the other hand, petty offences are partly sanction of the infringements of administrative regulations. These acts can be observed on a 'scale' between these endpoints. As we have mentioned, in the 19th century the criminal nature was more important, but the administrative elements became more important in the mid-20th century. The 'administratisation' tendencies of the petty offence law ended in the 1990s, when stronger, merely criminal procedural guarantees were required by the practice of the ECtHR. The Act on Petty Offences of 1999 has a 'criminalisation' tendency, but the new Act on Petty Offences of 2012 transformed the system. In 2012 the concept of 'administrative criminal law' has been revived (Kis, 2018: 40-45). This dual nature has challenges – like a Scylla and Charybdis. The first question is, whether the punitive power of the administration can be accepted by a system based on the separation of powers and the rule of law. Because the administrative procedures are mainly faster. But one of the main reasons of the faster administrative procedure is the lack of guarantees. And these acts can be interpreted as criminal cases, and the guarantees of the fundamental rights of the defendants are important in a legal regulation based on the concept of rule of law. Therefore, a compromise shall be found when both objectives can be fulfilled (Kis, 2018: 110-118).

The practice of the ECtHR is one of the major guidelines for the guarantees which are required by a legal system based on the rule of law and on the fundamental rights. The relevant regulation of the ECHR is the article on fair trial in civil and criminal cases, the art 6 (1) of the ECHR. The first question is whether this article can be or cannot be applied for the petty offence cases, because the fair trial in criminal cases are regulated by it. The answer is that a broad interpretation of the criminal cases has been evolved by the practice of the ECtHR. The landmark case of that interpretation was the case *Engel and others v. The Netherlands* (Application No. 5100/71; 5101/71; 5102/71; 5354/72 and 5370/72). The *Engel* case was on a military disciplinary procedure, but this procedure was interpreted by the ECtHR as a 'criminal charge'. In this case a test was created by the ECtHR to determine whether the given case can be or cannot be interpreted as a criminal case (criminal charge). The test has three elements. Firstly, it shall be examined the classification of the proceedings under national law. But this examination is not enough to determine the nature of the proceedings, therefore secondly the essential nature of the offence shall be analysed. And thirdly, the nature and degree of severity of the penalty – that could be imposed having regard in particular to any loss of liberty, as a characteristic of criminal liability – shall be analysed (White & Ovey 2010: 244). Therefore the the 'criminal charge' is interpreted broadly by the ECtHR. In the case *Pákozdi v. Hungary* (51269/07 an infringement of the art. 6 (1) was stated by the ECtHR. The case *Pákozdi* was about a judicial review procedure of a tax fine. A first instance court ruling – which avoided imposing a tax fine – has been reversed by a judgement of the Supreme Court. This judgement was delivered without trial. The ECtHR stated that the procedure on the judicial review of a tax fine decision can be interpreted as a 'criminal charge', because the nature of the procedure and the severity of the punishment, thus it met with the *Engel* criteria. Therefore, the Hungarian petty offences are obviously under the scope of article

6 (1) of the ECHR (Rozsnyai 2019: 108 and Nagy, 2000: 196-198). The *presence* and the *trial* should have an important role in these proceedings.

The dual nature of the petty offences law is mirrored by the Hungarian regulation on the proceedings of them. Although the transformation of the regulation has transformed during the last decades and the criminal nature of the petty offences has been strengthened, and the guarantees of the proceedings became more significant, there are several regulation on the simplification and on the speed up of these proceedings (Király, 2013: 125-132). The administrative nature of the proceeding is a dominant one in minor cases. The decisions are mainly made without hearing, the decision-making bodies are administrative authorities and not courts, and there are ample opportunities for immediate actions: spot fines can be applied broadly in these cases (Bisztricki & Kántás, 2017: 360-392). The criminal nature of the proceedings is mirrored by the procedural rules of the major cases. Those cases can be interpreted by major petty offences cases in which custodial arrest can be applied by the courts. Because of the possibility of the custodial sentence the decisions are made by the courts, as a guarantee. However, there are some regulation of speeding up the procedures, a hearing must be held as a principle Király, 2013: 231-237).

4 Being present in petty offences (?)

The presence of the defendant in the petty offence proceeding is a principle in these proceedings, but the general rule prevails only to a limited extent. The main reason of it that majority of the petty offences cases belongs to the *minor petty offences.* The procedure on minor cases has merely an administrative nature. Majority of petty offences cases were traffic offenses (in 2018 76,91% of the petty offences were traffic offenses according to the Hungarian Criminal Statistics System).[1] These minor cases can be decided by the administrative authorities. Till 2019 the decision in minor petty offence cases belonged primarily to the competences of the district offices of the County Government Offices and the police authorities. The system was unified from 1st January 2020, now the police authorities are the primary petty offence authorities. Therefore – similarly to other Eastern Central European countries (like Poland) (Czurik – Kostrubiec, 2019: 34-35) – the administrative nature of these procedures has been dominant. This administrative nature of the petty offences can be observed in the sanctions, as well. Vast majority of the petty offence punishments were spot fines which has been decided directly by the police and administrative authorities.

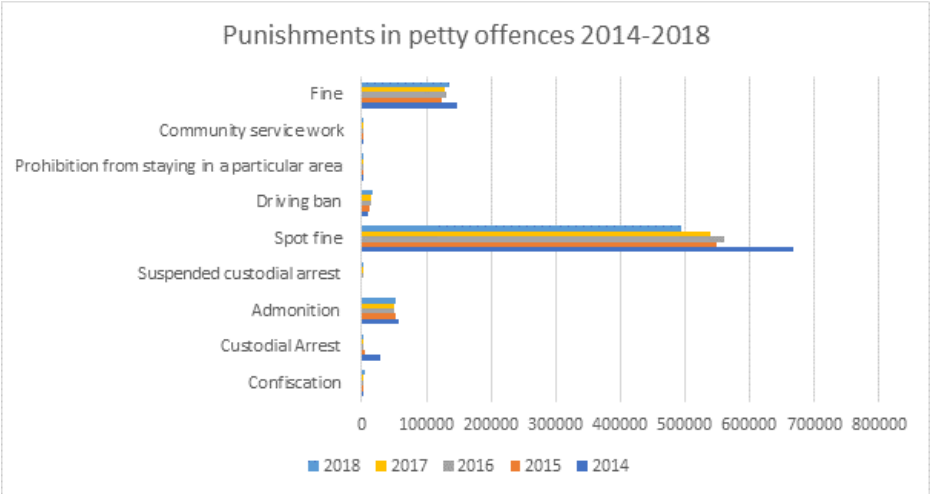
Table 1: Punishments in petty offences cases 2014 – 2018

Punishments	**2014**	**2015**	**2016**	**2017**	**2018**
Confiscations	666	452	560	3 542	4 919
Custodial Arrests	28 740	5 485	2 103	1 670	744
Admonitions	57 087	51 486	50 223	49 222	52 511
Suspended custodial arrests	-	-	3	35	11
Spot fines	667 320	548 774	560 516	538 806	494 104
Driving bans	10 266	11 348	13 967	15 252	16 556
Prohibitions from staying in a particular area	6	9	7	7	4
Community service works	2 514	1 925	1 807	1 472	706
Fines	148 143	124 177	130 908	127 925	134 302

Source: BSR - (https://bsr.bm.hu/Document, downloaded at November 5th 2019

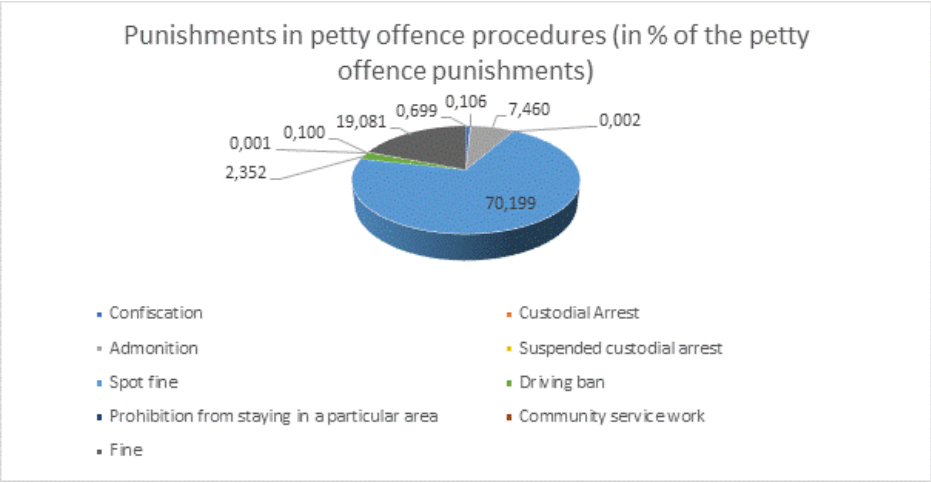
In the last five years spot fines have been the dominant form of punishments and even in 2018 70,58% of the them were spot fines (see Figure 1 and Figure 2). The share of the fines and spot fines were 89,28% of the petty offence punishments in 2018.

Figure 1: Punishments in petty offences cases 2014-2018



Source: BSR (https://bsr.bm.hu/Document, downloaded at November 5th 2019).

Figure 2: Punishments in petty offences in 2018 (in % of the punishments)

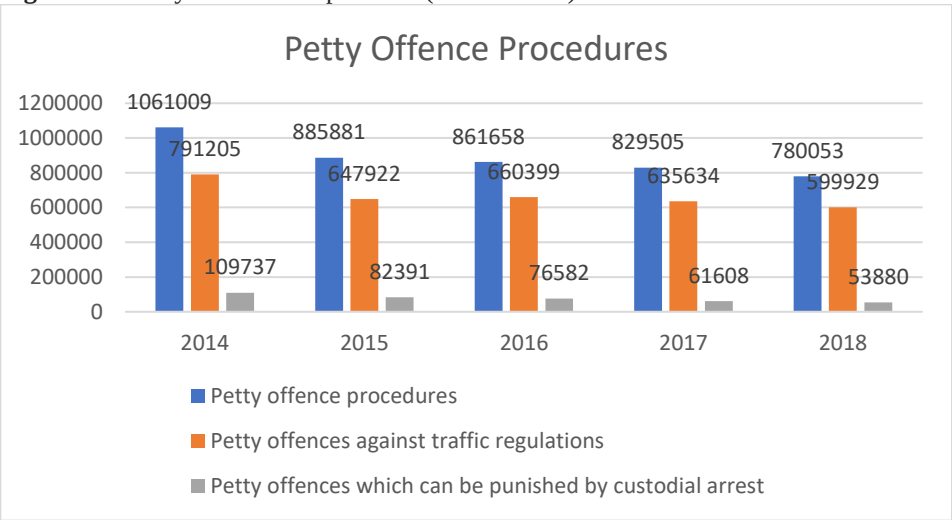


Source: BSR (https://bsr.bm.hu/Document, downloaded at November 5th 2019).

According to the European traditions and to the legislation in the field of fundamental rights – especially the requirements of the ECHR (interpreted by the ECtHR) – the presence is obligatory at the court procedures. The Hungarian regulation meets these requirements, because the possibility of the presence of the defendant is guaranteed in

petty offence cases, especially in the court procedures. First of all it should be emphasised that – as I have mentioned earlier – the court cases are just the minority of the petty offence cases: in 2018 6,91% of the petty offence cases belonged to the competences of the courts – see Figure 3).

Figure 3: Petty offence competences (2014 – 2018)



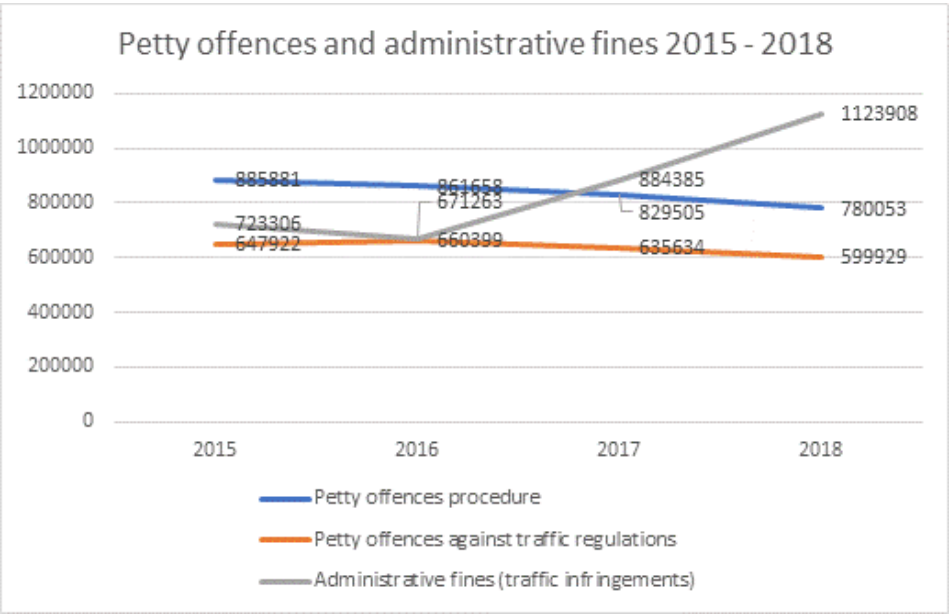
Source: BSR (https://bsr.bm.hu/Document, downloaded at November 5th 2019).

The presence of the defendant in court cases is a principle, but there are several cases – for example if the facts are clear and the hearing of the defendant(s), witnesses, victims and experts (expert witnesses) are not necessary – when the hearing is not required (Király, 2013: 198-202). If the petty offence decisions have been made by administrative authorities and the court procedure can be interpreted as a remedy, the trial and hearing is not required, but it is available upon request (Nagy, 2013: 330-335). Therefore, the presence is often not automatic, it should be requested. This is the reason, that the notifications on the procedural acts are important. These notifications are done mainly by postal services, but there is a possibility of electronic communication. The notification deadlines are very strict. If they are missed, the presence can be guaranteed hardly.

The importance of presence of subjects of the procedures are decreasing in Hungary. The number of the petty offence cases are constantly decreasing. The main reason of the is mainly the 'administratisation' of these infringements. Although the criminal nature of the petty offences has been strengthened since 1999, new forms of administrative liability have evolved in the first decade of the 2000-s. The new form of 'administrative fine' became the major form of the sanctions for traffic infringements. This fine is a purely administrative one: not only the procedure is an administrative procedure – regulated by

the General Code of Administrative Procedures, the CACP (Act CL of 2016) – but the liability in these cases is an objective one. The administrative fine shall be paid not by the offenders, but by the vehicle operator. The number of administrative fine cases has been increased significantly. Because o the great role of the traffic petty offenses, the decrease of the number of petty offences cases has been resulted by the growth of the administrative cases (see Figure 4).

Figure 4: Petty offences and administrative fines (2015-2018)



Source: Official Statistics of Administrative Decisions (OSAP) (h https://www.kormany.hu/hu/dok?source=7&type=308#!DocumentBrows, downloaded at January 5th 2020).

5 Is it obligatory? – The petty offence procedures and the Directive 343/2016/EU

The criminal nature – and thus the procedural guarantees – have been strengthened by the petty offence reforms, but the significance of them has decreased in the last years. As I have mentioned, these cases are interpreted by the ECtHR as 'criminal', as well. The Directive 343/2016/EU was adopted in 2016 to harmonise the different regulations on presumption of innocence and of the right to be present at the trial in criminal proceedings.

During the legislation procedure of the directive, the scope of it was a great question of debates. As I have mentioned earlier, the concept of 'criminal charges' – thus the concept of 'criminal case' – is interpreted broadly by the ECtHR. The EU has not accessed to the ECHR, but its Member States are part of that all-European regime (Gragl, 2013: 89). There were strong arguments for the application of the broad interpretation on 'criminal cases' of the ECtHR in the European Union law (Satzger & Zimmermann, 2019: 635). Despite this background, a narrow interpretation has been applied by the Directive. The paragraph (11) of the preamble states, that the dual nature cases – which includes the petty offences in the majority of the Member States of the European Union – are not covered by this Directive.[2]

Thus, the Directive should not apply to the petty offence procedures in Hungary because of the dual – and partly administrative – nature of the Hungarian petty offences. Therefore, the harmonisation of the Hungarian petty offence regulation cannot be examined by the European Court of Justice. But if we look at the Hungarian national rules, it can be stated, that the guarantees of the Directive are prevailed by the national legislation. The reason of this regulation is the broad interpretation of the article 6 of the ECHR by the ECtHR. Therefore, the Hungarian rules on the petty offence proceedings should not be harmonised by the Directive, but it should be consistent with the ECHR. Therefore, it would not be a great change for the Hungarian legislation if the Directive should be applied for the dual nature cases, as well.

6 Conclusions

The petty offences in the majority of the European – continental – legal systems have a dual nature: they have criminal and administrative elements. Therefore, they can be interpreted as 'administrative criminal law' (Köhler, 1997: 82). This continental – especially German– concept – *Verwaltungsstrafrecht* – of administrative criminal law (Binder & Trauner, 2014: 214-215) is applied by the Hungarian national legislation, as well.

Although the Directive 343/2016/EU is not based on the broad interpretation of criminal cases of the practice of ECtHR, and the Directive shall not be applied in Hungarian petty offence proceedings, the main guarantees of the Directive are prevailed by the major petty offence cases. If the procedures can result a detention nature punishment (in Hungary: *elzárás* – custodial arrest) the guarantees of the presence of the defendants mainly prevails. In more administrative – thus minor – cases in Hungary simplified and administrative nature procedural rules are applied.

Notes:

[1] The source of the statistical data is the *Bűnügyi Statisztikai Rendszer (BSR) (Criminal Statistics System)*, which is available on the website: https://bsr.bm.hu/Document.
[2] See par. (11) of the preamble of the Directive 343/2016/EU: „This Directive should apply only to criminal proceedings as interpreted by the Court of Justice of the European Union (Court of Justice), without prejudice to the case-law of the European Court of Human Rights. This Directive should not apply to civil proceedings or to administrative proceedings, including where the latter can lead to sanctions, such as proceedings relating to competition, trade, financial services, road traffic, tax or tax surcharges, and investigations by administrative authorities in relation to such proceedings."

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The Right to be Present as a Guarantee of Justice in Procedure

ATTILA MENYHÁRD

Abstract The right to be present is to be assessed in context of oral procedure and the function of procedure, i.e. if procedure shall aim at promoting social justice. The right to be present is not an absolute right of the party. It may be limited by the procedural rights of the other party but the grounds for such limitation are to be construed very narrowly. The right to be present is mostly understood as implied in the right to fair trial. It is argued that the right to be present is an element of the guarantees of justice and trust in the procedure. The right to be present is less protected in civil procedures, although justice and trust are important policy in civil actions as well.

Keywords: • civil actions • justice • limits on right to presence • oral procedure • right to be present • right to fair trial

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1 The social function of the right to be present

Legal relationships are social relationships. Although the importance and the consequences of this statement have been emphasized and elaborated primarily for contractual relationships (Kohler, Josef 1921: 51, MacNeil, Ian, 1974: 715), I believe that it is a general truth that holds for all kinds of legal relationships. This comes from the nature of the law, because law is designed for organizing social relationships. Thus, procedural laws are to be assessed as social relationships as well. In order to understand the importance of the right to be present in a procedure, be it a criminal or a civil one, one should consider the messages of the well-known novel of Franz Kafka, "The Trial." Josef K., the citizen is the subject to a procedure which is for him completely unknowable and unpredictable. The trial is for him a labyrinth and the distance between him and the power taking action against him and providing justice is extremely big (Posner, Richard, 1998: 135.). Why the procedure against the average citizen, Josef K was so suggestive in demonstrating the depressing and devastating feeling of separation? Because Josef K did not get the chance of taking part in the procedure. The distance between the state and the citizen is so big that the authorities appear for him as pure manifestation of power, not more. This result may comply with the view of autocratic regimes but certainly is incompatible with the idea of the modern welfare state or with the view that the state is a social consent and it is to serve the society.

That is, the right to be present is not simply one of the values for the common good but is to be seen as an important element of the social function of the state and of the procedure. The relationship of the state and the citizen seeking justice or suffering a punishment as a consequence of violating the basic values of the social community is one of the most important factors of the society. Law is the tool of exercising the public power, which is to provide justice with establishing rights and obligations in the social relationships as well as in the procedures. It seems to be an emerging tendency in our modern societies that the quest for justice becomes less important as a result of expanding formalism, judicial organisation and judicial attitude. The priority of closing down social conflicts as quickly as possible makes enforcement of law self-serving and increases its distance from social reality. The growing gap between the social reality and the judicial system, that is, between the state and the citizen results in tension which may, in extreme situations, even undermine the power of the state. We expect the state providing justice on the basis of truth. This fundamental function of the state is threatened if persons, whose position is affected by the finding of the court or the authority are not the part of the procedure.

2 Presence as a right

Right of presence is basically assessed as an element of the right to fair trial, which is a protected human right and normally held as a principle provided in our constitutions as well. This approach, however, has certain implications which may call for revisiting this idea. The right to fair trial is a mutual right of the parties and shall be seen as provided to

them on an equal footing. From this follows that the right to fair trial of the party may be a limit on the procedural right of the other party. That is, if the right to be present is assumed as an element of the right to fair trial, it may (and even shall) be limited in order to guarantee the right to fair trial of the other party. An understanding of the right to fair trial may be as a right of the citizen vis-á-vis the state to have social justice provided. That is, fair trial and procedural justice are interrelated, conceptually and practically as well. Procedural justice, as well as the right to presence do not have a value for their own sake, but they are to serve material or substantive justice which should be the main goal of the legal system as a whole. From this angle, the right of presence is a guarantee of justice in civil and in criminal procedure as well.

It became a real issue in the state procedural laws in the USA if the plaintiff, especially if she is a minor or is the alleged victim of medical malpractice case, due to her age, her incapacity to communicate or to understand what is happening in the courtroom (often caused by the defendant's alleged wrongdoing) may or even should be rejected to be present in the jury trial, completely or at least in the liability phase. In cases of serious personal injury cases the presence of the plaintiff could influence the jury due to her pitiful status and appearance in a way which deprived the jury of the opportunity of assessing of the defendant's conduct objectively. The Georgia Supreme Court (Kesterson v Jarrett) and also the Indiana Supreme Court (Jordan ex rel. Jordan v Deery) decided that the plaintiff can never be excluded from the courtroom because of a risk of prejudice that may result. Although this conclusion has not been questioned, the judgements have been criticized on the ground that the legal justification might not been correct. It has been suggested that the plaintiff's right to be present should be acknowledged as an independent right instead of assuming it as implied in the right to fair trial (Farber, Joanna: 2014, 724, 726 and Olearchik, Meredith Quinn: 2004, 1530). Similar critic has been expressed concerning the right to be present of minors (Lundergan, E Kirsten: 1987, 187). One of the possible solutions could be identifying the "right to be heard" as an independent right within the due process clause and certainly not to be left upon the discretion of the judge (Grunes, Allen P: 1987, 407).

The right to be present is not an absolute right. The absence of the party cannot be an obstacle to the procedure. If absence could be a barrier to the action, it would obviously violate the other party's interests and the other party's right to fair trial. That is, the party to a civil action may waive its right to be present simply by being absent or the party can be deprived the opportunity to be present due to his or her conduct violating the rules and principles of the trial. The right to be present is to be contrasted to the other party's procedural rights, especially the other party's right to fair trial. This may result in imposing limits on the right to be present. Such limitation, however, does not seem to be justifiable by the age, health conditions, personal injury or other personal circumstances by the party.

The right to be present is not simply about allowing the party, the accused or the victim to acquire direct impressions from the procedure and to control the procedure in a way,

but is to put into the context of the goal and function of the procedure and contrasted to the paradigm of written or oral nature of the procedure. Our procedural laws, either civil or criminal, are a kind of mixture of oral and written procedure. Presence, and right of presence in the procedure is tightly linked to the oral procedure. In written procedure there is no sense to speak about presence. Oral procedure is not a value for itself either, but it is an important element of convincing the court about material or substantive justice and, on the other hand, providing the opportunity and, at the same time, the obligation to the judge to establish his or her personal conviction of the case. With other words, oral procedure connects the judge with the reality, which is the key for enforcing justice in the society. This is, after all, the primary goal of court procedures.

3 Expanding formalism: criminal vs civil actions

Changes of our procedural laws and the judicial organisation in the past decades present a tendency of expanding formalism: the priority of the written form of contact, the decreasing role of direct communication between the court and the citizen, the growing role of legal representatives (lawyers) in the procedure degrade justice to a service provided by the state to the citizen, that is, a product sold to the society. The consequence is the broadening gap between the exercising of statutory power and the citizen seeking justice. Such developments are detrimental to the society, because the loss of the faith in justice alienates the citizens from the state and removes law from social justice. If this occurs, the law becomes the limit of seeking social justice instead of promoting it.

Criminal procedure is about exercising the power of the state against the citizen. Thus, it reflects the relationship of the state and the citizen. It is the manifestation of power of the community vis-á-vis the person accused with an offence against the community. Such relationship, contrasted to civil law relationships, cannot be privy to the parties. If procedural justice is assumed as equal positions provided to the parties, the control of the community over public offences would be limited, which is not the socially desirable result. That is a point which makes a basic difference in the paradigm of criminal procedure on the one hand and the paradigm of civil procedure on the other hand. The position of the public prosecutor representing the social community in a criminal procedure vis-á-vis the accused is not the same as the position of the plaintiff to the defendant in a civil litigation and this holds for the accused and the defendant respectively. The civil procedure reflects the relationship of the citizen to citizen. It holds to civil procedure as well that, in absence of fair trial, promoting justice would only be incidental and the rule of law could not prevail. That is, the risk of arbitrary judgements of courts could not be reduced and the reciprocity of the citizen's relationship to the state could not be guaranteed.

4 Right to be present as a Human Right

From the point of view of protection of Human Rights, right of presence is an element of the right to fair trial in context of criminal as well as of civil procedure (Leanza, Piero,

2014, 10). As it has been established by the ECHR in the case of Hermi v Italy (2006, GC), the right of presence is a precondition of exercising those rights that are provided as guarantees in Art 6 (1) and (3) of the European Convention of Human Rights. As Piero Leanza stressed it, although the right of presence is generally accepted as being of universal application in criminal trials, and the absence of the party can only be justified in exceptional cases and under certain exceptional circumstances, the presence of the party to a civil procedure is considered to be necessary only in exceptional cases. In context of civil procedure, right of presence is seen as a consequence of the right of equality of arms. In Pashayev v Azerbaijan the Court established that "Article 6 of the Convention does not guarantee the right to attend a civil court in person, but rather a more general right to present one's case effectively before a court and to enjoy equality of arms with the opposing side." Thus, it is not a right guaranteed per se by Article 6 of the Convention. In the majority of cases the presence of the legal representative is sufficient in order to comply with the requirements of the Convention in this respect.

Considering the consequences of this approach we might conclude that, contrasted to criminal procedure, the right of presence has only a secondary importance in civil procedures. International tendencies in legislation and court practice in regulating civil procedure may confirm this approach. It seems to be a dominating view that, in civil procedure, written communication between the parties and with the court is sufficient and the oral nature of the procedure is diminishing. This approach, however, involves considerable risks and implications that are hardly to accept. One of these implications is that, as the right of presence is an element of the right to fair trial, and the right to fair trial is an element of providing justice to the citizen, in civil law cases promoting justice would be less important than in criminal ones. Considering the function of the state and the law in the society, I don't think that such a conclusion could be properly justified. Another implication is that as oral procedure connects the judge with reality, abandoning oral elements results in that reality is less important in a civil procedure than in a criminal one. This is the approach degrading justice to a kind of public service provided by the state to the citizen, not more. This would mean that in context of civil law, the state waives the goal of promoting justice. I don't think that such conclusion could be justified convincingly either. A further implication is that with emphasizing the importance of written procedure and the priority of procedural justice as contrasted to substantive justice, formalities play a central role in the procedure. Such formalities, however, do not have a value in itself. Overestimating their role is a great danger for promoting social justice in civil law cases.

5 The civil procedure: A Hungarian example

More than hundred years ago, in 1911, Sándor Plósz, the "father" of the first modern civil procedure in Hungary, commented the civil procedural rules drafted under his leadership and supervision with the following words: "in the ordinary proceedings, as the consequence of written procedure, formalities prevail. This, however, becomes often fatal to the enforcement of substantive justice, because it limits the free activity of the judge in

revealing the facts of the case properly and punishes even the minor negligence of the party with harsh consequences which is detrimental to finding and providing justice. Moreover, it makes even the simplest cases difficult and long lasting." (Explanatory notes to the Bill of the Civil Procedure 1911).

The new Hungarian Civil Procedure Act enacted in 2016 (Act no. CXXX on Civil Procedure) emphasizes that it attempts to provide procedural justice instead of substantive one and shifts to the importance of formalities. I am afraid, that this trend is not a Hungarian speciality. I believe, that giving up the quest for substantive justice undermines the public trust vested into the state and into the law, which results in social disfunction because the law and justice would not be enforced. Just coming back to our example of the case of Josef K in "The Trial" of Franz Kafka, from the point of view of the citizen it does not really matter if the procedure was a criminal or a civil one. It also could have been a claim for damages or a case of inheritance, like it was the case in the roman of Charles Dickens with the title "Bleakhouse." We should not accept that substantive justice is less important in civil law cases than in criminal ones, otherwise we build a distance between the citizen as a human being and the society. This also endangers the trust in the law among the members of the society. That is, as a final conclusion, I would suggest revisiting our prevailing view about the role and importance of the right of presence in civil procedure.

I believe, that in order to establish the role of the right to be present in the civil procedure one has to consider first the importance of oral procedure. Today, this does not seem to be the mainstream view. Results of the technological developments would suggest that the modern ways of electronic communication, the possibility of online dispute resolution in particular may make the personal interaction of the court and parties unnecessary. The history of civil procedures presents that the tendency of unpersonal written communication always shift the procedure to formalities. Formalities never promote justice and increase the distance between the citizen and the state. As a result, the gap between the state and the citizen undermines trust in the judiciary and, on a longer run, in the law. This result is socially not desirable.

6 Conclusions

The right to be present in the procedure is less protected in civil actions compared to criminal procedure. The lower level of protection may be justified by the nature of private law relationships and by the nature of the civil procedure, i.e. the equal position of the parties. Due to the mutual rights of the parties, the procedural rights of the other party, the other party's right to fair trial, in particular, may limit the right to be present of the party. Such limitations are not to be justified by the party's personal qualities or personal conditions. The party, however, may waive its right to be present. The right to be present is to be assessed in context of oral procedure which is a guarantee of promoting justice in civil actions. If the procedure law does not aim at promoting justice, the growing gap

between the state and citizen undermines the trust in the judiciary, the state and the law. This is the factor underlying the importance and the value of the right to be present.

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Right to Fair Trial from the Perspectives of Slovak Legal Acts and the European Law viz. Directive (EU) 2016/343

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Abstract The objective of the study was to analyse the transposition of the Directive (EU) 2016/343 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 the trial in criminal proceedings. In the Slovak legal order, this Directive´s transposition highlights the responsible attitude of the Slovak Republic to fulfil the obligations arising from EU membership. The system of protection of suspected persons from committing crimes is regulated in several Slovak legislation. After analysis and comparison with the European legal framework discrepancies in Slovak And European legislation have been highlighted and an amendment has been incorporated into amended legislation.

Keywords: • right to fair trial • Directive (EU) 2016/343 • criminal proceeding • legislation • Slovakia

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1 Introduction

When a person is accused of a crime, or involved in some other legal dispute, having the right to a fair trial should be necessity in a democratic society. What does it mean? A charged person with a crime has the right to a fair and public hearing, that commences within a reasonable time, and is executed by an independent and impartial court. If this does not happen the accused may submit a complaint to the European Court of Human Rights. It has been coping with a great deal of cases of unfair trials – even examples which resulted in imprisoning an innocent person. The European Convention on Human Rights assists people to get a retrial and to assure and monitor that governments strive to constitute appropriate legislation to avoid miscarriages of justice. Famous cases have been, for instance, a) due to excessive delays to legal proceedings; b) due to arbitrary detention in a psychiatric hospital against the person´s will, violating his right to liberty; c) because of unjust verdict leading to imprisoning the innocent person; d) because of being the victim of political corruption; e) due to a failure to investigate attack on Roma settlement and many others.

The aim of the study was to analyse the transposition of the Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings (Ú. v. EÚ L 65, 11.3.2016, pp.. 1 – 11) which is in Slovak language as "Smernica o posilnení určitých aspektov prezumpcie neviny a práva byť prítomný na konaní pred súdom v trestnom konaní". In the Slovak legal order, this Directive´s transposition highlights the responsible attitude of the Slovak Republic to fulfil the obligations arising from EU membership. The system of protection of suspected persons from committing crimes is regulated in several Slovak legislation. In terms of comparing the transposition of the EU Directive with the Slovak legal order, a full degree of approximation of law has been achieved. In managing the study, we used the relevant EU legislation and the Slovak legislation in force. The European Commission has not yet taken any measure in respect of the Slovak Republic in terms of unsatisfactory transposition. The right to a fair trial was enacted first time in the context of the Constitution of the Slovak Republic.

2 Right to fair trial in the context of Slovak legal acts and in the European law

The current Slovak legal order is to a large extend influenced by the legal acts of the European Union, as well as by the international agreements and treaties binding on the Slovak Republic.

Rights granted to an individual that form part of the right to fair trial are enshrined especially in the Fifth Chapter of the Slovak Charter of Fundamental Rights and Basic Freedoms adopted in 1991 as well as in the Constitution of the Slovak Republic (Act No

460/1992 as amended). The Slovak Constitution represents the basic act and takes precedence over any other legislative acts. According to the Constitution a punishment may be imposed on a person only in accordance with the law and in the manner laid down by the relevant laws. These laws are the Criminal Code as well as the Criminal Procedure Code, which establish the rules for criminal proceedings, including specific conditions for exercising and enforcing rights of individuals. According to Article 1 paragraph 2 of the Constitution the Slovak Republic acknowledges and adheres to general rules of international law, international treaties by which it is bound, and its other international obligations. In this provision the relationship of the Slovak Republic to the international conventions, treaties and other acts acceded to by the Slovak Republic and are binding on it. Among such international treaties also ranks the Treaty on the Functioning of the European Union, the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights and Fundamental Freedoms. Article 7 paragraph 2 of the Slovak Constitution states explicitly the obligation to transpose the directives into the internal legal order. In this connection, we can also talk about the constitutional principle, according to which the Slovak Republic recognizes and honours general rules of international law, international treaties by which it is bound and its other international obligations.

The right to fair trial is also guaranteed by Article 48 paragraph 2 of the Constitution which stipulates that everyone has the right to have his case tried in public, without undue delay, and in his presence and to deliver his opinion on all pieces of evidence.

Another provision stipulating the procedural rights in the context of fair trial are enshrined in Article 50 of the Constitution, according to which the guilt and punishment shall be established only by the decision of the court (no punishment without the law). Another principles specifically guaranteed in this provision are the presumption of innocence, right to legal counsel, right to self defence, right to refuse to testify, as well as the principle ne bis in idem and the right to more favourable sanction.

Article 141 of the Constitution enshrines the principle of independence of courts that undoubtedly represents the traditional constitutional principle. It is the independence together with the impartiality of the courts that forms part of the right to fair trial.

Article 81 of the Constitution guarantees the independence of courts and the administration by independent and impartial courts. Undoubtedly this represents the traditional constitutional principle that forms part of the right of fair trial and the right for impartial and independent courts. The judiciary as a whole represents the guarantee and thus being the part of the independence of every individual judge who applies and interprets directly the law. Another aspect that forms part of right to fair trial is the fact that the judge is bound by the law and applicable international treaty, as it is stipulated by

article 144 of the Constitution. This provision represents the constitutional expression of independence of judges.

In this context it is important to note, that also the Court of Justice of the EU has distinguished this aspect of judicial independence, especially in case C-506/04 Graham J. Wilson v. Ordre des avocats du barreau de Luxembourg. The Court of Justice makes the difference between the external aspect of judicial independence presuming the protection of the court against external influence or pressure, which could endanger the independent assessment of concrete case by the court and its judges. The internal aspect of independence entails the capacity to render judgement that is independent and based only by the law.

3 Right to fair trial in the context of international conventions and the European law

The doctrine of fair trial is also enforced by virtue of transnational systems as stipulated by the international treaties involving the judicial systems. In particular this is the case of the jurisprudence of the European Court on Human Rights deciding on the basis of European Convention on the Protection of Human Rights and Fundamental Freedoms, forming so called Strasbourg pillar of the human rights protection. Another transnational mechanism is established by the primary law of the European Union and its enforcement mechanism is created by the system of courts of the EU, forming the so called Luxembourg pillar. As for the secondary law of the EU, together along with the "Lisbonisation" of the formal third pillar the significant strengthening of the protection of procedural rights of suspect and accused persons has taken place, through adopting several measures included in the Road Map for strengthening procedural rights of suspected or accused persons in criminal proceedings adopted by the resolution of the Council of 30 November 2009 (OJ C 295, 4.12.2009, p. 1–3).

3.1 European Convention

According to Article 6 of the European Convention on Human Rights everyone is, in determination of his or her civil rights and obligation or of any criminal charges, entitled to fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Thus the context of the right to fair trial means the right to have the case decided in fair and public matter in the reasonable time by the independent court deciding about civil rights and obligations or about any criminal charges.

The provision of Article 6 of the European Convention on Human rights is relatively extensive in terms of its length, but also in terms of enumerating the specific rights that are designed to form part of the right to fair trial. The right for fair judicial decision is also comprised in this catalogue of Article 6. The notion of "fair decision" is not defined in the European nor in the national level. At the same time in the criminal proceedings

the fair decision can only be considered the decision that is adequate as to the imposed punishment or function and as to the person of offender. It is also important to note that the principle of fairness is in the context of the Convention as well as in the context of several recommendations of the Committee of Ministers of the Council of Europe is related both to the person of offender as well as to the interest of society. It is important in the application of this principle to comply with the principle of legality and individualization of sanctions.

Right to fair trial is at the EU level also regulated by the Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings. This Directive contributes to the general aim of strenghtening the mutual trust by stipulating the catalogue of common minimal rules for the procedural rights in the criminal proceedings. At the same time it contributes to the improvement of the application of the principle of fair trial that represents the milestone of the space of freedom, security and justice in the EU. It helps to uphold the mutual trust through ensuring the more consistent enforcement of the right to fair trial as stipulated by Article 47 of the Charter of Fundamental Rights of the European Union[1] and Article 6 of the European Convention on Human Rights.

3.2 European Law

Five other directives have been adopted at the EU level concerning:

1. right to information about rights and charges and access to the court case file:
2. right of access to a lawyer and communication with third persons while being deprived of liberty ;
3. strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial ;
4. procedural safeguards for children ; and
5. legal aid

The Directive on the presumption of innocence has been in the Slovak Republic transposed by the Law on the European Investment Order in Criminal Matters and on the amendment of other laws No. 236/2017 Coll. as well as by the Code of Criminal Procedure No. 301/2005 Coll.

The Directive contains the provisions aiming at the strengthening the right to fair trial in the criminal proceedings through the setting the minimum rules relating certain aspects of the presumption of innocence and the right to be present at the court hearing. The catalogue of rights of person involved in the criminal proceedings regulated by the Code of Criminal Procedure and in the Law on European Investment Order in Criminal Matters are following:

a) Law enforcement authorities are acting swiftly and taking fully into account fundamental rights and freedoms;
b) Law enforcement authorities act in such a way to avoid any reasonable doubts about the facts necessary in order to issue the decision, while fully taking into account the evidence;
c) Right of a detained person to express to all charges and related evidence;
d) Right to refuse to testify;
e) Right to inspect court files, to make notices and extracts, as well as copies;
f) Right to take part in the court hearings, right to have final speech during the court proceedings;
g) Right to present proposals for taking the evidence and way of decision making and to file applications;
h) Right to remedy;
i) Right for legal counsel;
j) Right to talk to the legal counsel without the presence of third person;
k) Right to use the mother tongue or other language according to one´s choice in the contact with the law enforcement authorities.

3.2.1 Fundamental Principles of Criminal Procedure applied at present

In its Article 1 the Directive regulates the minimum rules applicable to certain aspects of the right of presumption of innocence. The aim of this provision is to ensure the rights of suspect and accused persons so that they would not be in public statements and official decisions of public authorities indicated as guilty without the final sentence of the court. This also includes the principle of in dubio of reo decision as well as the right to refuse the testimony.

These rights regulating the presumption of innocence are already guaranteed in the valid legislation of the Slovak Republic, more specifically in particular in the Code of Criminal Procedure as the fundamental principles of criminal procedure in its Article 2 paragraph 4 and Article 6 paragraph 2. At the same time this Article regulates the right to be present at the hearing before the court, which is included in the Code of Criminal Procedure, in particular in its Article 358 regulating the proceedings held in absentia.

Article 4 of the Directive stipulates the right of suspect persons or accused persons not to be referred as being guilty in the public statements and decisions of public authorities before the final judgement is rendered. This right is guaranteed in the Slovak legal regulation and it is enshrined also in the introductory fundamental principles of Code of Criminal Procedure in its Article 2 and Article 6.

Article 7 of the Directive guarantees the right of suspect and accused persons to remain silent. The right to refuse to testify and not to incriminate himself or herself while

cooperating with the law enforcement authorities belongs among the generally applicable standards ensuring the right to fair trial as the principle of not self-incrimination.

In the Slovak legal order the right to refuse to testify is contained in Article 50 paragraph 4 of the Constitution of the Slovak Republic, within the meaning of which everyone charged with a criminal offence shall have the right to refuse to give testimony and this right may not be denied to that person under any circumstances.

This right is also regulated in Article 34 paragraph 1 of the Code of Criminal Procedure, according to which the suspect and accused has the right to express himself or herself to all facts related to all charges and related evidence.

Article 8 foresees the ensuring the rights of suspect or accused persons by guaranteeing their rights to be present at the hearing before the court.

The aim is to ensure that the right for defence is respected and that the accused person cannot be held guilty without the opportunity to claim other facts in relation to the reasons for his or her conviction.

This article regulates the proceedings held in absentia as well. The requirements contained in this provision are fully incorporated in the Slovak legal regulation of proceedings in absentia as contained in Article 358 and following, and especially in Article 362 of the Code of Criminal Procedure.

4 Conclusion

Slovak legislation fully complies to European legislation and useful links where people can find useful information and advice.

1. Council of Europe webpage on criminal justice reform
2. Council of Europe webpage on effective judicial remedies

Factsheets on the case-law of the European Court of Human Rights:

3. Article 6 – the right to a fair trial (civil) PDF (820 Ko)
4. Article 6 – the right to a fair trial (criminal) PDF (930 Ko)
5. Police arrest and assistance of a lawyer PDF (285 Ko)
6. Handbook on European law relating to access to justice PDF (2,130 Mo)
7. Handbook on Human Rights and Criminal Procedure PDF (2,150 Mo)

Incorporation of European legislation into national legal Acts has resulted into augmenting national legislation and in improving democratic The right to fair trial is an

essential safeguard of a just society and its significance cannot be overstated. It is an essential guarantee of the rule of law.

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Notes:

[1] Ú. v. EÚ C 326, 26.10.2012, s. 392.

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Practical Challenges and Best Practices Regarding the Right to be Present in Austria

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Abstract Without being present at trial, an accused person cannot react on charges, dispute evidence, or effectively use procedural rights. Without the right to be present, thus, the right to a fair trial cannot be upheld. The following article summarizes the findings of the PRESENT project in Austria. Overall, the research conducted shows that in Austria the right to be present at trial is not only legally protected, but also guaranteed and enforced. The article pinpoints practical challenges in the application of the right to be present as well as good practices.

Keywords: • right to be present • fair trial • right to information • procedural rights • harmonisation • right to be heard

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1 Introduction

The right to be present at trial is a fundamental right. Without being present at a trial, an accused person cannot react on charges, dispute evidence, or effectively exercise his or her procedural rights. Without the right to be present, thus, the right to a fair trial cannot be upheld.

While the right to a fair trial is already enshrined in several legal documents on EU level,[1] "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" (Directive 2016/343, recital 5). Due to this reason, the Council of the European Union adopted a Roadmap for strengthening the procedural rights of suspected or accused persons in criminal proceedings. In this scope, Directive 2016/343 (the Directive) was drafted, establishing common minimum rules concerning certain aspects of the presumption of innocence and the right to be present at trial which were to be transposed in April 2018. The PRESENT project (runtime: jan 2018 – dec 2019) took a closer look at the transposition of the Directive in Austria, Bulgaria, Cyprus, Portugal and Romania, in particular to identify challenges and best practices.

The following section presents the research results of the PRESENT project in Austria. As in Austria the right to be present at trial was already a well-established principle before the Directive was introduced, the Austrian research team put a special emphasis on identifying best practice examples and learnings from professionals working in the field. These learnings should serve other Member States as an inspiration how the rights defined in the Directive can be implemented and ensured.

The following article structures as follows. First, a brief overview of the methodology of the research conducted in the scope of PRESENT is provided in Chapter 2. Chapter 3 demonstrates the transposition legislation of the Directive in Austria. The following chapters focus on the application of the existing legislation in practice, while Chapter 4 points out the challenges, and Chapter 5 best practices. Lastly, in Chapter 6 concluding remarks are given, summarizing the research findings.

2 Methodology

PRESENT is an EU-funded research project with a runtime of two years. The project has the aim to enhance the right to be present at trial for persons suspected or accused of crime, as well as to strengthen certain aspects of the presumption of innocence.

In the first year of the project, two research reports were drafted in each of the participating member states[2]: a report on the transposition of Directive 2016/343 and a report on statistical data and best practices. In Austria, both reports are based on desk research, in particular legal commentaries and journals, as well as an expert interview

with an Austrian criminal judge (Interview, 25.07.2018). Moreover, a contrasting juxtaposition of Directive (EU) 2016/343 and the corresponding Austrian law was prepared to pinpoint possible shortcomings in the Austrian legislation. Lastly, an in-depth review of statistical data was conducted.

The second year of the project was dedicated to bringing the research results to practice. In all participating member states, two participatory seminars were conducted with the aim to present the research findings and create a space for discussion and reflection for involved professionals about challenges to the right to be present. Another aim was to identify the most successful and effective measures regarding the implementation and application of Directive 2016/343. In Austria, these seminars took place in Vienna and Graz and participants came from the justice sector, law enforcement agencies, and academia. As a final step, a summary of the discussions was sent to participants with the query for feedback.

3 A legal analysis: the right to be present at trial

3.1 Transposition of Directive 2016/343 in Austria

In Chapter three, the Directive sets out minimum rules regarding the right to be present at trial. Amongst others, the Directive determines that a trial in absentia may only be held, if the accused 1) has been informed, in due time, of the trial and of the consequences of nonappearance; or if 2) the accused who has been informed of the trial is represented by a mandated lawyer, who was appointed either by the accused or by the State. If the accused cannot be located despite reasonable efforts, decisions may also be held under the condition that the accused has the right to a new trial or another legal remedy which allows a fresh determination of the merits of the case and is informed about this right and the decision of the court.

In Austria the right to be present is a well-established legal principle that already existed before the Directive. The European Convention on Human Rights, including the right to a fair trial under Article 6, for example, has constitutional rank in Austria. Furthermore, partial aspects of the right to a fair trial are defined in the Austrian Code of Criminal Procedure (Strafprozessordnung, StPO), such as the right to a fair hearing, the right to defence and the presumption of innocence. As a consequence, there existed no need to transpose the Directive in Austria. The Austrian legislator did, however, introduce two minor changes to the Austrian Code of Criminal Procedure. These changes are rather formal and are expected to have no impact in practice (Erläuterungen Ministerialentwurf Strafprozessänderungsgesetz 2017).[3]

First, the article determining the information to be included in the summons sent to the procedural parties, including the accused, was changed (§ 221 (1) StPO). A passage was introduced stating that the summons of the accused also must include the information that

in case of non-appearance, a trial in absentia might be held or that he or she might be brought before a judge by the police.[4] While before, these regulations were not determined in black-letter law, they were clearly determined in literature and settled case law. Secondly, a new phrase was introduced in the passage regulating the procedure for the placement in a facility for mentally ill offenders (*Anstalt für geistig abnorme Rechtsbrecher*) (§§ 429 ff), according to which the decision to hold a trial in absence of the accused can only be made after the judge made sure that the accused was informed about the date of the main hearing (§ 430 (5) StPO), amongst others.

3.2 The rights of the suspect – accused - defendant

The Austrian criminal law – the Code of Criminal Procedure in particular – differentiates between the roles of the suspect, the accused, and the defendant. Which legal term applies is dependent on the stage of the criminal procedure. They are aimed to ensure that a suspect is not accused of having committed a crime until a concrete suspicion exists. Moreover, the legal term that applies in a specific stage of the procedure has effects on the position and the rights of the person to whom this definition applies. All legal terms are determined in the Austrian Code of Criminal Procedure:

- A suspect (*VerdächtigeR*) is every person being investigated due to an initial suspicion. An initial suspicion exists, if due to concrete indications it can be assumed that a criminal offence was committed (§§ 48 (1) 1 icw 1 (3) StPO). In this phase, either the police or the prosecutor is conducting the investigation.
- An accused (*BeschuldigteR*) is any suspect, as soon as he or she is concretely suspected of having committed a criminal offence on the basis of certain facts and if in order to solve this concrete suspicion, an investigation procedure was disposed and initiated.
- As soon as the prosecutor introduces a criminal charge (*Anklageschrift*) or a complaint (*Strafantrag*) to court, the accused becomes a defendant (*AngeklagteR*). In general, the *nomen iuris* remains unchanged until the final decision. There exist also some circumstances under which a trial might be terminated by order of the court (*Beschluss*) (§ 191 StPO).

At all stages - thus, the suspect, the accused and the defendant – have certain rights to information, defence, and procedural participation. For instance, they must be informed as soon as possible that an investigation has been initiated and that there exists a concrete suspicion against them. In general, all provisions of the Austrian Code of Criminal Procedure which refer to the accused are also applicable to suspects and defendants, if the provision does not specify otherwise (§ 48 (2) StPO).

The accused is a procedural party (*BeteiligteR*) of the criminal proceeding according to §220 StPO. While this provision is only applicable to the criminal proceeding at court and not to the investigation phase, it is accepted that the suspect has a similar position within the investigation phase (§6 (2) StPO) (Wiederin, 2014, RZ 199).

3.3 The duty to be present & trial in absence of the accused

Directive (EU) 2016/343	Austrian legislation
Article 8 - Right to be present at the trial	§ 6 StPO – *Rechtliches Gehör* § 427 StPO – *Abwesenheitsverfahren* § 491 StPO - *Mandatsverfahren*

In Austria, the accused has the duty to be present during the court proceeding (§ 6 StPO). The right to participate in the whole criminal procedure, on the other hand, is not a duty. It includes the right of defence, to remain silent, to call for the admission of evidence and to participate in evidence hearings (Wiederin, 2014, RZ 176). A trial can only be held without the presence of an accused person under strict and particular circumstances which are regulated in § 427 (1) StPO. Accordingly, in absence of a suspect, a trial in absentia may only be held if:

a) **the suspect is only accused of having committed a minor offence (*Vergehen)*;** This means that the offence was committed in negligence (*fahrlässig*), or was a non-negligent act punishable by deprivation of liberty for not more than three years;[5]
b) **the accused was already heard in the case;** This implies that the accused was informed about all accusations and had the possibility to invalidate them. The interrogation might have taken place during the criminal investigation by the police or the prosecutor or via inter-court assistance (*Rechtshilfeweg)* and must include all information about what offence he or she is accused of, detailed information of the facts of the case as well as their legal implications. Thus, the information must include the entire criminal charge (OGH 15 Os 180/15g). It is insignificant whether the accused used his or her right to remain silent during the interrogation (Bauer, 2017). If the accused does not appear at trial, the protocols of the interrogation of the accused may be read out in court according to §252 (1) Z1 StPO. In this manner, the principle *audi alteram partem* is exercised. As a result, any extensions or (essential) modifications of the criminal charge are inadmissible, if the accused has not the possibility to be heard in this manner (Hinterhofer/Oshidari, 2017). The latter includes also a modification of the legal analysis of the case (Stricker, 2015); and
c) **the accused was sent a formal summon, which contained all the necessary information;** The summon has to contain the date of the proceeding and the information about the consequences of a non-appearance, including the possibility of a trial in absentia (§ 221 StPO). Further, the summon also has to include the subject of the trial, the essential facts of the case as well as their legal consequences (Sticker, 2015).

The summons must be sent by a registered personal delivery (*persönlich; zu eigenen Handen*) (§427 (1) StPO). The latter constitutes a manner of delivery ensuring a particular level of security for the recipient. The idea of the registered personal delivery is that the recipient receives a "direct notice" from the delivery. The delivery cannot be accepted by another person than the recipient (Meter, Pirklbauer, 2014). After the delivery has been

completed, the recipient must sign a receiving confirmation (*Rückschein*).[6] The receiving confirmation is noted in an internal system, to which the responsible criminal judge and his or her office has direct access (Interview, 25.07.2018). The signed receiving confirmation is sufficient proof that the accused has received the summon (Interview, 25.07.2018).

According to case law, a delivery by deposit is sufficient for that the accused is considered as duly notified (OGH 11 Os 19/05m; RIS-Justiz RS0120038). In this case, the delivery is effective on the day after the deposit (§ 17 (3) Service of Documents Act, Zustellgesetz, ZustG). If the accused was absent from the place of delivery, the delivery is only effective on the day following his or her return (§ 17 (3) ZustG). If the accused does not collect the summons, it is still assumed that the summons was delivered, if the accused was present at his or her home (*ortsanwesend)* during the two-weeks period in which it was possible for the accused to collect the summons. The procedure to verify the presence of the accused is conducted by the police following an order by the court (Interview, 25.07.2018). Only if the accused or his or her representative was unable to obtain knowledge of the delivery in time, due to absence from the place of delivery, the delivery is not accepted as effective.

If these three conditions prevail and the judge does not deem the presence of the accused necessary for the comprehensive evaluation of the case, a decision on guilt or innocence may be made. In this case, the verdict has to be issued in written form to the accused.

If the conditions do not prevail, the proceeding must be adjourned and – if necessary – the judge can order that the accused is to be brought before a judge by the police (§427 (2) StPO). If the residence of the accused is unknown or the accused is fugitive, the investigation must be continued as far as it is necessary to preserve traces and perpetuate evidence. Under these conditions, investigations in which the accused generally has the right to participation may be conducted also without his or her presence. The judge may order to investigate the residence of the accused, to de-registrate the accused of the residence where he or she could not be found or issue a warrant (Interview, 25.07.2018). Subsequently, the prosecutor's office has to interrupt the proceeding and continue after the exploration of the accused (§§ 427 (2) icw 197 (1)). This decision is, however, not a formal order of the Court (*Beschluss)*. Thus, there exists no appeal mechanism against this order.

According to case law and prevailing opinion in the literature, an accused adult can waive his or her right to be present at trial through a personal and unambiguous declaration (RIS-Justiz RS0115797; ECHR, Jones v. The United Kingdom, 9 September 2003, no. 30900/02). Presumed that the accused was informed about the consequences beforehand, a premature departure of the criminal trial or the deliberate bringing about of the inability for trial might be equated with such a declaration (Hinterhofer/Oshidari, 2017).

Legal remedies: The right to a new trial

Directive (EU) 2016/343	Austrian legislation
Article 9 – Right to a new trial	§ 427 (3) StPO – *Abwesenheitsverfahren* § 281 (1) Z 3 StPO – *Nichtigkeitsbeschwerde* § 489 (1) StPO – *Berufung wegen Nichtigkeit*

The accused or his or her counsel may lodge an appeal (*Einspruch*) against a verdict which was made in absentia of the accused within fourteen days after the receipt of the verdict (§427 (3) StPO).[7] The accused must be informed about this right. This legal remedy is not fighting the decision, but that the sentenced in absentia did not have the possibility to be present at trial, thus, the procedure that lead to the verdict. This means that the sentenced appeals the sentence of the fact that he or she was not duly informed and thus unable to exercise his or her procedural rights. For the appeal to be successful, the accused must prove that an irrefutable obstacle (*unabweisbares Hindernis*) prevented him or her from being present at trial. This includes, for example, delivery shortcomings or incomprehensible instructions of the court.

If the appeal is successful, the verdict will be reversed, and the case will be sent back to the court of first instance (Hinterhofer/Oshidari, 2017). If the appeal is rejected by the Supreme Court of Justice (*Oberster Gerichtshof*, *OGH*), no legal remedies are admissible. If the appeal is rejected by a District Court (*Bezirksgericht*) as cour of first instance, a further appeal may be logged to the competent Regional Court (*Landesgericht*) (§ 478 (2) StPO).

Further, a breach of the right to be heard constitutes a breach of the right to a fair trial and might, thus, lead to the nullity of the verdict. An appeal for nullity is an extraordinary legal remedy that can only be introduced in exceptional cases of serious procedural errors. The special characteristic of this legal remedy is that it is not bound to deadlines and that it gives the accused the right to request a new hearing even after the judgment has become final. Thus, along with or instead of the appeal (*Einspruch*) the accused may contest the verdict either by using an appeal for nullity (*Nichtigkeitsbeschwerde* - §§281 (1) 3 icw 427 StPO) or an appeal because of nullity (*Berufung wegen Nichtigkeit* - §§489 (1) icw 427 (3) StPO), depending on the court which issued the verdict.

The Austrian *"Mandatsverfahren"*

Since 2015 there exists a special procedure which allows a penal order *(schriftliche Strafverfügung*) to be issued under specific circumstances without holding an oral court proceeding (*Mandatsverfahren)*. This procedure is intended to conserve resources and accelerate the process, while at the same time upholding the rights of the accused. One of the preconditions for the admissibility of this procedure is, that the result of the investigation, in connection with the responsibility of the accused, is sufficient for the

court to assess all the circumstances relevant for the decision. Further, the sentence can only impose a fine or a conditional sentence of not more than one year's imprisonment. According to the legislative materials, the *Mandatsverfahren* should be carried out without impairing the right to a fair trial according to Article 6 of the ECHR (Bundesministerium für Justiz, 2017). Due to this reason, a further precondition for admissibility of this procedure is that the accused must explicitly forgo the possibility of a criminal proceeding to be held (§ 491 (1) 1 StPO) while he must have been informed in advance of all consequences. The accused must also be informed of his right to appeal the decision. The appeal may be lodged within 4 weeks of the receipt of the criminal ruling and does not need to contain any reasoning. The public prosecutor and the victim can also lodge an appeal within 4 weeks (§ 491 (6) and (8) StPO). In case of an appeal, the main proceedings must be initiated.

4 The right to be present in practice

4.1 Challenges to the right to be present

From a legal perspective, the right of the accused to be present at trial is guaranteed through several regulations and mechanisms. Nevertheless, there still exist challenges from a practical point of view. These challenges include the lack of statistical data and systematic empirical studies on trials held in absentia, administrative difficulties to ensure that every accused person is duly notified, and questions on the correct interpretation of the law. The following section pinpoints the challenges to the right to be present in Austria that could be identified in the scope of the PRESENT project. These challenges were extracted from discussions between representatives from the judicial sector, law enforcement agencies and academia.

Austria: Challenges to the right to be present at trial
a) No data available on trials in absentia
b) The right to a translator and interpreter
c) Personal delivery of the summons: is the deposit sufficient?
d) Audi alteram partem: reading out documents in absence of the accused
e) Registered personal delivery in other countries

a) No data available on trials in absentia

Over the course of criminal proceedings, the following bureaucratic data sources are collected by Austrian authorities: crime reports,[8] number of criminal trials,[9] verdicts[10] and others. None of the latter, however, collects data concerning *trials in absentia*. Only two sets of data within these ministerial statistics record indirect references to *trials in absentia:* first, the number of trials which had to be interrupted due to the absence of an accused person (16.580 in 2017);[11] and second, the number of appeals against trials in

absentia. The documentation of data relating to trials in absentia, hence, is under-developed and does not provide a systematic record on an on-going basis.

Statistical data is necessary in order to systematically assess the quality of trials conducted in absence of the accused person over a longer period of time. Without the relevant data and information, it is impossible to conduct a profound comparative analysis on a European or international level nor to identify in depth which local legislation and practices appear promising. What is remarkable, is the fact that in addition to the lack of official data sources recording *trials in absentia*, there are virtually no systematic empirical studies on the subject.[12] The available literature is limited to questions of procedural law and a variety of human rights implications in respect to the extraordinary circumstances a *trial in absentia* poses.

b) The right to a translator and interpreter

Being able to understand and communicate with law enforcement agencies and court officials is a prerequisite for the effective exercise of any other right an accused or suspected person has. The necessity for having a good translator and interpreter during the very first interrogation by the police, receives even more importance in the light of the legal framework of trials in absentia: In absence of the accused, the testimony of the accused person may be read out in court (see below for a critique on this practice). Regarding this fact, two practical problems were discussed with professionals in Austria.

First, the decision if a translator and interpreter is required, thus, if the suspected or accused person speaks sufficient German, varies depending on the official in charge of taking this decision. In practice, police officials consider the appointment of a translator necessary in fewer circumstances than judges (Interview, 25.07.2018). In the case of a trial in absentia, however, a judge only reads out the police documentation. In these cases, no judge can verify whether the accused person spoke sufficient German to be interviewed without a translator, having to trust the evaluation made by the police.

Secondly, while in court, only registered court translators can be appointed, there does not exist any specific requirements for the translators appointed by the police. According to our expert interview, it is often difficult to assess how good a translator is during the first interview, if he or she is not listed in the official court translator register. Moreover, in the case of a trial in absentia, it is ultimately impossible to assess mistakes that were made during the interview of the accused in the preliminary investigation phase (Interview, 25.07.2018).

c) Personal delivery of the summons: is the deposit sufficient?

One of the admissibility criteria for a trial in absentia is, that the summons was sent personally (*persönlich zugestellt,* § 427 (1) StPO*).* According to the Austrian Code of Criminal Procedure, every letter that is decisive for time limit for the submission of an appeal, must be sent by registered personal delivery *(zu eigenen Handen)* (§ 83 (3) StPO).

As previously described, the latter constitutes a form of delivery with a particular security for the recipient, in which the recipient receives "direct notice" from the delivery. The respective provision of the Austrian Code of Criminal Procedure refers to the Service of Documents Act, which determines that the summons may not be accepted by another person than the recipient (§ 21 ZustG).[13] The delivery is generally performed by the Austrian Post as delivery service (§ 12 Postal-market law, *Postmarktgesetz*, PMG). After having received the delivery, the recipient must sign a receiving confirmation (*Rückschein*) (§ 22 ZustG).

According to settled case law, a delivery by deposit is sufficient (OGH 11 Os 19/05m; RIS-Justiz RS0120038). However, it is questioned whether the deposit of the summons is fulfilling the required standards. In fact, the wording used in § 427 (1) StPO ("*persönlich"*) can be found neither in the Service of Documents Act, nor in the Code of Civil Procedure (*Zivilprozessordnung, ZPO*), but only in § 427 (1) StPO which determines trials in absentia. Following this argumentation, it is argued that the delivery through deposit can only be sufficient if the recipient had the possibility to collect the summons. According to the currently applied law, however, also in the case of the disappearance of the notification – and out of this reason the impossibility to collect the summons - the delivery is seen as valid. (See further: Sticker, 2015).

d) *Audi alteram partem:* reading out documents in absence of the accused

All court proceedings in Austria must be held orally and publicly, while exceptions may be determined by law.[14] Accordingly, the verdict in a criminal proceeding can only be based on evidence that was recorded in the criminal trial. This is the reason why the practice of reading out earlier statements or other minutes – instead of gathering primary evidence in court – is only admissible under narrow conditions determined in the Code of Criminal Procedure.[15] Under other circumstances reading out documents in the criminal trial is only admissible if all parties to the proceeding – including the accused – agree to do so (§ 252 (2a) StPO). This agreement may also be conclusive, while the failure of objection to the reading cannot be understood as an approval. Rather, more concrete evidence must persist that clearly indicates the accused approval (Rointer, 2015).

Following these provisions, it is permissible to read out – and consider – only certain documents if the accused is absent from the trial. Which documents can be read out, however, is not clearly defined by law (Interview, 25.07.2018).[16] Nevertheless, it is common practice that in the case of a trial in absentia witness testimonies are often read out by mutual agreement (*einvernehmlich).* Scholars criticise that from the absence of the accused, no agreement to this procedure can be deduced (Hinterhofer/Oshidari, 2017, Rz 10.106).

e) Registered personal delivery in other countries

How summons or verdicts must be sent to people resident outside of Austria is determined in numerous bilateral and multilateral treaties (Meter, Pirklbauer, 2014; § 11 ZustG). In

general, a delivery outside of Austria must be suitable to have legal effects in Austria. If no international treaty exists, the law of the recipient state is to be applied in order to decide whether the delivery was legitimate (Meter, Pirklbauer, 2014; , § 11 (1) ZustG). The Austrian Supreme Court argues that a recipient who lives in another country cannot rely on Austrian laws on the delivery of documents, but only on those applicable to the country he or she resides in (RIS-Justiz: RS0119937). Authors have questioned this practice, arguing that it differentiates the rights of accused people in Austria and other countries resulting in "two classes of delivery" (translation by the author; Meter, Pirklbauer, 2014).
In practice, when sending verdicts from Austrian criminal courts to an accused person in other countries in the EU, they are either sent by international confirmation delivery (*internationaler Rückschein*) or via inter-court assistance (*Rechtshilfe*) (Meter, Pirklbauer, 2014).

4.2 Good practices from Austria

One of the central aims of the PRESENT project was to identify workable solutions on how the right of the accused to be present at trial can be applied in practice. Due to the distinct legal frameworks and existing administrative systems in place in EU member states, every country inevitably produces divergent answers for transposing and implementing EU directives on national level. Nevertheless, good practices can serve as inspiration to identify transposition legislation.

Overall the research conducted in Austria shows that the right to be present at trial is not only enshrined in several legal documents, but also guaranteed and enforced. The following section will pinpoint good practices.

Austria: Good practices for ensuring the accused persons' right to be present at trial
a) A well-developed and functioning residency register & postal service
b) Summoning accused persons: "registered personal delivery"
c) Voluntary notification of absence
d) The judges' discretion as an important prerequisite for a fair trial
e) Cancelation and resumption of the criminal proceedings

a) A well-developed and functioning residency register & postal service
The well-developed and functioning national administrative system – including the residency register and the postal system – is one of the most important prerequisites for ensuring the summoning of the accused in Austria. In general, the Austrian Post performs the delivery of judicial documents and ensures that the recipient signs a receiving confirmation. Only if the accused person is not listed in the residency register or not reachable at his or her residency, the responsible judge will request that the police detects

the accused person's residence or whereabouts in order to inform him or her about the accusation as well as to deliver the summons. The Austrian example shows therefore, that the more effective the residency registration system and the postal system work, the more tasks can be taken over by the postal service and, hence, have not to be performed by the judiciary or police. Therefore, Austrian experts highlighted the importance of a well-functioning administration system with effective mail delivery services on the national level.

The rules regarding the registration in the *nationwide residence register*[17] in Austria are quite strict: Every person living in Austria must be registered and there exists a limited time frame in which a person must report a change of residency. The latter can be done in three ways: in person, via mail, or delivered by a person of trust. It is necessary to fill out a residence registration form (*Meldezettel-Formular*), which can either be downloaded online or picked up at the registration authority. Online, however, the form is only available in German. In several other EU member states, no nationwide residence register exists, causing ambiguity regarding mail deliveries, for example, in cases with wrong or outdated addresses making deliveries less successful.

b) Summoning accused persons: "registered personal delivery"

According to the Austrian Code of Criminal Procedure, every court letter that causes a time limit in which an appeal must be submitted, must be sent by "registered personal delivery" (*zu eigenen Handen,* see § 83 (3) StPO). If a letter is sent via this delivery method, the letter can be only received personally by the recipient and by no other person. After having received the delivery, the recipient must sign a receiving confirmation (*Rückschein*), which is noted in an internal system, to which the responsible criminal judge and his or her office has direct access. The signed receiving confirmation is sufficient proof that the accused has received the summons. The idea of the registered personal delivery is, thus, that the recipient receives "direct notice" from the delivery and that there exists a certain proof that – and when – the recipient received a letter.

The delivery of the summons is generally performed by the Austrian Post as delivery service. As this mailing method ensures that the accused person has been personally informed about the charges against him or her, participants identified it as a promising practice.

Further, in practice judges may also call the accused to ask about his or her location and why he or she did not come to trial. If the accused person forgot about the trial, the judge may allow the accused some time to come to court (Interview, 25.07.2018).

c) Voluntary notification of absence

The Austrian post offers the service of a notification of absence (*Abwesenheitsmitteilung*) as a form of voluntarily notifying authorities when travelling. With this notification, every resident of Austria has the option of having incoming formal letters (*RSa or RSb-Briefe*)

returned to authorities and public offices in their absence. This notification can be made in a post office, or online on the webpage of the Austrian Post. While the settled case law does not require residents to make such a notification of absence, this option makes procedures less complicated and cheaper.

d) The judges' discretion as an important prerequisite for a fair trial

If all legal requirements to hold a trial in absentia are met in Austria, it is ultimately the judge who decides if a judgment will be taken in the absence of the accused person. As an unlawful judgment in absentia may lead to the nullity of the verdict, Austrian judges tend to uphold the legal requirements particularly well. The discretion of the judge is therefore an essential prerequisite for the protection of the right to be present at trial and can be regarded as good practice, if exercised with due diligence. Against this background, the awareness of judges for the (procedural) rights of the accused, is to be considered a crucial factor for the protection of the right to be present.

e) Cancelation and resumption of the criminal proceedings

If the conditions to hold a trial in absentia do not prevail, the proceeding must be adjourned and – if necessary – a demonstration of the accused must be ordered. Not seldomly, the residence of the accused is unknown, and the investigation must be continued to investigate the accused persons' whereabouts. These proceedings can take long, and the accused person may never be found. Due to this cause, the Austrian legislation provides the possibility to stop the proceeding (*Abbruch*) and to resume them as soon as the accused was located.

5 Conclusion

The PRESENT project is an EU-funded research project with a runtime of two years that was conducted in five EU member states. The main aim of the project is to enhance the right to be present at trial for persons suspected or accused of crime, as well as to strengthen certain aspects of the presumption of innocence. Overall, the research conducted in the scope of the PRESENT project shows that in Austria the right to be present at trial is not only enshrined in several legal documents, but also guaranteed and enforced.

Form a legal perspective, there existed no need for implementation measures in Austria as all the rights enshrined in Directive (EU) 2016/343 already existed before the Directive. Only two minor changes were introduced to the Austrian Code of Criminal Procedure which were rather formal and are expected to have no impact in practice. In Austria, a trial in absentia may only be held under the strict regulations laid down in § 427 StPO. These requirements include that the suspect is only accused of having committed a minor offence (*Vergehen*), that the accused was already heard in the case

and that he or she was sent a formal summons, which contained all necessary information about the case and the possible consequences of not appearing at trial.

The practical application of the Directive was examined during two participatory seminars that were conducted in the second half of the research project. In the course of these seminars, the research findings were discussed with representatives from the justice sector, law enforcement agencies and academia with the aim to identify challenges to the right to be present as well as good working practices.

While from a legal perspective, the right to be present at trail is guaranteed through several regulations and mechanism, there still exist challenges. These challenges include the lack of statistical data and systematic empirical studies on trials held in absentia, administrative difficulties to ensure that every accused person is notified, and questions on the correct interpretation of the law.

Further, several good practices could be identified in Austria. These good practices must be viewed in the light that every member state works in distinct legal frameworks and existing administrative systems and, thus, inevitably produces divergent answers for transposing and implementing EU directives on national level. In Austria practitioners pointed out the well-developed and functioning residency register and postal service as best practice. They argued that the more effective the residency registration system and the postal system are, the more tasks can be taken over by the postal service and, hence, have not to be performed by the judiciary or police. Also, the summoning of the accused person via "registered personal delivery", a manner of delivery that can only be accepted by the recipient was identified as good Austrian practice.

Notes:

[1] The Charter of Fundamental Rights of the European Union, the European Convention for the Protection of Human Rights and Fundamental Freedoms

[2] Austria, Bulgaria, Cyprus, Portugal and Romania.

[3] The law introducing these changes is the *Bundesgesetz, mit dem die Strafprozessordnung 1975 geändert wird (Strafprozessrechtsänderungsgesetz 2017).* All changes were implemented in the Austrian Code of Criminal Procedure (*StPO*).

[4] *"Die Ladung des Angeklagten hat die Androhung zu enthalten, dass im Falle seines Nichterscheinens je nach den Umständen entweder die Hauptverhandlung und Urteilsfällung in seiner Abwesenheit vorgenommen oder seine Vorführung angeordnet oder, falls dies nicht zeitgerecht möglich ist, die Hauptverhandlung auf seine Kosten vertagt und er zur Verhandlung vorgeführt wird."*

[5] This is also applicable in the case of financial crimes according to the Law on financial crimes (*Finanzstrafgesetz*).

[6] For a more detailed assessment of the requirements of the registered personal delivery please see chapter V, subchapter 1. The deposit of the summons.

[7] A second norm - § 478 StPO - determines provisions of the trial in absentia of the accused in front of a District Court. There only exist minimal differences between these two procedures. (for further

information see Stricker, Das Abwesenheitsverfahren in der Strafprozessornung, ÖJZ 2015/8/2, 61 ff)

[8] Police Crime Statistics (*Polizeiliche Kriminalstatistik, PKS*): published by the Ministry of Interior (quarter) annually; Annual Safety Report on the Policy (*polizeilicher Sicherheitsbericht*): published jointly by the Ministry of Interior and the Ministry of Justice;

[9] Statistics of the prosecutor's office documents (*staatsanwaltschaftliche Statistik*): not publicly available,

[10] Court Crime Statistics (*Gerichtliche Kriminalstatistik*): published annually by the Statistics Austria; Annual safety report (*Sicherheitsbericht*): published by the Ministry of Justice and Ministry of Interior; Justice Process Automation (*Verfahrensautomation Justiz*): not publicly available,

[11] Bundesministerium für Verfassung, Reformen, Deregulierung und Justiz, Sicherheitsbericht 2017: Bericht über die Tätigkeit der Strafjustiz, p.12.

[12] This is not only the case for Austria, but seems to hold true for most Member States.

[13] If the accused has a mandated counsel, the summons is to be sent to him/her according to § 83 (4) StPO. The verdict of a trial in absentia must be, however, always be sent to the accused.

[14] Article 90 Austrian Constitution, Bundesverfassung (B-VG)

[15] According to § 252 (1) StPO, reading out earlier statements is only admissible: If the person is prevented from personal appearance at court (death, illness, significant other reasons); if the person being interviewed in main proceedings deviates essentially from previous statements, if a witness unjustifiably refuses to testify, or if co-defendants deny the statement; or if a witness is entitled to refuse to testify and the earlier statement has been filed as part of adversarial hearing.

[16] Also, Rointer (2015) critically questions the settled case law according to which a conclusive agreement of the accused is enough for a legitimate reading of all documents.

[17] Zentrales Melderegister, www.bmi.gv.at/413/.

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Public References to Guilt and Presentation of Suspects and Accused Persons – Rule of Law in Bulgaria

HRISTINA VESELINOVA BOGIA

Abstract The paper analyses the international rules on the rights of the accused in criminal proceedings related to the principles of publicity and the presumption of innocence. The rules of Directive (EU) 2016/343 of the European Parliament and of the Council in March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings and its implementation in the legislation in Bulgaria is referred. The author analyses the Media Strategy issued by the Supreme Judicial Council and a statement of the Commission for Personal Data Protection of the Republic of Bulgaria issued on an inquiry of Bulgaria's Prosecution Office.

Keywords: • presumption of innocence • Directive 2016/343 • Bulgaria • public • press release • data protection

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1 Introduction

It has been several years since the European Union (the EU) is active on ensuring that procedural rights in criminal trials are protected with certain guarantees in all Member States. Strengthening the presumption of innocence and the right to be present at the trial in criminal proceedings is on the agenda of the Union in relation with the principles of justice, security and freedom. Setting common standards in all EU Member States is a momentous step not only towards achieving judicial cooperation in civil and criminal matters in all Member States, but also in matters of police cooperation in the EU (Presidency Conclusions 1999 EC VI Tampere). An important milestone in this regard is the adoption of Directive (EU) 2016/343 of the European Parliament and of the Council in March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings (the Directive; Directive 2016/343).

The EU is a 'sui generis' legal system and since all Member States are obliged to bring their legislation in unison with the rules of EU legislation, in Bulgaria legislative changes are often undertaken in response of directives and regulations adopted by the EU. The fight against crime and the mutual recognition of judgments and other judicial decisions are important step towards achieving justice, security and freedom within the EU. After the adoption of the Lisbon Treaty (2009) the EU has been granted with competence in the area of criminal law and justice. According to article 83 of the Treaty, the European Parliament and the Council have the right to establish minimum rules concerning definition of criminal offences with directives. Directive 2016/343 is a step towards further developing the guarantees for the protection of fundamental human rights in criminal proceedings that are already laid down in several international legislative instruments.

Public references to guilt and presentation of suspects and accused persons in public are related to the principles of publicity of the trial and the work of the institutions on the one hand, and to the presumption of innocence, on the other. In Bulgaria, the obligation of the courts to publish their acts was established more than 20 years ago (Law on the Organization of the Judiciary 1994 Bulgaria), the presumption of innocence is also enshrined in the Bulgarian Criminal Procedure Code. Nevertheless, digitalization changed the way of carrying out the principle of publicity of the trial and the public delivering of judicial acts and brought challenges for the authorities to balance between the public interest and the individual's rights when they communicate their work to the public.

2 The right to a public trial and the presumption of innocence

The right to a public trial and the presumption of innocence are enshrined in most international legislative instruments - the International Covenant on Civil and Political Rights (the ICCPR), the European Convention for the Protection of Human Rights and Fundamental Freedoms (the ECHR), the Charter of Fundamental Rights of the European Union etc. All of them are ratified and valid in Bulgaria.

2.1 Right to a Public Trial

The fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law is a widely recognized fundamental right (EU Charter of Fundamental Rights of the European Union 2012 Art. 47). In the context of democratic society it is indisputable that trials should be public, and individuals should have all the guarantees necessary for a defense (UN General Assembly Universal Declaration of Human Rights 1948 Art. 11.1). The press and the public can be excluded from all or just a part of a trial 'for reasons of morals, public order or national security in a democratic society' (International Covenant on Civil and Political Rights UN 1966/1976 Art. 14 .1; European Convention for the Protection of Human Rights and Fundamental Freedoms CE 1950 Art. 6.1). The same is applicable when the interest of the private live of the parties requires for some part of the proceeding to be held 'januis clausis'. It is up to the discretion of of the court to assess the extent of the exclusion.

Nevertheless, the judgments of criminal courts should be pronounced publicly. The exception for the public delivering of judgments is only in cases where juvenile persons are involved, thus their interests merit higher protection, or when the proceedings concern matrimonial disputes or the guardianship of children (International Covenant on Civil and Political Rights UN 1966/1976 Art. 14 .1). In the case of juvenile persons, the procedure takes account of their age. All means are set to promote rehabilitation and not just the punishment of juvenile offenders. The sensitive psychological state of juveniles allows the aims of the criminal proceedings to be reached with minimum intervention in their lives, that is also the foundation of the exemption of the principle of publicity. The legislation sets the basis for an assessment that should be made from the courts in each concrete case in order for the interests of the public, on one hand, and the individuals that are suspected or accused, on the other, to be protected. Nevertheless, public references to guilt and presentation of suspects and accused persons are not a subject matter of the abovementioned international documents. Public international law is in its nature abstract and aims to set a framework for the fundaments of the rights. Their further development is a matter of regional and national measures. In this relation, it is interesting to point out that there are many cases against Bulgaria when it comes to too restrictive measures on excluding the principle of publicity in court proceedings, but also on too wide publicity, e.g. public arrests, public statements, when it comes to activities in the course of the investigation that should be more confidential in order for the private lives of the accused

to be protected (Raza v. Bulgaria, Nikolova and Vandova v. Bulgaria, Fazliyski v. Bulgaria).

2.2 Presumption of innocence

Public international law grants everyone who has been charged with a crime with the right to be presumed innocent until proved guilty according to the respective applicable law (International Covenant on Civil and Political Rights UN 1966/1976 Art. 14 .2, EU Charter of Fundamental Rights of the European Union 2012 Art. 48). Furthering, no one can be declared guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed (UN General Assembly Universal Declaration of Human Rights 1948 Art. 11.2).

Directive 2016/343 enshrines not only the presumption of innocence but also rules on the public references to guilt made in public statements by public authorities, measures regarding restricting actions from the authorities that could lead to presenting individuals as being guilty in public, rules on the burden of proof, the right to remain silent, the right to be present at the trial and the right to a re-trial. In general, all the fundamental rights and principles, already existing in other international legislative instruments. In the process of adoption of the Directive, it was proposed that the scope of application should be extended to legal persons also, it was discussed if it should be applicable to similar proceedings to those of a criminal nature, such that lead to comparable sanctions with punitive or deterrent nature (ECLAN 2016). The aim of such legislation is to ensure that Member States do not envisage any exemptions regarding the safeguards laid down in the Directive not only when it comes to the procedural rights of the accused but also in respect of the rules concerning public statements made from public authorities in an ongoing criminal proceedings (ibid.). In that case, if the Directive would apply also to organizations, they would have the right not to be presented as guilty or to be subject of public statements regarding criminal proceedings against them. The Committee proposed effective remedies to be taken to ameliorate breaches in an event of leak of information (ibid.).

After five trialogues held between January and October 2015, on 4 November 2015, the Committee of the Permanent Representatives of the Governments of the Member States to the European Union (the COREPER) approved the compromise text that was agreed with the European Parliament during the last trialogue and the Directive was signed on 9 March 2016, and published in the Official Journal on 11 March 2016 (OJ L 65). The deadline for the implementation ended on 1 April 2018 (ECLAN 2016).

2.3 Public Statements

The texts of Article 4 and Article 5 of the Directive are ruling the obligation of Member States to ensure that as long as a suspect or an accused person has not been proved guilty according to law, public statements made by public authorities, and judicial decisions, other than those on guilt, do not refer to that person as being guilty. That means that Member States should implement rules for the public authorities, and they should be aware of the importance of respecting the presumption of innocence when issuing press releases or providing information to the media in any way. This is to be without prejudice to national law protecting the freedom of press and other media (Directive 2016/343 EU Recital 19). In Bulgaria there is no Media Law, the 'fourth estate' has but an ethical code that is not legally binding and nor obligatory. That is why it is important that the national authorities involved in criminal proceedings have strict rules on their public relations activities. Notwithstanding, the rules of the Directive regarding public statements of the authorities are not explicitly implemented in national legislation. Articles 4 and 5 of the Directive are laying down the rules for communication by public authorities involved in criminal proceedings in more detailed way than all abovementioned international legal instruments that regulate the principle of publicity of criminal trial.

That is an important guarantee for the right to access to information and the principles of publicity of criminal trial to be balanced in all Member States (Directive 2016/343 EU Recital 16). It is of great value that public awareness on criminal matters is possible. Nevertheless, when the statements of the authorities are based on suspicion or on elements of incriminating evidence, such as decisions on pre-trial detention, they should not refer to the suspect or accused person as being guilty (Directive 2016/343 EU Recital 16). The obligations of the authorities to verify that there are enough elements of incriminating evidence against the suspect or accused person is a guarantee for the safeguarding of the rights of individuals related to the presumption of innocence and the respect of their private lives. The rules of the Directive are not limiting or derogating from any of the rights and procedural safeguards that are already ensured under the Charter, the ECHR, the ICCPR, the UDHR or other relevant provisions of international law. The same is applicable when the rule of law of any Member State of the EU provides a higher level of protection (Directive 2016/343 EU Art. 13).

2.4 Presenting Suspects or Accused Persons as Being Guilty

Directive 2016/343 further stipulates the obligation to competent authorities to abstain from presenting suspects or accused persons as being guilty, in court or in public, using measures of physical restraint. Such measures are, according to the Directive - handcuffs, glass boxes, cages and leg irons. An exception can be made only when the use of such measures is required for case-specific reasons, related to security matters. For example - to prevent suspects or accused persons from harming themselves or others or from damaging any property. Physical restraint measures are also possible when that is

necessary for to the prevention of suspects or accused persons from absconding or from having contact with third persons, such as witnesses or victims (Directive 2016/343 EU Recital 20). Presenting suspects or accused persons in public or in court with prison clothes is also to be avoided (Directive 2016/343 EU Recital 21). Such measures leave the impression as if the individual is guilty before the court issues its final decision in a trial and it harms the right to be considered innocent until proved guilty according to the law.

In Bulgaria the transportation of accused persons is enshrined not in a law, but in a by-law of the Minister of Interior (Instructions for the Organization and Order in the Implementation of Convoy Activities in the Ministry of Interior 2017). They do not include any rules regarding the right of the accused not to be presented as guilty in public, but rather are specifying the organization of the transportation, the competences and interaction between the authorities and the necessity of the physical restrain measures compared to the seriousness of the alleged crime in question. In 2018 when a mayor being charged with bribery was brought by the authorities to a hospital with handcuffs, both on the hands and legs (the Dessislava Ivancheva and Bilyana Petrova Case), a public discussion was opened if the rules on the transportation of accused persons should be subject to legislative changes. The focus was not the presumption of innocence in particular but the fact that the measures were not necessary. Up until the moment of the drafting of this paper no legislative changes followed.

For the purpose of comprehensives, it should be noted that Bulgarian legislation does not provide a legal definition for a 'suspect', nor is this procedural role regulate in any way. Individuals gain procedural rights in criminal proceedings only after the formal beginning of the proceedings (after being accused). The fact that the Directive's rules apply from the moment when an individual is suspected or accused (Directive 2016/343 EU Art. 2) is therefore useful in national context. Even though directives are not originally thought to be binding before their implementation in national laws of Member States, the doctrine of 'direct effect' developed by the European Court of Justice (the ECJ) allows individuals to claim damages that occur because of bad implementation or non-implementation of directives. In the case of Francovich v. Italy, the ECJ extended the principle of Van Gend en Loos to provide that Member States that failed to implement a directive could be liable to pay damages to individuals and companies who had been adversely affected by the unsuccessful attempt of the respective Member State to implement the rules of a directive.

3 Bulgarian legal framework

The Bulgarian Constitution states in its Article 31 that anyone charged with a criminal offence must be brought before the judiciary within the time limit established by a law, no one may be compelled to plead guilty, nor may be convicted solely on the basis of the confession and accused individual should be presumed innocent until otherwise proven by an enforceable sentence. The rights of an accused party may not be restricted beyond what is necessary for the administration of justice. Individuals deprived of their liberty should be afforded conditions to exercise the fundamental rights that are not restricted by the effect of the sentence. On the other side, in Article 32 the private life of citizens is being announced inviolable. According to the Constitution everyone has the right to protection against any unlawful interference with their private or family life and against any encroachment on their honour, dignity, and reputation. It is not allowed for anyone to be followed, photographed, filmed, recorded, or to be a subjected to any other similar actions without their knowledge or despite their express disapproval, save in the cases provided for by the law (Constitution of the Republic of Bulgaria 1991 Art. 32.2).

In the chapter of the Criminal Procedure Code of Bulgaria dealing with the fundamental principles it is laid down that the court, the prosecutor and investigative bodies make their decisions according to their inner conviction, based on the objective, comprehensive and complete investigation of all circumstances relevant to the case (Criminal Procedure Code 2005 Art. 14). The rights of defense, the presumption of innocence and the publicity of the hearings are also enshrined and legally binding to all authorities within the criminal proceedings chain. National legislation does not refer any provisions regarding the publications on criminal proceedings, neither when the media is disseminating information about the proceeding's, nor when the competent authorities are spreading information through their websites and/or trough public interviews. Although in general, Bulgarian legislation is considered to be synchronized with the European democratic values, the ECHR dealt with 879 applications concerning Bulgaria in 2018, of which 841 were declared inadmissible or struck out. It delivered 29 judgments (concerning 38 applications), 27 of which found at least one violation of the European Convention on Human Rights (ECHR 2019).

3.1 Implementation of the Directive

Since directives leave Member States with a certain amount of leeway to the exact rules to be adopted, Directive 2016/343 explicitly states that Member States shall insert a reference to the Directive when implementing it in national legislation. Another possibility is the specific law to be accompanied by such reference on their official publication (Directive 2016/343 EU Art. 14.1). The information on the official EUR-Lex portal shows hat in Bulgaria the rules of Directive 2016/343 are implemented in several laws.

In the concrete case, according to the official website of the EU, the section 'National Transposition' shows that the Directive is implemented in: Implementation of Penal Sanctions and Detention in Custody Act, Criminal Code, Act on the Liability for Damage Incurred by the State and the Municipalities (Title amended, SG No. 30/2006), Judiciary System Act, Obligations and Contracts Act, Criminal Procedure Code. Consultation with the Issues of the States Newspaper that promulgate the above-mentioned laws, shows that the legislative changes are fragmented, and it is not clear which of the legislative changes are corresponding to the rules of the Directive.

Although regulated, the publicity principles often are being violated in Bulgaria. The legislation is discontinuous and same is valid for the practices of prosecution, court and media. Often there is too much information that leads to shaping the public opinion on proceedings that are in a very early stage (i.e. Dessislava Ivancheva and Bilyana Petrova Case).Then, there are cases when a trial is of significant public interest, yet the public cannot get access to information (SG No. 63/4.08.2017 restricting the public delivering of judgments). And, last but not least, Bulgaria is holding one of the lowest places in the Ranking on press freedom of Reporters Without Borders (2019 World Press Freedom Index).

3.2 Media Strategy of the Judiciary

In 2016 the Supreme Judicial Council (the SJC) of the Republic of Bulgaria adopted a Media Strategy for the Judicial Authorities. The document lays down the grounds for interaction with the SJC and the judiciary with the media in order to promote the functions of the judiciary in the protection of the rights and legitimate interests of citizens, legal entities and the state. The Media Strategy synchronizes the existing rules among all courts and the prosecution bodies in Bulgaria. The Strategy includes rules and practices for communication with the media and aims at achieving uniform, clearly established and modern standards in media communication.

It includes the coordination of the activities and measures implemented by the judiciary. The implementation of the Media Strategy aims to ensure transparency in the work of the judiciary. The prosecution in Bulgaria is part of the judiciary, that is why the rules laid down in this document apply also to the investigation of criminal offences and proceedings in criminal trials. The strategy defines short-term goals, mid-term goals and long-term goals on transparency, building unified media policy of the judiciary, providing access to information etc. It emphasizes on the importance of achieving an effective model of interaction with the media, in order to ensure providing of adequate and objective information. The communication channels for the judiciary are the websites, Facebook Pages, livestreaming etc., but there are no rules on the content of the statements and the obligation of the authorities to avoid presenting suspected and accused persons as being guilty before a sentence is definitive. The Prosecution of the Republic of Bulgaria also has adopted rules on the communication with the media. The lack on concrete rules

for the relation between public statements and the presumption of innocence is valid for them too. According to the rules, the Prosecution is responsible for continuously informing the society on its work with delivering information to the public in plain and clear way and with respect to the principles laid down in the Constitution and other Bulgarian laws.

The public relations activities of Bulgarian's Prosecution office were one of the topics on the Concept of the newly chosen chief prosecutor (Concept on the Strategic Management of the Prosecution of the Republic of Bulgaria 2019 Ivan Stoimenov Geshev). The vote for the Prosecutor General was one of the most discussed topics this year, not only because of the sole candidate, but also because of the lack of information of his work and the principles, stated in the strategy for the Prosecution, that includes rules on the public relations of the investigative body that could lead to unjustified public referral to guilt and political manipulations.

And, although, according to the abovementioned acts, publicity and transparency of the Bulgarian judiciary should be strengthened, in 2017 with legislative changes in the Criminal Procedure Code it was forbidden for the courts to publish court decisions on their website, unless it is confirmed from the Prosecution that the needed measures for bringing the penalty into force are being undertaken which was considered to be a step back from the main principles of publicity of criminal proceedings and transparency in the judiciary.

The international legislative instruments concerning fundamental principles of criminal proceedings and the EU legislation are developing same principles on publicity detailed and consistent, but the national legislation of Bulgaria is changing every couple of years – some changes include motives from directives, but they do not necessarily lead to the result foreseen. In the case of the publishing of court decisions and judgments in criminal matters, the reasoning was with the efforts of the prosecution to prevent the accused escaping justice. Completely illogical step to restrict publicity of the proceedings, when assessing that matter. The defendant has the obligation to inform the accused, it is slightly possible that the releasing of the judgment on the website of the court will lead to escaping justice. The Media Strategy shows that Bulgarian judiciary is aware of the importance of the public statements that authorities are making when it comes to criminal proceedings, but the policy makers do not have a uniform approach to that matter.

3.3 The Commission for Personal Data Protection

Apart from the Media Strategy and the Rules of the Prosecution, another important document that affects the matter of dissemination of information in criminal matters in Bulgaria, is a statement of the Bulgarian Commission for Personal Data Protection (the CPDP) issued on the request of the Bulgarian Prosecution on 26 June 2018, just a month after Regulation (EU) 2016/679 of the European Parliament and of the Council of 27

April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (the GDPR) came in force. As a data controller, the Prosecution has an obligation to respect all data protection laws, including GDPR, the matter of the inquiry is if data that enables the society to identify a certain person, such as first and family name, profession, workplace, family relationships, military rank etc. can be a subject of press releases. The concrete questions that the Bulgarian Prosecution asked CPDP were:

First, are the following actions a violation of the regulations in the field of personal data protection?

- Publication of personal data of participants in the pre-trial proceedings (accused persons, witnesses, etc.) on the prosecutor's office websites?
- Disposing of personal data to participants in pre-trial proceedings for journalistic purposes? If yes, in which cases? How does the handling of these cases relate to the presumption of innocence?

Second, if there are no obstacles regarding the transfer of personal data, is there any limit and, if yes, what are the boundaries that should be respected in order the rights of citizens to be protected? The Prosecution explicitly asked for specific answers to be provided from the CPDP.

The legal analysis in the statement of the CPDP underlines that the new EU legal framework on the protection of personal data, applicable from May 2018, includes two main legislative instruments – Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA (the Police Directive) and the GDPR. Meanwhile both are implemented in the national Data Protection Act. But that did not bring any clarity on the practical implementation of the legal framework. Not long ago the article that implements the GDPR rules on the processing of personal data for journalistic purposes and the journalistic exemption was declared unconstitutional. It is obvious that both policymakers and individuals in Bulgaria have issues on implementing the rules on data protection.

According to the statement of the CPDP, unlike the processing of personal data for the purpose of criminal proceedings (that falls under the scope of the Police Directive), the publication of press releases and the providing information to the media containing personal data of participants in pre-trial proceedings is processing for purposes other than the statutory role of the Prosecution in criminal proceedings and, in that matter, and thus is subject to the rules of GDPR. It was important for the practical implementation of both the Police Directive and the GDPR that this is clear, not only because of the overlapping of the scope of the acts, but also because of the legislative approach in Bulgaria. The

Police Directive was implemented in the Data Protection Act, and although in a separate chapter – it is leading to a confusion to the processors of personal data if the rules are applicable to them, or not.

The legal basis for the Prosecution when disclosing data to the public is the performance of a task carried out in the public interest and in the exercise of official authority vested in the controller. The CPDP underlines that it should be taken account of the fact that the Prosecutor's office (and the authorities, part of the judicial system in general), in view of their statutory jurisdiction, do not process personal data for journalistic purposes. That is why they do not have to observe the special rules that are otherwise applicable to the media.

When personal data is being processed for journalistic purposes, the legitimate interest is the applicable legal basis (GDPR 2018 Art. 6.1.f). In such cases the provision of Art. 85 of the GDPR, under which EU Member States have an obligation to reconcile the right to the protection of personal data with the right to freedom of expression and information, including processing for journalistic purposes is to apply. The CPDP emphasizes that those rights are of equal importance and therefore a proper, reasonable and proportionate balance should be sought in the exercise and protection of both. Since the legal basis in the national Data Protection Act of Bulgaria was declared unconstitutional, it is a matter of practical implementation and individual assessment to implement those rules in accordance with the GDPR in its integrity.

The Prosecution, as part of the Bulgarian judiciary, is also subject to public scrutiny. The public control over the activities of the Prosecution cannot be carried out without the publication of information about its work. Principles of publicity, transparency and accountability of the judiciary ensures public control over the bodies of the judiciary, in order to achieve justice, lawfulness and independence and to strengthen public confidence. In addition, in some cases the public interest may prevail over the interest of the individual, which results in the permissible and justified provision of personal data which should, however, be proportionate to the purpose. According to the statement of CPDP, public interest as a legal basis for lawful processing of personal data can be justified also in the means of the general prevention, laid down in the Criminal Code of the Republic of Bulgaria (Art. 36). In that case the dissemination of information on certain criminal offences can be seen as a tool for achieving prevention in the aspects of criminal justice, that results in the producing of an educative and deterring effect on the other members of society.

In its statement, the CPDP underlines also that when delivering public statements, the Prosecution, in its role of data controller, should assess for each separate case, whether the purpose for which the information is published on the Prosecution’s website or in the media cannot be achieved by applying the approach outlined in Art. 64 of the Bulgarian Judiciary System Act, namely in a way that does not allow the identification of the

individuals mentioned in them through pseudonymization (replacement of names with initials). The CPDP states that if it is impossible or inappropriate to publish the information pseudonymized, for reasons of achieving public awareness and public benefit, then the national identifier, address and names of individuals otherwise connected to the proceedings would be excessive. The Prosecution should also take specific measures to prevent the misidentification of another person in case of a coincidence of names and use additional features, including aliases, age, location, etc. The importance of the necessity of having access to information published by the Prosecution, is underlined by the national Data Authority also in accordance of Art. 204 of the Bulgarian Criminal Procedure Code, by virtue of it, pre-trial authorities should make extensive use of public assistance in detecting crimes and clarifying the circumstances of the case. Where justified and in proportion to the public danger of the perpetrator or the criminal act, the Prosecution may seek assistance from citizens through its website and/or the media, including through the publication of personal data - photographs, names, address or other facial data. Here an example can be given with the practice of the Bulgarian Ministry of Interior, which Sofia Directorate publishes pictures of individuals that are missing, with an unknown identity, or persons somehow connected to alleged crimes.

According to the CPDP, the authorities should widely use the assistance of the society in order to discover the criminal offence and to elucidate the circumstances of the case. The public interest of access to information could indeed outweigh the principles of protection of personal data. For instance, when the individual involved in criminal proceedings is holding a senior public office within the meaning of Art. 6 of the Counter-Corruption and Unlawfully Acquired Assets Forfeiture Act. The Constitutional Court of the Republic of Bulgaria already in 1996 has stated that 'the public authorities, as well as political figures and civil servants, may be subject to public criticism at a level higher than that of individuals. Initially, the level of personal data protection enjoyed by those persons is much lower in comparison to the level of protect enjoyed by the average citizen (Case 1/1996). Further, the Constitutional Court emphasizes, again, that authorities have an obligation to provide the public access to information on their activities.

In the inquiry of the Prosecution to the Data Protection Authority, special attention is paid to the connection between processing of personal data when publishing press releases and provision of information for journalistic purposes, on the one hand, and the presumption of innocence as a fundamental constitutional right of every citizen, on the other. According to Article 16 of the Bulgarian Criminal Procedure Code, the accused is presumed innocent until the contrary is established by a verdict. According to Article 20, court hearings are public, except in cases explicitly specified in the Code itself. Only the court can declare a person guilty or not guilty and the Prosecution in its procedural role as a party in the process, which raises and supports the charge of certain crimes should avoid disseminating information that could lead to assumptions that a person is guilty, before the delivery of a final verdict. Nevertheless, the CPDP states that it is in the public interest for the Prosecution to disseminate information and this does not violate the

presumption of innocence, but merely provides information of the actions taken by the prosecution to detect and investigate criminal acts.

The CPDP underlines that it is important when assessing the proportionality of the publication of personal data by the Prosecution to pay attention to the distinction between the accused persons and the other participants in the pre-trial proceedings, such as witnesses, experts and others. In general, the statement is synchronized with the rules of Directive 2016/343 on the public statements and references to guilt of suspected and accused persons. Regarding the individuals involved in criminal proceedings, other than being accused or suspected, there is no overriding public interest and their personal data should not be made public. The national Data Protection Authority states that exemptions are possible in cases where senior public officials are involved or where the publication of the information protects the vital interests of the data subject, e.g. in the search for a missing person.

The Prosecution, in its role of data controller, should make an assessment based on objective criteria for how long it is justified to leave such information on its website, but there are no such criteria laid down in Bulgarian legislation. Each decision regarding the processing of personal data, should be taken on the basis of the specifics of the concrete case (Dimitrov, Ilieva, Makshturova 2018). When criminal proceedings are closed with a definitive act or the entry into force of a sentence acquitting a person, his or her right to privacy and protection of personal data outweighs the public interest in information, respectively, the information on the charge should be deleted as inaccurate or out of date, as stated from the CPDP. But that does not apply to conventional media. Even if the Prosecution office is obliged to delete data from its website, that is not the case when it comes to newspapers, magazines, news agencies. Every press release on the website of the Prosecution finds its place on the daily news, it is being indexed by Google, its being re-shared on Facebook, Twitter, Instagram. A year and a half after GDPR came into force, the complaints against media are growing. The rules of the GDPR are still unclear in Bulgaria, although implemented in national legislation.

To summarize:

- In Bulgaria the publication of personal data of accused persons in the pre-trial proceedings on the websites of the Prosecution, as well as the provision to the media for journalistic purposes, is lawful when there is a legal obligation or there is an overriding public interest;
- When it is impossible or inappropriate to publish the information in an anonymous or pseudonymized form, Bulgarian authorities should provide only minimum personal data to the public;
- The processing of personal data by the Prosecution for the prevention, investigation, detection or prosecution of crimes falls within the scope of the Police Directive and not the GDPR;

- Personal data of witnesses, experts or other third parties, should not be published or otherwise disclosed, if there is no legal obligation to do so or overriding public interest;
- Personal data of individuals holding high public positions has lower protection in Bulgaria;
- The principles relating to processing of personal data (GDPR Art. 5) are to be followed.

4 Conclusion

The lack of detailed rules in the legislation of Bulgaria leads to issues in the practical implementation of the Directive when it comes to the objectivity of the information provided to the media. The rules on communication and public relations of the judiciary are a step towards unified and conscious approach in that matter, but 'de lege ferenda', legislative changes should implement the articles of the Directive, in order to avoid the authorities of making mistakes when disseminating that highly sensitive information. According to the Directive the term 'public statements made by public authorities' should be understood to be any statement which refers to a criminal offence and which emanates from an authority involved in the criminal proceedings concerning that criminal offence, such as judicial authorities, police and other law enforcement authorities, or from another public authority, such as ministers and other public officials, it being understood that this is without prejudice to national law regarding immunity (Directive 2016/343 EU Recital 16). The terms 'acts of the prosecution which aim to prove the guilt of the suspect or accused person', 'preliminary decisions of a procedural nature, which are taken by judicial or other competent authorities' and 'based on suspicion or incriminating evidence' should be implemented through legal definitions in Bulgarian national legislation in order mistakes to be avoided when disclosing information in the highly sensitive matters of criminal proceedings.

The obligation not to refer to suspects or accused persons as being guilty should not prevent public authorities from publicly disseminating information on the criminal proceedings, but only where this is strictly 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 to the public interest (Directive 2016/343 EU Recital 18). It should be possible to provide information to the public in order to prevent public order disturbance in cases of environmental crimes.

Each disclosure of information should be in accordance with principles of proportionality and minimisation. Several interests should be taken into account – of the individual, of the society, of the public authorities also. Not to create an impression that a person is guilty is highly sensitive and difficult. The obligation of the national legislator to ensure that appropriate measures are available in the event of a breach of the obligations laid down the Directive - not to refer to suspects or accused persons as being guilty, cannot be

found in Bulgarian law. The same is valid for the appropriate measures that should be taken in order to ensure that suspects and accused persons are not presented as being guilty, in court or in public, using measures of physical restraint.

In the age of digital communications where the media is not only on the Internet through its websites, but also on Facebook, Twitter and Instagram, certain news can reach thousands of hundreds of people just in minutes, the responsibility of authorities involved in criminal proceedings to be mindful when the dissemination and communication of information on ongoing criminal proceedings is extremely high. The 'right to be forgotten' applicable to digital service providers is not a guarantee enough to the individual's personal life to be protected. It is just a response, reaction to an unlawful or inappropriate information dissemination. The damage already done to the reputation and good name of the accused cannot be erased. That is why the measures for prevention are the more appropriate respond in criminal justice matters.

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The Presumption of Innocence and the Right to be Present at Trial in Criminal Proceedings: The Romanian Case Study

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Abstract The present article aims at analyzing the national legislative framework to assess the level of transposition of the Directive (EU) 2016/343 of the European Parliament and of the Council of March 9, 2016, on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings in Romania. The article has been drafted following several methodological indications, contained in a methodological protocol specially elaborated for this research. The research included a desk review, as well as semi-structured interviews with relevant actions, addressing the following topics: (a) The general situation regarding the right to be present and presumption of innocence; (b) Transposition and implementation of the Directive; (c) Recommendations and proposals for improvement.

Keywords: • presumption of innocence • Directive 2016/343 • right to be present • Romania

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1 Introduction

Starting with April 2018, Romania among other member states of the European Union, had the obligation to fully transpose into its national legislation Directive (EU) 2016/343 of the European Parliament and of the Council of March 9, 2016, on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings. One of the most important provisions of the Directive is set out in article 8 regarding the right to be present at trial. In regards specifically to the right to be present and accordance with the article, member states must ensure that suspects and accused persons have the right to be present at their trial and subsequently to provide that the suspect or accused person has been informed in due time of the trial and is represented by a mandated lawyer.

2 Methodology

For the elaboration of this particular article, a specified methodology pattern has been used by analyzing the current context of the Romanian legislation in correlation with Directive EU 2016/343 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings. Whilst elaborating an in-depth evaluation of the national legislation, the certain emphasis has been put on gathering input from several experts, by using a previously developed questionnaire that had the objective of providing useful information about the national legislation before the Directive and even more interesting after the Directive entered into force. Furthermore, for the elaboration of the report, mixed research methods were used such as mentioned beforehand : (1) Qualitative method – Interviews with national experts that have experience in the field (judges, prosecutors, law experts) and in-depth evaluation of legislation; (2) Quantitative method – applying questionnaire. Several documents have been examined and used for the elaboration of the report, such as the following sources: Romanian Constitution, Criminal Procedure Code, and correlated laws/conventions/regulations.

3 Conceptual framework

The Romanian national legislation, through its NCPC (article 77), defines **a suspect** *the person in respect of whom the relevant data and evidence suggest reasonable suspicion that he has committed an offense under the Criminal Law.* According to the national legislation, the suspect has the same rights provided by the Law for the defendant, unless the law provides otherwise. Article 82 of the NCPC defines **the accused** as the person

against whom the criminal actions were initiated, and that becomes consequently part of the criminal trial. The defendant has several rights integrated within the national legislation (article 83 of NCPC), such as *(1)* ***The right to not make any statements during the criminal proceedings, drawing attention to the fact that if they refuse to give statements, they will not suffer any adverse consequences and if they make statements, those can be used as evidence against them****; (2) The right to be informed about the act for which it is investigated and its legal classification; (3) the right to consult the file, according to the Law; (4) the right to have a lawyer chosen and, if he does not appoint one, in cases of compulsory assistance, the right to appoint a lawyer ex officio; (5) the right to propose the taking of evidence under the conditions provided by the Law, to raise exceptions and to draw conclusions; (6) the right to make any other claims regarding the settlement of the criminal and civil aspects of the case; (7) the right to benefit free of charge from an interpreter when he/she does not understand, speaks well or can not communicate in Romanian; (8) the right to appeal to a mediator, in cases permitted by Law;*

The principle of the **right to a fair trial** was first established in article 6, paragraph 1 of the European Convention on Human Rights, and implemented at the national level through article 10 of the Law no. 34/2004 regarding the judicial organization (republished) according to which all persons have the right to a fair trial and to solve the cases within a reasonable time by an impartial and independent court, established according to the Law. In the Romanian constitutional system, the right to a fair trial was explicitly found in the Art. 21 par. (3) of the Romanian Constitution, as a result of its last review in 2003. The article entitled Free access to justice makes several references such as *(1) Any person may address justice to defend his rights, freedoms and legitimate interests; (2) No law may preclude the exercise of this right; (3) The parties shall have the right to a fair trial and to settle the cases within a reasonable time and (4) The particular administrative jurisdictions are optional and free of charge.*

As regards the need for a fair trial, since the Convention does not define the term "fair," it has been stated in the doctrine that this requirement must be interpreted in such a way as to ensure respect for fundamental principles such as the contradictorily principle (adversarial), the right to defense, equality, and compliance with the requirement that the cases should be settled within a reasonable time. Furthermore, respect for the right to defense is a fundamental principle of the criminal process, as well as one of the guarantees of the right to a fair trial.

Article 24 of the Constitution provided that the right to defense is guaranteed and that throughout the criminal proceedings, the parties have the right to be assisted by a lawyer elected or appointed by an officer or represented by a defense counsel. In correlation with the NCPC, article 8 refers to fairness and a reasonable duration of the criminal proceedings. In doing so, the judicial bodies must carry out the criminal prosecution and the trial in compliance with the procedural guarantees and the rights of parties and the

procedural subjects, so that the facts that constitute offenses are entirely and promptly detected, that no innocent person should be held liable and consequently that any person who has committed an offense to be punished according to the Law within a reasonable time. Article 10 of the NCPP presents an analytical presentation of the rights which are part of the principle of guaranteeing the right to defense. Par. (3) of the same article mentions that the accused has the right to be informed immediately and before being heard about the deed for which the prosecution is carried out and its legal classification. According to par. (4), the suspect and the defendant must be aware that they have the right not to make any statement before being heard.

4 Evaluation of national legislation before Directive (EU) 2016/343

The presumption of innocence was first found within the Romanian Law through the decree no.212 of 1974 for the adoption of the International Covenant on Civil and Political Rights. Later on, it was reconfirmed by Law no. May 30 May 18 1994 by which Romania ratified the Convention for the Protection of Human Rights and Fundamental Freedoms and the additional protocols to this Convention. Correlated with the definitions and rights mentioned beforehand, the current Romanian national legislation makes direct references to the notion of **presumption of innocence** under Article 4 of the NCPC, indicating that any person shall be considered innocent until the determination of his guilt by a final criminal judgment. More so, after the administration of the entire evidence, any doubt shall be interpreted in favor of the suspect or accused. Furthermore, under the Romanian Constitution (article 23 par. 11) a person is considered innocent until the final judgment of the conviction has passed, thus reiterating that every suspect or accused person will be presumed innocent until his guilt has been proven under the Law (**principle in dubio pro reo**).

In correlation with the presumption of innocence, the national legislation mentions through article 99 of the NCPC that the burden of proof belongs mainly to the prosecutor and in the cases of civil action, the burden belongs to the civil party or as the case may be, to the prosecutor who exercises the civil action if the injured person is deprived of his or her exercise capacity or has limited exercise capacity. Accordingly, the suspect or defendant benefit from the presumption of innocence, not having the responsibility to prove his innocence, having the right not to contribute to his indictment. During the criminal proceedings, the injured party, the suspect, and the parties have the right to propose to the judicial bodies the administration of evidence.

According to the national legislation, **the suspect and accused** have several rights throughout the criminal proceedings, as mentioned beforehand, rights that were present in the bill even before the existence of the Directive (EU) 2016/343 and the need for transposing different measures. Unlike the old criminal proceedings code, the NCPC specifically provides that the suspect or defendant may exercise his right to silence at any time during the hearing as to any of the facts or circumstances in question. Furthermore,

the suspect and accused have, according to article 82 of the NCPC, the right to be informed about the act for which they are investigated and also its legal classification. A lack of procedural safeguards regarding the activity of informing the suspect/accused of criminal charges can be found in the legislation.

According to article 311 para. 1 of the NCPC, in the case in which after the commencement of the criminal prosecution, the criminal investigative body finds new facts, data on the participation of other persons or circumstances that may lead to a change in the legal framing of the deed, the judicial body can order the extension of the criminal prosecution or the change of the legal classification. Also, according to par. 3 of the same article, the judicial body that ordered the extension of the criminal prosecution or the change of the legal classification is obliged to inform the suspect of the new facts about which the extension was ordered. From the systematic interpretation of the texts, it can be easily denied that in the course of criminal prosecution, in the event of changing of the accusation, the legislator understood to grant the right to be informed about it only in the case of the extension of the criminal prosecution, not the change of the legal classification, although this interpretation can be found in contradiction with the same article mentioned above refers to the fact that the accused must be informed both of the act for which the criminal prosecution is carried out and of its legal classification. The vagueness of the text can lead to several misinterpretations during criminal proceedings.

Regarding the **right to be present at the trial**, the national legislation makes several references to the citation mode and communication of procedural documents and also assignment mandate. The summoning of a person before the criminal prosecution body or the court is made by written citation, but the Law mentions that the citation can also be made by telephone or telegraphic note, a report being concluded in this respect. The summons and all the procedural documents shall be communicated ex officio through the procedural agents of the judicial bodies or any other employee, through the local police or by postal or courier service. In this regard, the persons in charge of communicating the citations and procedural documents are obliged to perform the citation procedure and to deliver the evidence of its fulfillment before the citation deadline previously established by the judicial body. The citation may also be sent through electronic mail or by any other electronic messaging system, but with the consent of the person quoted. The judicial body may also communicate to the present person the following term, informing her/him of the consequences of the failure to appear. In the course of criminal prosecution, the acknowledgment of the term shall be mentioned in a report to be signed by the person quoted.

The suspect/accused will be therefore informed through the citation that the party cited has the right to a lawyer with whom to present himself/herself within the fixed term, and if applicable, the party will be informed that according to art.90 and 93 par. 4 of the NCPC, the defense is mandatory, and if the party does not choose a lawyer at the fixed term of the court, a lawyer will be appointed ex officio. The party is also informed about

the fact that it may consult the case file to exercise his/her right to defense and even the consequences of not being present before the judiciary. According to the Law, the suspect and the defendant receive the citation at the address where they live and in the case in which the address is not known, at their place of work through the staff department of the unit in which they work. Furthermore, the suspect or the defendant may be summoned at the headquarters of the chosen lawyer, if the party had not appeared after the first legal summons. Even furthermore, the legislation provides even more measures for the citation in which all the above measures do not apply, case in which the notice shall be posted at the headquarters of the judicial body.

In the case in which the suspect or defendant is living abroad, the summoning is made for the first term according to the rules of international criminal Law applicable in the relationship with the requested state, according to the Law. In the absence of such a provision or where the applicable international legal instrument so permits, the citation shall be by registered letter.

In this case, the acknowledgment of receipt of the registered letter, signed by the addressee, or the refusal to accept it, shall serve as evidence of the completion of the citation procedure. For the first term of the trial, the suspect or defendant will be notified by stating that he has an obligation to indicate an address on the territory of Romania, an e-mail address, or e-mail, where all the communications about the trial will be made. If it fails to comply, notifications will be made by a registered letter, the receipt of the letter to the Romanian post office, in which the documents to be dispatched will be mentioned, taking the place of proof of the procedure. It should be said as well that with the exception when the presence of the defendant is mandatory, the irregularity regarding the party's summoning procedure may be invoked by the prosecutor (according to article 265 NCPC), the other parties or ex officio only at the time at which it occurred.

The current national legislation does a reference to the defendant's participation in the trial and his rights through article 364 of the NCPC. According to the article, the trial takes place in the presence of the defendant, bringing the defendant in court being obligatory. Some exceptions occur when the defendant is missing, had evaded from the court, or changed his/her address without informing the judicial bodies (and all of the requirements for citation mentioned above have been fulfilled). The trial can also take place in the absence of the defendant if, although legally cited, the defendant is unjustifiably missing from the trial. It should be mentioned that throughout the trial, the defendant may request in writing to be judged in absentia, is therefore represented by his chosen lawyer or ex officio. If the court considers imperative the presence of the defendant, a mandate can be issued in this regard.

In the cases in which it is established based on forensic expertise that the defendant suffers from a severe illness that prevents him/her from participating in the trial, the court shall

order the suspension of the trial until the state of the defendant's health will allow him to participate in the trial.

An important mention regarding the case of suspension of a trial due to the absence of a defendant, even in the situation where there are more defendants, but the grounds of suspension concerns only one of them (and the Division is not possible) the whole case shall be suspended. The criminal proceedings are resumed ex officio as soon as the defendant can participate in the trial, according to the Law. It can be concluded that certain instances can lead to a trial to be held in the absence of the suspect or accused, but only when several measures have been taken to avoid this. The trial can only occur if the accused and the parties are legally summoned, and the procedure is considered fulfilled. It should be mentioned that no specific procedural safeguards for vulnerable persons suspected or accused in criminal proceedings are in place at the moment at the national level.

There are cases in which the person concerned can not present himself or herself to the trial for various reasons. Legislation under Art. 466 of NCPC provides that a person that has been convicted and judged in absentia may request the reopening of the criminal proceedings within one month of the day on which he/she has become aware, through any official notification, that a criminal case has been brought against him. The convicted person who has not been summoned to trial and has not been formally notified in any other way, namely, although he has known the prosecution, has been judged in absentia, has been deprived of his trial and has not he could notify the court. It is not considered as a faulty trial the convicted person who has appointed an elected defense counsel or a trustee, if they have appeared at any time during the trial, nor the person who, after communicating, according to the Law, the sentencing sentence has not declared appeal, gave up his or her appeal or withdrew its appeal. The criminal proceedings can’t be reopened if the convicted person has requested to be tried in absentia.

Practical case

By the application filed before the Court of Appeal, Criminal Section I, the convicted person A. demanded the reopening of the criminal trial held by the Court of Appeal, the abolition of the decision no. 825 of June 10, 2015, and re-examining the case at the stage of the trial in the hearing on March 4, 2015. In the reasoning of the request, it was claimed that the applicant was in the situation stipulated by the Law, respectively, the lack of trial and also did not have a chosen defense counsel and refused to be assisted by an ex officio lawyer. The petitioner pointed out that on March 4, 2015, he was removed from the courtroom during the hearing and was not recalled until the end of the hearing, in the absence of two hearings of the defendants, where his presence would have been was imperative. In one of the written notes, a similar situation was invoked, which would have existed at the trial date of May 15, 2015, when his presence was formal, having no right to speak, intervene and clarify.

It has been argued that this genuine lack of process has undermined the rights of the defense, the institution of reopening the criminal proceeding having precisely the purpose that any defendant should have the right to a fair trial, conducted in contradictory and oral proceedings, respecting the principle of equality and presumption of innocence.

The Bucharest Court of Appeal found that the petitioner does not fall into one of the two cases when he considers himself absent. Thus, about the first sentence, it was noted that it is clear that the applicant, who was indicted in the criminal case, was summoned to trial, being aware of his existence and presenting himself at the time-limits set in the case. The second sentence also did not contain the incidence of the sentence, and it was not possible to assume that the petitioner lacked the merits of the case, since, on the contrary, he was present at the time.

In conclusion, the reopening of the criminal trial is a procedural remedy for those persons who have been tried in absentia, in the sense that they were not present at the trial either because they did not know of the existence of the case or because they were in an objective impossibility to appear before the court and to announce the matter. However, the lack of a time-limit does not mean that the person concerned can't enjoy these rights, the presence at the other terms or even the fact that he is aware of the existence of the criminal proceedings (even if he would exercise his right under the Law to be sued in absentia) by giving him the real opportunity to exercise the right to defense in the desired form.

5 Evaluation of the national legislation after transposition measures of Directive (EU) 2016/343 to the national Law

The presumption of innocence and the right to a fair trial are currently established in the Charter of Fundamental Rights of the European Union (articles 47 and 48), in the European Convention for the Protection of Human Rights and Fundamental Freedoms (through article 6) and also through the Directive EU 2016/343 of the European Parliament and of the Council of March 9, 2016, on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings. The Directive aims to facilitate mutual recognition of decisions in criminal matters and as well as to strengthen the trust of Member States in each other's criminal justice systems.

As of April 2018, Romania, as well as the other Member States, had the obligation to fully transpose the Directive EU 2016/343 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings. Starting with the same date, Member States were required to communicate to the Commission the legislative progress regarding the obligation to fully transpose the Directive. As a result of not sending the communication on the progress made by Romania, the EC opened an infringement procedure, as it did in the case of other Member

States**.** The procedure only referred to the lack of the necessary communication on behalf of the country, so it did not meant a lack of actions and measures taken to transpose the Directive into national legislation fully. Currently, the Romanian Parliament has made several amendments to the current legislation (Criminal Procedure Code) to comply with the Directive. The amendments have not been approved yet.

Transposing stage of the Directive EU 2016/343

Directive	Existing national legislation NCPC	Amendments
Article 3 Member States shall ensure that suspects and accused persons are presumed innocent until proved guilty according to Law In correlation with article ECHR - Right to a fair trial	**Article 64** "(1) The judge is incompatible if: ... .. "	In Article 64, a new paragraph is inserted after paragraph 1, paragraph 11, with the following proposal: "(11) The Preliminary Chamber judge can not adjudicate on the merits of an ordinary or extraordinary remedy in the same case, and the person who participated in the trial of the case or in a regular way the attack can not participate in the trial of an extraordinary attack. "
Article 4 The Member States shall take the necessary measures to ensure that, for as long as a suspect or an accused person has not been proved guilty according to Law, public statements made by public authorities, and judicial decisions, other than those on guilt, do not refer 109n dis109 person as being guilty. This shall be without prejudice to acts of the prosecution, which aim to prove the guilt of the suspect or accused person and to preliminary decisions of a procedural nature, which are taken by judicial or other competent authorities and which are based on suspicion or incriminating evidence.	**Article 4: Presumption of Innocence** (1) Any person shall be considered innocent until the determination of his guilt by a final criminal judgment. (2) After the administration of the entire evidence, any doubt in the formation of the conviction of the judicial bodies shall be interpreted in favor of the suspect or defendant.	In Article 4, two new paragraphs are inserted after paragraph (2), par. (3) and (4) with the following contents: "(3) During the prosecution and trial of the case in the proceedings of the preliminary chamber are prohibited public communications, public statements as well as the provision of other information, directly or indirectly, from public authorities or any other natural or legal person relating to the facts and persons subject to these procedures. Breach of this obligation is an offense 109n this punishable, according to the criminal Law. (4) During the criminal prosecution, the public presentation of persons suspected of committing crimes with handcuffs or other means of

		immobilization or of other ways of inducing in the public perception that they are guilty of committing offenses
Articles 3 and 6 (2) of the Directive - the presumption of innocence, the burden of proof. Right to defense	Article 106 - Special Rules regarding Hearing: (1) If, during a hearing of a person, it shows visible signs of excessive fatigue or symptoms of a disease that affects his / her physical or mental capacity to participate in the hearing, the judicial body discontinues listening and, if necessary, takes action that the person to be consulted by a medical expert	In Art. 106, after par. (1) a new paragraph is inserted, (11), with the following wording: "(11) Hearing of a person may not take more than 6 hours from 24 hours."
Article 7 Right to remain silent and right not to incriminate oneself	Article 116 - Subject and limits of the witness statement (1) The witness is heard on facts or factual circumstances which are the subject of the probation in the case in which they were cited. 2. The hearing of the witness may be extended to all the circumstances necessary to verify his credibility. (3) The facts of the case or circumstances whose secrecy or confidentiality may be opposed by Law to the judicial bodies may not be the subject of the witness statement.	In Art. 116, after par. (2) two new paragraphs are inserted, (2.1) and (2.2), with the following wording: "(2.1) The witness may refuse to testify to those facts or circumstances that may entail his responsibility for committing a criminal offense. (2.2) The witness may be accompanied by a lawyer before the judicial authorities and may consult with him during the hearing. "
Article 8 (1) the Member States shall ensure that suspects and accused persons have the right to be present at their trial.	Art. 364: Participation of the defendant in the trial and his rights (6) The defendant may file requests, raise exceptions and conclude, including in the situation stipulated in paragraph (1) the final thesis.	In Article 364, after paragraph 6, two new paragraphs, para. (7) and (8), with the following wording: "(7) The person can be convicted in absentia only if he has been legally summoned for each phase of the trial or has entered by other official means in possession of information on the

		place and date was informed of the possibility of a default judgment and whether he was represented by a lawyer elected or appointed ex officio and enjoyed adequate defense in the proceedings (8) Procedure for enforcement of a final judgment rendered in absentia the defendant may only be initiated if the decision has been communicated to him and only after he has been expressly informed of the right to a new court proceedings or appeals to which it has the right to appear and which allows a new determination of the merits of the case, including the examination of new evidence that may lead to a change of the original decision, namely whether the person expressly declares that does not contest the decision or request a new court proceeding or introduce an extraordinary remedy within 30 days of receiving the decision information. "

Whilst all of the proposed amendments have not yet been approved, several key judicial institutions in Romania have declared that these amendments are not necessary and beneficial to the current legislation system. The National Anti-Corruption Division has made a public statement reiterating that these changes will have a devastating impact on criminal investigations, as it eliminates the indispensable legal instruments by which investigative bodies can investigate offenses. The Division mentioned that all the guarantees under Directive (EU) 2016/343 are already provided within the national Law, therefore the Directive is used only as a pretext to remove the ability of criminal prosecution bodies to discover and prove crimes, and the purpose of these changes has nothing to do with the presumption of innocence. An example would be the modification of Art. 83 of the NCPC which gives the suspect and the defendant the right to witness at the hearings of the witnesses will make it more challenging to carry out the criminal prosecution, since in many situations the witnesses will be intimidated by the presence of the offender, especially in situations in which they are in a relationship of subordination as it happens in the case of abuse of service and corruption. Currently, the Law gives the

lawyer the right to attend these hearings, a guarantee that is sufficient for the right of defense of the investigated person;

6 The interrelation between the right to be present at trial and other fundamental human rights in national legislation

The presumption of innocence is a fundamental right of citizens and an essential component of the right to a fair trial. However, in Romania, there is no legislation or jurisprudence to explain how the presumption of innocence works to ensure its effectiveness and to impose sanctions in the event of its violation, namely measures to remove the acts or facts that violate it. The current public perception regarding the presumption of innocence relates only to the courts during the criminal trial. However, the purpose for which the principle was built goes far beyond the strict limits of the process, be it the criminal prosecution phase, or the trial phase before the judge. Moreover, the presumption persists even after the finalization of the criminal trial, when it does not end with a conviction decision.

The current Romanian legislation provides several fundamental human rights that can be correlated with the right to be present at trial. Article 20 paragraph 1 of the Romanian Constitution states, "*Constitutional provisions on the rights and freedoms of citizens shall be interpreted and applied following the Universal Declaration of Human Rights, with the covenants and other treaties to which Romania is a party*." The principle of equality of rights and equal opportunities can also be found in the Romanian Constitution through article 16 that specifically mentions that citizens are equal before the Law and public authorities, without privileges and discrimination. The Constitution goes even further by establishing that no one is above the Law. The right to defense and the principle of non-discriminatory access to the act of justice is ensured through the Romanian Constitution article 24 Right to defense which establishes that the right of defense is guaranteed and that throughout the proceedings, the parties have the right to be assisted by a lawyer elected or appointed ex officio and correlated with article 21 entitled Free access to justice mentions that establishes that any person may address justice to defend his rights, liberties, and legitimate interests. The same fundamental right is provided through Law no. 215/2003, for the accession of Romania to the Convention for the facilitation of international access to justice, concluded at Hague on October 25 1980.

The most important conclusion to be drawn after evaluating the national legislation is the urgent need to adopt specific legislation that protects the fundamental values of the criminal process, to regulate the desirable behavior of public authorities explicitly, officials, political people towards suspects, and ongoing criminal trials.

7 Conclusion and recommendations

During the process of collecting information and gathering relevant data regarding the obligation to transpose into the national legislation Directive (EU) 2016/343 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, **several** recommendations and conclusions can be put forward such as:

(1) Although Romania had an obligation to fully transpose the Directive by April 2018, an infringement procedure has been opened by the EC. The procedure was opened due to a lack of necessary communication on behalf of the country, and it did not mean a lack of actions and measures to be taken to transpose the Directive fully. That being said, after evaluating the national context and measures that have been taken in this regard, it can be concluded that there is no national consensus regarding the measures that should be taken to comply with the Directive fully. Whilst, several judicial institutions have raised attention to the fact that Romania already complies with the Directive, the Romanian Parliament has proposed several amendments to the national legislation (mainly the NCPC) that also have other implications to the legislation;
(2) The presumption of innocence can be found within the national legislation and has been correlated with several fundamental rights;
(3) The national legislation ensures that a person that has been convicted and judged in absentia, may request the reopening of the criminal proceedings, thus benefiting of a new trial;
(4) The right to a fair trial and the right to silence are currently guaranteed through the Romanian Constitution and correlated national legislation;
(5) Whilst, the Romanian legislation ensures the right of the suspect or accused to be present at trial, no specific procedural safeguards for vulnerable persons has been set out;
(6) Regarding the right to be present at the trial, the national legislation makes several references to the citation mode and communication of procedural documents and also assignment mandate. The citation may also be sent through electronic mail or by any other electronic messaging system, but with the consent of the person quoted. Although several steps have been set out for ensuring that the suspect or accused receive their summons, often the system proves itself as ineffective and can lead to misinterpretation of the Law;

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The Right to be Present at Trial in Criminal Proceedings under Bulgarian Legislation

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Abstract Bulgarian Criminal Procedure Code introduces different types of legal means which guarantee the right of the accused person to be present at his/her criminal trial. The introduction and transposition of Directive 2016/343 into the Bulgarian legislation provides more secure guaranties to the accused person in cases when his/her trial is viewed in his/her absence. Bulgarian case-law represents more clarification on the right itself and how it could be efficiently exercised. Judges and prosecutors are becoming more aware of the need to accrue the participation of the accused person in his criminal trial and on this basis, they take additional measures to ensure his/her presence. The statistical data from the Supreme Court of Cassation show that there is an increase in the application of legal remedies that guaranties basic rights and principles of the accused and ensures the conduction of fair trial.

Keywords: • Directive 2016/343 • criminal procedure • criminal proceedings • trial in absentia • right to be present • re-trial • Bulgarian Criminal Procedure Code

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1 Introduction

In Bulgaria, numerous rights of the accused persons in trial and pretrial proceedings are established at constitutional level. Art. 121.(1) of the Bulgarian Constitution stipulates that the courts shall ensure equality and equal opportunities for all the parties in the judicial trial to present their case, while Art. 31(4) guarantees that the rights of a defendant shall not be restricted beyond what is necessary for the purposes of a fair trial. In the light of these provisions, the Bulgarian Criminal Procedure Code (CPC) establishes strict rules for conducting the proceedings in the absence of the accused (trials in absentia).

2 Legislation overview

The right to be present at trial was introduced in Bulgarian legislation as early as 1975. The requirements for conducting the trial in the absence of the accused remain unchanged in the previous CPC (1975) and the new CPC (2005):

- when the person is accused of "serious crime" under the Bulgarian legislation (crime for which the Bulgarian Criminal Code prescribes more than 5 years of imprisonment according to Art. 97, point 7 Criminal Code), his or her presence in the trial is mandatory;
- when the person is not accused of a serious crime, his or her presence in the proceedings before a court is not mandatory, as far as the absence of the accused does not obstruct the ascertaining of the objective truth;
- when the absence of the accused does not obstruct the ascertaining of the objective truth (even when he or she is on trial for a serious crime), the court may decide to conduct the proceedings in his or her absence if the following requirements are fulfilled:
  - the accused is not found on the address he or she indicated to the authorities or changed the address without informing the authorities;
  - the accused's place of residence within the country is not known and could not be determined after a diligent search;
  - the accused is not in the country and: a) his or her place of residence in not known, b) he or she cannot be summoned for other reasons, c) he or she was duly served and did not appear before the court without a duly justified reason for his or her absence.

Of particular interest is the notion of "ascertaining the objective truth". This notion is subjective and not defined in law. It relates to the criminal procedure principle that in every case the Court is obliged to find the facts which are objectively true. The judges make an *ad hoc* assessment whether the ascertaining of the objective truth is possible in the absence of the accused and therefore a trial in absentia could be conducted. In this regard, the provision provides for case-by-case assessment whether a trial in absentia

would infringe the rights of the accused and the basic principles of Bulgarian criminal procedure.

An additional basis for conducting the trial in the absence of the accused was introduced in 2017 in relation to the new figure of the preliminary trial[1] – if the absence of the accused does not obstruct the ascertaining of the objective truth, the accused was duly summoned and did not indicate any justified reason for his or her absence and he or she was served all the mandatory documents, the trial can be conducted in his or her absence.

In regard to proceedings before upper level courts, the presence of the accused was not mandatory before courts of second level[2] until 2015. Currently, the rules for the presence before second level courts are the same as before the first level courts. Before the Supreme Court of Cassation, the presence of the accused is not mandatory[3]. In re-trial proceedings the presence of the accused is mandatory, and the proceedings must be terminated if the accused does not appear without a justified reason.

3 Summoning of an accused person

It should be noted that before the adoption of Directive (EU) 2016/343 ("The Directive") the Bulgarian CPC did not contain different provisions regarding the summoning of the accused for the trial compared to the legislation in force. The Bulgarian case-law before 2016 on the matter is in conformity with Article 6 of the European Convention on Human Rights (ECHR) and Resolution (75) 11 on the Criteria Governing Proceedings Held in the Absence of the Accused, adopted by the Committee of Ministers of the Council of Europe.

The means of summoning the accused are the following:

- The summons and other documents are handed by the respective official of the court, the pre-trial authorities or the municipality, or, as an exception, by officials of the Ministry of Interior and the Ministry of Justice;
- the summoning of military personnel is performed by the respective military authorities;
- the summoning of employees could be performed via their employer;
- the summoning of accused persons under the age of 18 is performed via their legal representative;
- the summoning of arrested, detained or imprisoned persons is performed by the respective authorities;
- the serving and summoning of persons and establishments in other countries is performed in accordance with the international legal assistance treaties;
- in urgent matters, the summoning could be performed via telephone, telex, fax or telegram (the latter is absent from the new CPC).

The following persons can receive summons:

- adult member of the family of the accused, and if such is not present –the building manager or the door-keeper, flat mate of neighbour, if they undertake the obligation to deliver it to the accused;
- the defence lawyer of the accused.

The summons is always served after the person signs a receipt, and, in cases when he or she declines to sign the receipt, the serving is verified by the signature of at least one other person. A mandatory requisite of the summons is also information regarding the consequences of not participating personally in the proceedings before the court.

The courts and prosecutors have the practice to use all means listed in CPC to summon the accused. All means for summoning, i.e. contacting relatives, friends, checking known addresses, contacting the employer of the accused, nationwide search and others are used often cumulatively.

The summoning via telephone is an often practice when the accused cannot be found on their known addresses and the relatives and friends do not provide their location. The case law requires that courts follow strictly the provisions of the CPC and use such means only when the matter is urgent (Sofia Regional Court. 09.07.2013. Decision 929). These restrictions, however, do not provide enough protection to the right of the accused to be present, as, first, it is hard to prove that the he or she was the person to whom the summoning staff talked on the telephone, and second, that the information was duly and fully delivered without mistakes. In this sense, summoning on the phone may be in breach of Directive 2016/343 and of the obligation of the authorities to inform the accused of the trial. There is no case law of the Supreme Court of Cassation on the matter after the adoption of Directive 2016/343. However, this instrument for summoning the accused may be in breach of the EU legislation.

1. Requirements for the summoning personnel

In Bulgaria the personnel who serves the summons is part of the court staff. They must meet the requirements, laid down in the Ordinance for the Judiciary Administration, among which: to be above 18 years old, not convicted, not in relation to a person on an executive position in the court and others. The summoning personnel are appointed after a competition procedure and every chairperson of a court determines additional requirements (for example minimum level of education, good knowledge on procedural laws, good computer skills, good language skills).

2. Cases in which the accused provided their address to the authorities

In some cases, the accused may have provided their address to the authorities. Most often, they are obliged to do so because of a supervision measure imposed on them. Under the CPC, when the accused provides their address to the authorities and consequently changes it or was not found on it, the court has enough grounds to conduct a trial in absentia. The

matter is of importance because there was inconsistent case law on the question whether a diligent search must be conducted when the accused provided their address to the authorities and subsequently was not found on it or changed it.

The prevailing case-law (Supreme Court of Cassation, II Criminal Section. 26.06.2000 Decision 348, Supreme Court of Cassation, II Criminal Section. 16.11.2019. Decision 426) and opinions of the doctrine (Chinova, M. p.46). state that in such cases the court must accept that the accused does not have a known place of residence within the country and the authorities must conduct a diligent search. Only after the conduct of a diligent search, which includes nationwide search, the Court can accept that the requirements were fulfilled and that proceedings in the absence of the accused can be conducted. In contradiction to that opinion, in certain decisions (Supreme Court of Cassation, II Criminal Section. 18.04.2001. Decision 182) the Supreme Court of Cassation (SCC) did not require the conduct of a "diligent search" when the accused provided certain address and then was not found on that address – the SCC stated that the accused manifested undue procedural behaviour and therefore the court of lower instance did not have to conduct a diligent search to comply with the requirements of the law. The case law of the Supreme Court of Cassation from 2016 and 2017 (after the adoption of Directive 2016/343) presents the same view. In many cases (Supreme Court of Cassation, I Criminal Section. 07.04.2017. Decision 89, Supreme Court of Cassation, I Criminal Section. 19.10.2016. Decision 197) the Court ruled that if the accused provided an address to the authorities as part of a supervision measure (a.k.a. reporting to the police authorities, house arrest) and then left that address, the Court is not obliged to conduct a diligent search. In such situations the judges assessed that the accused did not display due procedural behaviour and became "uninterested" in the proceedings, therefore choosing not to exercise their right to be present. The SCC based its decision on the case law of the ECHR, which states that when the accused deprived themselves of the opportunity to participate in the proceedings, they cannot be granted a re-trial.

This view is logical considering the provision of Art. 269, where there is a separate basis for conducting the trial in the absence of the accused when they are not found on the address they indicated to the authorities or changed the address without informing the authorities, which does not require further search. Still, the opposite practice is also encountered in the case law (Supreme Court of Cassation, II criminal section. 24.04.2018. Decision 71).

3. Summoning via electronic means

Since 2016, citizens can use electronic means when participating in civil or administrative proceedings. This is accomplished via an e-justice portal, which could be used after filing a request to receive summons and other information on concrete proceedings before a specific court. For the moment this system is not used for criminal proceedings, which will be the last step of the e-justice implementation (Dimitrov, G. 2015).

The biggest challenge before such measures is ensuring secure ways to identify the person and to prove that he or she was the one who was informed/ who received certain information or documents. This problem is serious obstacle before electronic summoning in all proceedings, but even more so in criminal matters, considering the grave consequences of the undue summoning of the accused.

4. Summoning of accused who are not on the territory of Bulgaria

The case law on this matter develops together with the international relations, international acts and EU law.

First, in cases where Bulgaria does not have any mutual legal assistance treaty (MLAT) with the country of residence of the accused and there is no information of an exact address in that country, it is permitted for the court to initiate the proceedings in the absence of the accused without procedures for summoning him or her, as such would be legally and objectively impossible. Second, in cases when a MLAT exists, the Court is obliged to use the means provisioned in the MLAT to summon the accused, provided that he or she has a known address in the other country. Otherwise, if the authorities do not use these mechanisms, a re-trial is granted (Sofia Regional Court. 10.12.2015 Decision 1253) or the proceedings begin again from a previous stage. Third, the courts are obliged to use the mechanisms of the European Arrest Warrant wherever the address of the accused is in an EU Member State and he or she has a known address in that Member State. There is almost no case law on the matter before the entry into force of Directive 2016/343. The few decisions dealing with accused in other EU Member States before 2016 stipulate that when he or she has a known address in a Member State, the provisions of the Bulgarian European Arrest Warrant Act must be applied by the competent authorities, otherwise the courts consider that the necessary efforts have not been made(Regional Court – Haskovo. 06.01.2019. Decision 1).

With the development of international and European remedies for collaboration between competent authorities of different countries the means for summoning persons located in other states are used more, including in Bulgaria. The Bulgarian courts, according to acting judges, use all instruments established in mutual legal assistance treaties and the European legislation (the European Arrest Warrant), provided that they know the country of residence of the accused. The authorities question relatives, friends and acquaintances in order to identify the country or countries where the accused may be found. Judges refrain from issuing European Arrest Warrant, when they do not have more concrete information and know only that the accused left the territory of Bulgaria, as in such situations he or she may be in any Member State or third country. Acting judges state that generally the courts use all means to find the accused and start proceedings in their absence only when it is objectively impossible to determine the location of the accused or when the other country refuses to transfer the person. Nevertheless, it is left to the judges to assess which actions are necessary and which actions are unlikely to give result and are therefore unnecessary when searching for the accused.

The case law on the necessity to issue a European Arrest Warrant states that when the country of residence of the accused is known to the court, such warrant must be issued in order to accept that the court made the due efforts to find the accused (Court of Appeals – Plovdiv. 14.03.2016. Decision 69).

4 Whether the accused knew of the proceedings

The question whether the accused knew of the proceedings is quite important in Bulgarian and European case law, legislation and doctrine. First, it is connected to the matter whether the national authorities fulfilled their obligation to inform the accused, or in other words, whether the accused effectively received all necessary information regarding the trial in order to be able to participate in it. Second, the question whether the accused knew of the proceedings is connected with the granting of a re-trial under Bulgarian legislation. The Supreme Court of Cassation (SCC) makes an assessment whether the accused fled or absconded based on evidence that they knew or did not know of the criminal proceedings against them. The constant case law of the SCC stipulates that if it can be proved that the accused knew of the proceedings, then the Court has enough grounds to believe that they fled or absconded. In such cases the SCC assumes that the accused's own behavior was the reason they could not be summoned for the trial/could not participate in the hearings before a court and does not grant a re-trial.

The case-law before 2016 is inconsistent regarding the matter whether the accused knew of the proceedings. In the majority of cases the court decided that, if the first investigation action was conducted with the participation of the accused, he or she knew of the criminal proceedings, even if he or she was not duly summoned for the trial before a court (in Bulgaria, when the accused is summoned for the trial proceedings, he or she is served with a copy of the indictment and is presented with information on the consequences of not appearing before a court). In such cases, the court accepted that the accused became "uninterested" in the proceedings and his or her undue procedural behaviour was the only reason he or she did not know about the beginning of the proceedings before a court. In the majority of cases the Court imposed a supervision measure and the accused was obliged to inform the authorities if he or she changes his/her address[4].

In Decision 182/18.04.2001 the Court accepted that re-trial could not be granted even if the accused did not try to flee or abscond, because he had an obligation to inform the authorities of his address which he did not fulfil and therefore manifested undue procedural behaviour, which was enough reason to not grant re-trial.

In other cases, the Supreme Court of Cassation decided that even though the first actions of the investigation were conducted with the participation of the accused, he did not know about the beginning of the trial before a court and granted him a re- trial (Supreme Court of Cassation, I Criminal Section. 10.10.2013. Decision 415). The Court ruled that the

accused clearly knew of the pre-trial proceedings but had to be explicitly informed - of the beginning of the proceedings before a court.

In Decision 415/10.10.2013 the Court took into consideration the fact that the accused was confirmed to have address in another EU Member State, but no efforts were made to contact him there, and also the trial started 4 years after the last investigation actions with the accused's participation.

In Decision 155/17.03.2000, the Court stipulated that, no matter the circumstances, the accused must always be informed of the beginning of a new phase of the criminal proceedings and that the fact that the indictment was not duly served meant that a re-trial must be granted[5]. Such a drastic solution as the latter could be regarded as infringing the balance between the rights of the accused and the society and to not be in compliance with the international acts in the field. Cases in which the accused go into hiding after the first investigation actions are quite common and in many decisions the courts stipulate that it is impossible to serve the indictment on the accused because of the accused's own actions (Supreme Court of Cassation, I Criminal Section. 08.12.2014. Decision 471). The arguments stated here may be the reason the case law after 2016 (the year of adoption of Directive 2016/343) became uniform: if the accused knew of the criminal charge, the courts consider that he or she knew of the proceedings, even if the indictment was not duly served (Court of Cassation, III Criminal Section. 10.04.2018. Decision 45). After the adoption of the Directive there is no case law supporting the view that the accused must be informed of the beginning of every phase, even if his or her own behavior prevented the authorities from serving them with the necessary documents.

If the criminal charge is presented to a lawyer appointed by the state, it is considered that the accused could not have known of the criminal proceedings (Supreme Court of Cassation, I Criminal Section. 03.10.2017. Decision 199).

In cases in which the pre-trial is also conducted in the absence of the accused, the case law is unanimous: it is not possible for the accused to know about the proceedings if he or she did not participate in any of the investigation actions and was not duly notified of the fact that he or she was investigated as part of criminal proceedings (Supreme Court of Cassation, II Criminal Section. 26.06.2000. Decision 348). There is established case law stating that if the criminal charge was presented to a lawyer appointed by the State, the accused could not have known of the proceedings.

5 Diligent search

According to the Bulgarian legislation, a diligent search must be conducted when the place of residence of the accused in the country is not known. As already mentioned, in the majority of cases the Court stipulated that such diligent search must be conducted

even if the accused provided his or her address to the competent authorities themselves and then were not found on it.

According to doctrine (Chinova, M. p.46.) and case-law (Supreme Court, I Criminal Section. 19.12.1988. Decision 561), diligent search is the search conducted by the Ministry of the Interior via the Central Bulletin and by indicating concrete data on the means and places for the search. The "Central Bulletin" of the Ministry of the Interior does not exist anymore, the Ministry uses a specialised automated informational system and every regional directorate publishes information about the accused on their website. This search encompasses multiple checks of the properties of the accused, checks whether the accused left the country, checks of all places to which the accused is known to have a relation, of their workplace, as well as of the places for detention and imprisonment. These instruments, which are often enumerated in case law as comprising the "diligent search", are not enlisted in any legislative act. According to case law, the court must wait until the end of the search to initiate the proceedings in the absence of the accused, or otherwise it is considered a procedural infringement (Supreme Court II Criminal Section. 17.03.1993. Decision 147).

The proceedings can be conducted in the absence of the accused only after all necessary actions for finding the accused are objectively conducted and there are explicit data that he or she was not found after the diligent search (Supreme Court of Cassation, III Criminal Section 16.07.2002. Decision 473).

After the adoption of Directive 2016/343, the practices in conducting a diligent search did not change. The biggest problem, according to specialists in criminal law in Bulgaria, is the superficial approach of the competent authorities to the requirements for diligent search. Nevertheless, the courts always make an ad-hoc assessment on the measures taken and their suitability in the concrete case. They rule whether a "diligent search" was actually conducted or not and, consequently, order a re-trial or the re-conducting of the proceedings before the court of lower level, if they find that the measures taken were not effective (Supreme Court of Cassation, II Criminal Section 06.11.2017. Decision 256, Supreme Court of Cassation II Criminal Section 19.07.2017. Decision 143).

Generally, the Bulgarian judges interviewed under the PRESENT project stated that they try to perform all actions for finding the accused, provided in the CPC. In their opinion, proceedings in the absence of the accused must be and are an exception, and it is better for the courts to use all possible means for contacting the accused, even if it is not mandatory by law or by case law. They underline that, first, the accused can provide valuable information on the circumstances of the case and his or her presence could significantly contribute to the ascertaining of the objective truth, and second, that the presence of the accused could help the procedural efficiency and contribute to the shorter duration of the trial.

6 Grant of a re-trial

The re-trial is one of the main instruments used to guarantee the right of the accused to be present. In 2008 it was established that the accused which were duly served with the indictment and documents on their rights, the date of the first hearing and the consequences of non-appearance will not be granted re-trial, if they fled or absconded or if they did not indicate a justified reason for their absence. Unfortunately, the legislative intent for these amendments does not provide clarity on the motives and considerations of the legislator. From the case- law (Supreme Court of Cassation, II Criminal Section. 16.11.2009. Decision 426) it could be concluded that when all due efforts to find the accused were made and he or she was still not present at the trial, the Court ruled that he or she fled or absconded and did not grant a re-trial. Therefore, in such cases the Court still issues a decision on the request and makes an assessment based on all the circumstances of the case, but if it finds that the accused manifested undue procedural behavior, it does not grant the re-trial.

7 Obligation to provide information to the accused

Directive 2016/343 imposes certain obligations on Member States regarding the information provided to the accused on their rights under the Directive.

1. The obligation to inform about the consequences of non-appearance
The obligation to inform duly the suspect or accused of the consequences of non-appearance did not exist in the old CPC (1975). However, it was introduced in the new CPC with an amendment from 2008. The authorities have the obligation to include this information in the documentation served to the accused before the start of the trial, together with the indictment and information on the first hearing from the trial.

2. The Obligation to inform of the possibility to challenge the decision and of the right to a new trial or to another legal remedy
It should be noted that this obligation is not explicitly established in the CPC. It is not a practice for Bulgarian courts to include this information in their decisions and the authorities executing the apprehension of the accused do not provide them with the written informational document required by the Directive.

8 Statistical data on the right to be present

In the course of the PRESENT Project, a thorough research was conducted and data on trials in absentia and the compliance with the right to be present of the accused from 68 district courts and 19 regional courts, as well as from the Supreme Court of Cassation, was gathered.

1. Trials in absentia in the case law of the district courts

The first noticeable tendency is that there is a significant discrepancy in the number of trials in absentia in smaller district courts, although they have the same average number of criminal proceedings per year. The reasons for this discrepancy identified are two:

- in some courts there was a rise in trials in absentia because of the migrant movements, especially in 2013 and 2014. In some courts it is noticeable that many of the trials in absentia were conducted against foreign citizens, who were persecuted for unlawful crossing of the border.
- in some courts the abovementioned tendency is not present, and all categories of crimes are processed in absentia. From the court acts available to the public it could be concluded that certain judges tend to conduct trials in absentia.

The second noticeable tendency is the accused in trials conducted in absentia to be convicted.

The third noticeable tendency is all district courts report close to no trials terminated because of infringements of the right to be present.

2. Trials in absentia in the case law of the regional courts

The regional courts act as first or second level court, depending on the degree of seriousness of the crime. They have the right to conduct a trial in absentia and make a separate assessment on the fulfillment of the requirements for conducting trial in absentia.

- Most regional courts from which information was received, report 10 or less trials conducted in absentia in the last 5 years with some of them reporting that they did not have such cases. These statistics may be due to multiple circumstances: first, regional courts rule as first instance on cases involving more serious crimes, for which the presence of the accused is mandatory; second, there is higher probability for the accused to be present when the court is acting as a second instance, especially when he or she appealed and thus initiated the proceedings, but also in other situations. The regional courts conduct a second procedure for finding the accused, whose presence in the appeal proceedings is mandatory in trials for serious crimes since 2015. All of these factors most likely contribute to the low percentage of trials conducted in absentia before regional courts.
- The tendency for low percentage of acquainted persons when conducting the trial in absentia is also noticeable in the case law of regional courts.
- All regional courts report close to no trials terminated because of infringements of the right to be present.

3. Re-trial

In Bulgaria the re-trial is a main instrument used to defend the rights of the persons, against whom a trial in absentia was conducted. The CPC stipulates that a re-trial is granted when the accused did not flee or abscond. The latter is assessed in proceedings before the

Supreme Court of Cassation (SCC) following the principle *audi alteram partem* (adversarial process).

The data gathered from the SCC shows that in 2017, after the adoption of Directive 2016/343, the number of requests for a re-trial after the trial was conducted in absentia has significantly decreased.

The data gathered permit the conclusion that:

- first, in 2017 the courts conducted significantly less trials in absentia which the accused found necessary to appeal using the possibility for a re-trial;
- second, in the last 3 years significantly more acts of the courts issued in absentia were rendered compliant with the Bulgarian and European legislation in the field, es well as the European standards of fair trial.

Based on the interviews and on the evaluation of case law conducted, it can be concluded that the statistics of the SCC described above are result of the more extensive use of remedies to find the accused in the last 3 years. When all reasonable instruments have been used, it is easier for the court to rule that that the right to be present of the accused was not violated.

9 Conclusion

The provisions in Bulgarian legislation on the right to be present have not undergone many changes in the last decades. The reasons are various: first, before the adoption of Directive 2016/343, the Bulgarian legislation provided the guarantees required by the international acts in the field and did not contradict European human rights standards regarding the right to be present, which led to overall compliance with the requirements of the Directive; second, as the research carried out under the PRESENT project indicated, the case law of Bulgarian courts does not show many infringements of the right to be present.

The right to be present is established as one of the main rights of the accused in Bulgarian criminal procedure. The case law is gradually introducing stricter rules for summoning the accused, for example it requires the means of the European Arrest Warrant and Mutual Legal Assistance Treaties to be used in every case possible and a diligent search to be conducted even if the accused provided an address themselves and subsequently cannot be found on it. The national judges realise the importance of the participation of the accused in the proceedings and implement all measures provided in CPC to find the accused; if they do not apply the necessary measures, their decisions are repealed by the higher court or a re-trial is granted. The case law on the matter whether the accused knew of the proceedings was inconsistent, but after 2016 the courts rule that if the accused knows of the criminal charge, then it is considered that he or she knows of the proceedings before a court, even if the indictment was not duly served. The right to re-trial is one of the main tools used to guarantee the right to be present in Bulgarian criminal procedure;

re-trial is granted after an assessment whether the accused fled or absconded; the Bulgarian case-law bases its decisions on the case law of the European Court of Human Rights which stipulates that if the accused is uninterested in the proceedings, the court is allowed to conduct a trial in absentia.

Notes:

[1] The preliminary hearing is conducted after the deposition of the indictment in the Court. In this hearing, the Court discusses preliminary questions, inter alia: is the court competent to conduct the proceedings; are there grounds for suspension or termination of the proceedings; are there significant breaches of procedure during the pre-trial phase which seriously infringe the rights of the accused or other parties; are there grounds for applying special procedural rules; requests for gathering new evidence; the scheduling of the first hearing of the trial. Before the conduct of the preliminary hearing, the Court sends to the accused the indictment, together with information of the date of the preliminary hearing, information on the accused's procedural rights and information on the consequences of non-appearance before the Court.

[2] Courts of second level in criminal proceedings in Bulgaria have all the powers of the courts of first level regarding the gathering of evidence and therefore, in the Bulgarian academic field are often referred to as "second first instances".

[3] In Bulgaria the cassation instance cannot determine the facts in criminal proceedings and no new evidence on the facts of the case can be presented or required before it. It rules solely on the application of the law (both material and procedural) in the previous stages and phases of the criminal proceedings.

[4] Some decisions of the Supreme Court of Cassation do not contain explicit information of the imposition of a supervision measure, but instead only stipulate that the accused had an obligation to inform the authorities of any change in his/her address.

[5] In Bulgarian criminal procedure legislation, the criminal proceedings are divided into two parts, called phases – pre-trial phase and trial phase.

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Criminal Code, adopted on 01 May 1968;
Criminal Procedure Code, adopted on 15 November 1974, abolished on 28 October 2005;
Criminal Procedure Code, adopted on 28 October 2005;
Access to Public Information Act, adopted on 07 July 2000;
European Arrest Warrant Act, adopted on 3 June 2005;
Ordinance for the Judiciary Administration issued by the Supreme Judicial Council, adopted on 28 January 2014.

European Union Acts:

Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings;

Acts of the Council of Europe:
European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, supplemented by Protocols Nos. 1, 4, 6, 7, 12, 13 and 16;

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General Report: Comparative Analysis of the Legal Treatment of the Right to be Present and the Presumption of Innocence in the PRESENT partner States in the light of Directive 2016/343

COSTAS PARASKEVA, NIKITAS HATZIMIHAIL & ELENI MELEAGROU

Abstract This General Report evaluates the actual implementation of Directive (EU) 2016/343 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings across the EU Member States. Drawing primarily on the country reports from the six Member States – Austria, Bulgaria, Cyprus, Portugal, Romania, Slovakia – represented in the PRESENT project, the Report examines the policies underlying the Directive and the challenges of legislative implementation; the state of affairs across the EU prior to the national implementation of the Directive, the mechanics of national implementation and the new state of affairs. The Report is divided into two main parts, regarding respectively the presumption of innocence (broadly defined) and the right to be present. Apart from the state of the law, the Report also considers practices in the Member States in an attempt to contribute best practices to the discussion and help the judges and practitioners who will be called to apply the new regime in handling real, often difficult, cases.

Keywords: • comparative analysis • EU Law • right to be present • Directive (EU) 2016/343 • criminal procedure

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1 Introduction

1.1 The Directive 2016/343 in its Context

Directive (EU) 2016/343 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings ("the Directive") constitutes a vital aspect of judicial cooperation in criminal matters, i.e. the criminal-justice pillar of the emerging European area of freedom, security and justice. EU Member States have the legal obligation to enact all necessary legislation and administrative provisions in order to comply with EU Directives within the time provided and to immediately inform the Commission regarding their actions. In the case of Directive (EU) 2016/343, Member States were obliged to ensure that their domestic law was compatible with the Directive and, if necessary, to make all appropriate amendments to their domestic law, by 1 April 2018.

The Directive's purpose is to enhance the right to a fair trial in such proceedings by prescribing common minimum rules for certain aspects of the presumption of innocence and the right to be present at trial (Recital 9). The goal is to guarantee the procedural rights of both suspects and accused persons across the EU. The minimum procedural safeguards for suspects and accused under the directive must be directly secured to everyone within the jurisdiction of EU Member States. By thus promoting trust among Member States in each other's criminal justice system, the Directive should facilitate the mutual recognition of judgments and decisions in criminal matters (Recital 10). The importance of this goal cannot be overstated: this is a fundamental objective of EU law and an important dimension of legal and overall integration.

The choice of a Directive as the instrument for the endeavour in question allows for the optimal integration of EU norms into national legal systems. The subjects treated by the Directive touch upon the core of national legal traditions and have a considerable impact upon the political and legal institutions of each Member State, including especially the judiciary (and more broadly the administration of justice system), police and prosecutorial authorities but also political institutions insofar as certain aspects of the presumption of innocence are concerned.

The choice of common minimum rules as the Directive's tool of choice for harmonization is appropriate given the role of Directives as instruments in European governance and more specifically in judicial cooperation in criminal matters. It allows the most effective – and efficient – implementation of the Directives' provisions and objectives into the national legal systems of Member States, and especially into day-to-day police and judicial practice. It also serves to underline the **constitutional nature** of this material. In the modern Western legal tradition, criminal process has a very strong constitutional dimension and is inherently linked into a fundamental-rights discourse. In fact,

constitutional law and especially its fundamental-rights component often includes so many cases involving the criminal process than it can often only be taught effectively in parallel to criminal procedure courses. So national criminal procedural law is inherently linked to both the national constitutional tradition and the European Convention on Human Rights, as interpreted by the European Court of Human Rights in Strasbourg.

The hierarchical doctrinal thinking involved when addressing the subjects should not obscure its **comparative-law aspects**. Few subjects could be used more effectively than criminal process to explain to students, and lawyers, the diversity but also the functional similarities between the legal systems that comprise the European legal tradition – but also to contrast the fundamental values and ideologies of our common European legal tradition from external legal systems and traditions. The criminal process is at the heart of legal system, indeed at the heart of the relationship between law and society. One cannot understand the operation of the right to be present without a comparative lawyer's appreciation of the diversities between and the internal dynamics inherent to legal systems.

At the same time, the implementation strategy the EU opted for in this Directive requires a certain degree of vigilance in order to ascertain, on the one hand, whether the Directive has been fully implemented into positive law and, on the other hand, how such *de jure* implementation takes effect *de facto*. That is, in the medium term the Directive's impact on both the law in books and the law in action must be considered.

In effect, given the importance of the Directive's subject matter and how deeply it reaches into the core of national legal systems and everyday practice, implementation and evaluation must operate in a cyclical fashion: evaluation aids to implementation, moreover there is an important role for "soft" tools such as: training activities; fostering dialogue and transparency within and between Member States' legal systems; identifying and sharing potential best practices. In the end, optimal implementation of the Directive and indeed "enhancing the right to be present" and safeguarding procedural rights necessitates a deeper reflection into the national legal systems themselves and the administration of justice systems more broadly.

1.2 The PRESENT Report

This *General Report* is coming as the culmination of a yearlong process of research and dialogue and created by a comparative examination of six national reports from a variety of Member States: Bulgaria, Romania, Cyprus, Austria, Portugal, Slovakia.[1] All major legal traditions participating in the European Union are represented in this comparative analysis, as in the project: Common law (Cyprus) and Continental (the rest), and there again Romance (Portugal), Germanic (esp. Austria) and Eastern / Central European varieties. There are countries with a very long continuous tradition in criminal process,

developed long before the creation of a constitutional "fundamental rights" discourse (e.g. Portugal); countries with youthful legal systems that adopted wholesale the ECHR discourse or even the European Convention's wording verbatim (e.g. Cyprus), and countries whose legal and justice systems had to go through a drastic transformation, twice, with the advent and fall of Communism.

In some of these countries, Austria and Slovakia, national authorities considered that the minimum standards provided for under the Directive were already entrenched in national legislation; in Romania, national authorities were not in agreement regarding the need to introduce any amendments to existing legislation; in Bulgaria legislators introduced only minor amendments regarding the right to be present at trial; Portugal has been apparently dilatory in its obligation to transpose the directive, whereas Cyprus has introduced a number of critical amendments to existing legislation in order to comply with several aspects of the Directive but not with the provisions on trial in absentia.

In this Report we considered that the most effective way of assessing and presenting the material provided by the partners was by organising it under the different articles of the Directive as each report, given that different legal systems were the subject matter, had its own distinct internal logic. The Report exists because of the country reports of the PRESENT partners; but it does not substitute or replicate them, so interested readers are strongly invited to look into the country reports themselves, which often go into serious detail – and also show the diverse but homogeneous national approaches in legal thinking as well as in the practice of law. The Report is moreover functioning as a *background paper* – in the sense of providing information and content for analysis by policy makers, scholars and those directly involved in the criminal process across the EU – as well as a *concept paper* –in the sense of going further into elaborating ideas and providing food for advanced thought and discussion.

It is anticipated that a comparative analysis of how and the extent to which the Directive has been transposed in the six Member States will highlight both areas of success in implementing the minimum procedural safeguards but also disclose the failures and gaps in complying with the Directive. The objective is to underline best practices if possible in the different areas provided for by the Directive. More specifically the report highlights the extent to which the different legal systems of the PRESENT Consortium are complying before and/or after transposition of the Directive, with Chapter 3 of the Directive, Articles 8 and 9, i.e. the right to be present at trial and the right to a new trial. A close examination of the material provided in the country reports on these matters makes it possible to compare and contrast national legislation and remedies, and to draw certain conclusions regarding best practices under the Directive.

It is noted that though the focus of the present Report remains Chapter 3 of the Directive and its effective transposition, nonetheless it cannot and should not be addressed in

isolation from the other procedural safeguards of the Directive, i.e. certain aspects of the presumption of innocence. The Directive under consideration is the latest in a series of measures adopted by the European Parliament following EU Council Resolution on a Roadmap for strengthening the procedural rights of suspected or accused persons in criminal proceedings and its subsequent incorporation in the Stockholm Programme. The overarching principle underlying these measures is the enhancement of the right to a fair trial in criminal proceedings within the EU by the entrenchment within the legal systems of the Member States of minimum procedural safeguards in such proceedings.

The Report is divided into two parts. **Part I** addresses the critical aspects and norms encompassed under the notion of presumption of innocence. Section 2 breaks down the presumption of innocence into its component parts (presumption of innocence properly speaking: 2.1; public references to guilt: 2.2; presentation of suspects/accused: 2.3; burden of proof: 2.4; right to remain silent and not to incriminate oneself: 2.5). Section 3 elaborates on our comparative observations in this regard. **Part II** addresses the right to be present. Section 4 provides an essential overview of the state of affairs in each country, with an emphasis on the state of affairs prior to the implementation of the Directive – and the formal change ushered in by transposition. Section 5 goes into more depth, breaking down three main aspects: notification (5.3); trial in absentia (5.4); and remedies such as the right to a new trial (5.6). Each sub-section includes comparative observations and a consideration of best practices that emerge from our study.

Part I. Presumption of Innocence

2 Aspects of the Presumption of Innocence

This Section examines how each of the six countries examined treats the different aspects of the presumption of innocence, as defined in the Directive and scholarship. Namely, presumption of innocence properly speaking (2.1); public references to guilt (2.2); presentation of suspects/accused (2.3); burden of proof (2.4); right to remain silent and not to incriminate oneself (2.5).

2.1 Presumption of innocence (Articles 1 and 3 of the Directive)

2.1.1 Bulgaria

The presumption of innocence is laid down in Article 16 of the CPC according to which "the accused is presumed innocent until proven guilty with the force of res judicata" and in Article 31 of the Constitution (CRB). The presumption of innocence applies to all stages of the criminal proceedings - both trial and pre-trial. It starts to apply from the moment a person is considered accused under the Bulgarian legislation (when there is

enough proof of the guilt of the person or with the first investigative action against the person).

2.1.2 Romania

Both suspects and accused are presumed innocent until proved guilty under the Romanian Constitution and the NCPC. Proposed parliamentary amendments to national legislation in order to comply with certain aspects of the Directive have not yet been approved. One such amendment is to the existing provision on the presumption of innocence introducing certain restrictions regarding the persons (judges, prosecutors) allowed to participate during the different stages of the criminal proceedings.

2.1.3 Austria

The Austria report states that there was no need for transposition of the Directive. The presumption of innocence is enshrined both in the Constitution and in the Austrian Code of Criminal Procedure (StPO) and is applicable to suspects, accused and defendants alike. In general, all provisions of the Austrian Code of Criminal Procedure which refer to the accused are also applicable for suspects and defendants, if the provisions do not specify otherwise (§ 48 (2) StPO). The accused is a procedural party (*Beteiligte*) of the criminal proceeding according to §220 StPO. While this provision is only applicable for the criminal proceeding at court and not for the investigation phase, it is accepted that the suspect has a similar position within the investigation phase (§6 (2) StPO) (Wiederin, 2014, RZ 199).

2.1.4 Cyprus

Article 12.4 of the Cyprus Constitution enshrines the presumption of innocence, which is applicable to suspects and accused alike. In effect, this article is identical to Article 6.2 of the European Convention on Human Rights. Following transposition, the presumption of innocence and other rights were affirmed by the promulgation of Article 3A of the Criminal Procedure Law.

2.1.5 Slovakia

In Slovakia the principle of the presumption of innocence applies to suspects, accused and defendants alike under Section 2 paragraph 4 of the Fundamental Rules of Criminal Procedure. Following transposition, the country report restates that the presumption of innocence (and the right to be present) are already entrenched in the CPC.

2.1.6 Portugal

In Portuguese law, the presumption of innocence, as provided in Article 32 CPR, is directly applicable to the accused only. The suspect is defined as a person who is not aware of being under investigation, and to whom no rights are granted as they are not considered to be a party in the proceedings. From the moment there is sufficient evidence that the suspect in fact did commit a crime he is summoned to the court for, or the Public attorney's office, for being formally accused (indictment) as is notified of his/her rights, gaining the status of accused and all the guarantees that are available for this procedural subject.The suspect does not take part in criminal proceedings, it is the natural person on whom falls the suspicion of having committed or carried out preparatory acts or execution of a crime, whether he is an author or an accomplice. The suspect may be accused of having committed a crime, gaining the procedural status of accused. In the case the suspicion did not prove to be justified, the suspect is likely to never become aware of having been investigated. The suspect, if called for questioning, or if suspecting that he or she is being investigated, has the right under Article 59/2 CPR to request to be formally accused, in order to be protected by the same rights and guarantees of the accused (right to remain silent, protections against self-incrimination, not being obliged to tell the truth), hence becoming part of the criminal proceedings.

In the Portuguese legal system the actors of the process (procedural subjects) are the court, the Public Attorney, the accused, the defender and the assistant. In some cases there is also another subject, the "lesado", who is someone that, not being part of the proceedings, has suffered damage (For example, in the case of a stolen car, a person who does not own a car but usually makes use of the vehicle for his work is a *lesado*). A *lesado* is not directly involved on the proceedings, since the vehicle did not belong to him or her, but suffers damages for not being able to use the car. Since there was no transposition of the Directive, the country report does not include a section on the evaluation of national legislation after transposition.

2.2 Public references to guilt of suspects and accused/remedies for breach (Articles 4 and 10 of the Directive)

2.2.1 Bulgaria

There is a special provision regarding the acquitting decisions (when the legal proceedings end without a conviction) of the courts, which stipulates that such decisions cannot contain phrases that may cast any doubts on the innocence of the person.

Accused persons do not have an effective remedy in case of infringement of the presumption of innocence by public authorities as ruled by the European Court of Human rights on numerous occasions (Popovi v. Bulgaria, 09/06/2016; Gutsanovi v. Bulgaria,

15/10/2013). Bulgaria has a law establishing the liability of the state and of municipalities for damages, which is not considered an effective remedy by the ECtHR.

2.2.2 Romania

Following transposition, the Romanian parliament proposed an amendment prohibiting public statements during the prosecution and trial of the case. The amendment provides that breach of this provision is a criminal offence which is punishable under the law.

2.2.3 Austria

Austrian legislation provides for compensation if there has been a breach of the presumption of innocence by the media (§ 7b (1) MedienG). However, there is no reference whatsoever to public references to guilt by the national authorities.

2.2.4 Cyprus

Following transposition of the Directive, the Criminal Procedure Law was amended (Article 3B) in order to comply with the requirements of Article 4 of the Directive. In effect, the amendment complies fully with the provisions of the Directive and includes definitions of public authority and public statements to mirror those of Recital 17 in the Directive. In addition, the amendment provides a long list of officials covered by this provision.

2.2.5 Slovakia

There is no mention whatsoever in the country report on the issue of public references to the guilt of suspects and accused nor on remedies for breach.

2.2.6 Portugal

Portuguese proceedings are usually public, in nature, as stated in Article 86/6 of the CPC. Any person has the right to attend the instructional debate and all the procedural acts of the trial phase; the mass media can make a detailed narration of those procedural acts that are not covered by the secrecy of justice. Some restrictions apply. Procedural subjects may request to consult the records or obtain certificates of procedural documents. The Public Attorney may only refuse access to such documents during the investigation phase and only if such publicity would be prejudicial to the investigation or could jeopardize the rights of other procedural participants or victims. Any person with a legitimate interest may request to consult the process or to obtain certificates of parts of it, provided that it is not subject to the secrecy of justice. To that end, it is sufficient that the person demonstrates that there is a relationship of convenience between the subject matter, on

the one hand, and an interest that deserves legal protection enabling the request to access certain elements that are in the proceedings. The court is obliged to make such documents available, unless there is a ground for refusal which is stated. The principle of publicity is conditioned by the principle of proportionality.

As for the media, in particular, certain rules apply, such as the prohibition of reproducing documents, or parts of documents, before the first-instance court has decided on the matter; the transmission of images or the reproduction of recordings of any procedural act, including the trial hearing, in order to avoid distorted ideas due to partial and decontextualized transmission; the prohibition of identifying the victims in crimes such as human trafficking and other crimes that may interfere with the victim's right to preservation of their private life, in accordance with the CPR. Media are also not allowed to disclose conversations or communications recorded during the investigation stage without the consent of the actors.

The breach of any of the abovementioned rules constitutes a crime of simple disobedience, punishable with imprisonment up to one year or a fine of up to 120 days (the amount per day will depend on the income of the author of the violation).

2.3 Presentation of suspects/accused (Article 5 of the Directive)

2.3.1 Bulgaria

In Bulgaria the use of special attire for persons suspect or accused of crime was removed years ago. The cases in which the authorities can apply measures of physical restraint are explicitly enlisted in the legislation and there is a requirement for such measures to be appropriate and necessary to the specific case and to the specific person. Nonetheless, measures of physical restraint are often used without enough grounds for their application, especially in trials of public interest (such as trials against politicians and public officials). For that reason, a lot of complaints by accused have been made to the ECtHR.

2.3.2 Romania

Following transposition, the Romanian parliament proposed an amendment prohibiting the use of handcuffs or other similar means of restraint in public during criminal prosecution in order to avoid the perception of guilt.

2.3.3 Austria

According to the Austrian Questionnaire, the Austrian legislation states that the accused shall appear at court without handcuffs. Only if the accused is in custody (Untersuchungshaft) he shall be accompanied by a guard (§ 239 StPO).

2.3.4 Cyprus

There is no mention whatsoever in the country report on the issue of the presentation of suspects and accused as provided by Article 5 of the Directive.

2.3.5 Slovakia

There is no mention whatsoever in the country report on the issue of the presentation of suspects and accused as provided by Article 5 of the Directive.

2.3.6 Portugal

There is no mention whatsoever in the country report on the issue of the presentation of suspects and accused as provided by Article 5 of the Directive, given that no measures have been taken regarding the implementation of the directive in the national legislation. Under existing Portuguese law, in most cases, the accused goes to the Court, accompanied by his attorney (the presence of an attorney is mandatory in all stages of the proceedings). In those rare situations where the accused is in preventive imprisonment, the police shall drive the person to the court and restrain measures, such as handcuffs or such, may be used.

2.4 Burden of proof

2.4.1 Bulgaria

The burden of proof for establishing the guilt of the accused is on the prosecutor and the investigative authorities. Moreover, para.2 of art.103 CPC explicitly provides that the accused is not obliged to prove his or her innocence.

2.4.2 Romania

The Romanian NCPC provides that the suspect or defendant is not under an obligation to prove his innocence. The national report comments that the burden of proof falls mainly on the prosecution. Following transposition, the Romanian parliament proposed an amendment reiterating the fact that the suspect or defendant are not obliged to prove their innocence.

2.4.3 Austria

While the burden of proof is not explicitly referred to in Austrian legislation, according to § 4 StPO (Anklagegrundsatz) the prosecutor has the duty to produce the evidence. If there is any doubt that the accused has committed the crime, a verdict of not guilty must

be issued; the principle of "*in dubio pro reo*" (if in doubt in favour of the accused) is a legal principle in Austrian criminal law enshrined in § 14 StPO, It is not to be applied in the consideration of evidence, but if there exists a doubt whether the accused has committed a criminal offence. The national report suggests clearly that the issue is also related to the principle of impartiality which is applicable to judges, prosecutors and police under relevant legislation (§ 4 StPO). In addition, in Austria the standard for the burden of proof (*Anklagegrundsatz*) is derived from the principle of indictment regulated in Article 90 of the Austrian Constitution.

2.4.4 Cyprus

Cyprus has had no legislative provision on the burden of proof either before or after transposition). However, case law makes it clear that the burden of proof in criminal cases lies with the prosecution (See for example *Police v. Chrysanthou; Costis Panayi Kefalos v. The Queen*).

2.4.5 Slovakia

In the national report the only reference relevant to the burden of proof is (before transposition) the statement that the prosecution is responsible for the indictment and therefore the burden of proof lies with the prosecution authorities.

2.4.6 Portugal

Under Portuguese criminal law the "accused" is presumed innocent until proven guilty, and benefits from the privilege against self-incrimination. The criminal court must gather all the necessary evidence to prove the crime, and the burden of proof falls on the public prosecutor to prove the crime occurred. The powers of the court in the search for material truth are limited by the object of the procedure defined in the indictment or pronouncement, tempered by the principle of guarantees of defence, set forth in article 32 of the CPR. Thus, it is the duty of the court to order the production of the evidence necessary for the discovery of the material truth, both in relation to the facts described in the indictment or the pronouncement, as well as those alleged by the defence and any that might arise during the trial. In criminal proceedings, there is no real burden of proof in the formal sense and ultimately falls on the judge the task of investigating and clarifying the facts in search of material truth.

As regards the burden of proof in a material sense, the principle of presumption of innocence of the defendant requires that, in case of existing doubt, the matter should always be decided in favour of the accused. The lack of proof cannot result in a conviction, whatever *thema probandum* is in question.

2.5 Rights to remain silent/not to incriminate oneself (Article 7 of the Directive)

2.5.1 Bulgaria

In Bulgarian criminal procedure, the right of the accused to remain silent is enshrined in Art. 55 CPC, which sets out the fundamental rights of the accused. In addition, under Article 115.4 CPC, it is explicitly stated that "the accused has the right to refuse to give explanations" and that the exercise of this right cannot be held against the accused.

In addition, Article 116 of CPC provides that the confession of the accused about committing a crime cannot be the sole basis for conviction and the authorities retain the duty to gather additional evidence to proceed with the case.

2.5.2 Romania

The NCPC provides for the right to remain silent at any time during the proceedings. In addition, it provides that remaining silent should not be held as evidence against suspects and accused. Following transposition, the parliament proposed amendments to article 99 in order to include the right of suspects and accused not to incriminate themselves. In addition, there is a proposed amendment to article 116 provides for the right of witnesses not to incriminate themselves.

2.5.3 Austria

The national report states that the right to remain silent and not to incriminate oneself are provided for under the StPO (§§ 7 (2), 49 Z4 StPO), with reference only to the accused. In general, all provisions of the Austrian Code of Criminal Procedure which refer to the accused are also applicable for suspects and defendants, if the provisions do not specify otherwise (§ 48 (2) StPO). In addition, it is stated that these rights derive from the procedural principle of right to a fair trial as enshrined in Article 6.1 and 6.3 of the ECHR which has the rank of constitutional law in Austria. Also, as with the burden of proof, the report states that this right derives from the principle of indictment under the Austrian Constitution. The accused has the right to be informed regarding the right to remain silent and not to incriminate himself.

According to Austrian settled case law taking into account the defendant's silence on the question of guilt is not excluded under all circumstances. It is only incompatible with the right to remain silent, if a conviction is solely or principally based on the defendant's refusal to answer questions or testify against oneself. The precondition for the admissibility of any conclusions from the defendant's silence is that the incriminating

evidence "calls for an explanation" ("nach einer Erklärung rufen") by the accused (see RIS-Justiz RS0120768).

Austrian legislation provides for remedies where the rights of the accused to remain silent and not to incriminate oneself are breached as well as in the case of breach of any other procedural right.

2.5.4 Cyprus

Before the transposition of the Directive the right to remain silent and not to incriminate oneself, though not provided by legislation, was well settled in national case law (*Republic v. Avraamidou, 2004*; *Psyllas v. Republic, 2003*; *President of the Republic v. House of Representatives, 1994*). Following transposition Article 3A of the Criminal Procedure Law provides for the right to remain silent and not to incriminate oneself in essentially the same terms as Article 7 of the Directive including the definition as provided in Recital (25) of the Directive. A similar amendment regarding the right not to incriminate oneself was also made to the Rights of Suspect Persons, Arrested Persons and Persons Held in Custody Law 2005.

2.5.5 Slovakia

Under Slovakian Law both rights under Article 7 of the Directive are applicable to suspects and accused. Following transposition, the witnesses also have similar rights.

2.5.6 Portugal

1. In Portuguese law, even though national legislative implementation of the Directive is still pending, the accused holds the privilege against self-incrimination. This principle manifests itself in several manners. The best known, is the right to silence, embodied in Article 61/1(d) of the CPC and Article 32/1 of the CPR). However, there are other equally important aspects, such as the right not to testify against oneself (Article 32/2 CPR) and the right to object to the performance of expert body examinations. *Nemo tenetur se deterege*; *nemo tenetur se ipsum accusare*; *nemo tenetur edere contra se*; *nemo tenetur se ipsum prodere* and *nemo testis contra se ipsum* are the most used terms/maxims in regards to the right not to incriminate oneself.
2. The right against self-incrimination foreseen in the Portuguese CPC and CPR is in line with Article 6(e) of the ECHR and Article 14 of the UN International Covenant on Civil and Political Rights.

3 Comparative observations regarding the existence of minimum procedural safeguards in the six legal systems surveyed

3.1 Presumption of innocence (Articles 1 and 3 of the Directive)

The Directive guarantees the minimum procedural safeguards to both suspects and accused. The comparative material demonstrates that, in general, and to the extent that there is sufficient information in the country report, the minimum procedural safeguards seem to be applicable to both suspects and accused (and defendants) in the national legislation.

According to the national reports of all six partners, the presumption of innocence is guaranteed in general for both suspects and accused either in the Constitution and the criminal procedure law (Austria, Cyprus) or only in the respective criminal procedure law (Romania, Slovakia, Portugal). In the case of Romania, a proposed amendment purports to strengthen the existing guarantee of the presumption of innocence. In Bulgaria, the procedure role of "suspect" does not exist and the presumption of innocence is guaranteed only for people who are officially accused of a crime.

3.2 Public references to guilt of suspects and accused/remedies for breach (Articles 4 and 10 of the Directive)

Cyprus appears to be the only country of the six partners of the PRESENT consortium which has fully complied with the requirements under Article 4; though there is no reference for a legal remedy as provided under articles 4.2 and 10 of the Directive.

At present, there is a relevant amendment pending in the Romanian Parliament; there are no references in the reports of Slovakia and Portugal; and Austrian legislation provides for compensation only in the event of breach of the presumption of innocence by the media but not by the national authorities.

It is well settled that the prohibition of public references to guilt derives from the fundamental principle of the presumption of innocence so that the latter would be violated if such references are allowed. Hence, all countries should proceed with the proper transposition of this requirement and of the provision regarding the legal remedies for breach.

3.3 Presentation of suspects/accused (Article 5 of the Directive)

The requirement that "competent authorities should abstain from presenting suspects or accused persons as being guilty, in court or in public, through the use of measures of physical restraint" (Recital 20 of the Directive) and adopt appropriate measures

accordingly is being complied with in the legislation of at least some of the surveyed Member States, but not all. For example, the legislative amendment proposed in the Romanian parliament would appear, if passed, to be an effective transposition of the Directive in this point. Also, in Austria the accused is accompanied by a guard (§ 239 StPO) only when in custody (Untersuchungshaft), in all other circumstances no handcuffs are applied in Court. In Bulgaria, legislation requires the measures of physical restraint to be appropriate and necessary in each case, however, in practice, this requirement is rarely complied with when trials of high public interest are concerned.

3.4 Burden of proof

It is well settled that in states with an adversarial system the burden of proof in criminal cases is clearly on the prosecution. The relevant Recital (23) underlines this fundamental difference between the adversarial and the inquisitorial system by noting that in member states with the latter system, the burden of proof should also clearly fall on judges and competent courts as well as prosecution.

Cyprus is the only country in this comparative analysis with an adversarial system and it is noted that its national report makes no reference to legislative provisions regulating the burden of proof. However, as a common law jurisdiction, its case law, which has binding effect establishes that the burden of proof in criminal cases lies with the prosecution.

Bulgaria and Portugal briefly indicate that the Prosecutor has the burden of proof; in the case of Romania and Slovakia there are brief references that the prosecution is overall responsible to prove the case; whereas the Austrian legislation provides that the prosecutor has the duty to produce the evidence (*Anklagegrundsatz*) and that a verdict of not guilty must be issued if there exists doubt whether the accused has committed a crime. Moreover, the Austrian report suggests that the issue is related to the principle of impartiality applicable to the prosecuting authorities and the principle of *in dubio pro reo* is well entrenched in their criminal code.

It is important to note that a proper transposition of the Directive should make it clear that the burden of proof is on all authorities involved in investigating and prosecuting a criminal offence.

3.5 Rights to remain silent/not to incriminate oneself (Article 7 of the Directive)

Both the right to remain silent and the right not to incriminate oneself are important aspects of the presumption of innocence for both suspects and accused (Recitals 24-26).

Cyprus has fully transposed the requirement of the Directive regarding these two rights both in the Criminal Procedure Law and in the Rights of Suspect Persons, Arrested

Persons and Persons Held in Custody Law 2005, despite the fact that these rights were already safeguarded under well-established case law.

Bulgaria, Romania, Austria, Slovakia and Portugal already included provisions in their domestic legislation safeguarding these rights. However, only the Romanian and Bulgarian legislation explicitly state that silence should not be held against accused persons, whereas under Austrian case law taking into account the defendant's silence on the question of guilt is not excluded under all circumstances.

It is recommended that all countries should include clear provisions complying with the Directive requirement (Article 7(5)) that the exercise of the rights to silence and not to incriminate oneself by the suspect/accused is not used against them as evidence that they have committed a criminal offence.

Part II: Right to be present

4 Right to be present at the trial and right to a new trial (Articles 8 and 9 of the Directive)

4.1 Bulgaria

The right of the accused to be present is provided by article 55 CPC which also provides for the requirements for holding a trial in *absentia*. In the case of a "serious crime" the presence of the accused is mandatory except where the Court decides that his or her absence will not obstruct the proceedings and certain requirements are fulfilled including proper summoning and provision of the information regarding the right to a lawyer and the information regarding the consequences of not being present. The CPC also provides for "diligent search" when the accused is not found at the address provided.

The CPC provides for a retrial when the trial was conducted in the absence of the accused if they did not know of the proceedings against them. However, the remedy is not available to an accused if the court determines that the accused knew of the proceedings and they chose not to appear. Regarding accused persons who are outside Bulgarian territory, the case law provides that courts must comply with mutual legal assistance treaties where available and with the mechanism of EAW when the address of the accused is within the EU. When neither of the above is applicable and the address of the accused is not known, then the court may proceed with the trial in the absence of the accused without summons. Retrial is available as a remedy when the court failed to apply available remedies for summoning the accused.

Following transposition, the national report states that only minor amendments regarding trials in absentia were made. In particular, the CPC was amended to introduce a

"preliminary hearing": Before this hearing the court is obligated to send to the accused all the information regarding their procedural rights and the consequences of non-appearance; the preliminary hearing is postponed if the accused fails to appear when their presence is mandatory. If the accused, having been duly informed of the proceedings, fails to appear, then the trial can be conducted in their absence. In addition, under national case law, if the accused knew of the criminal charge, the courts consider that they knew of the proceedings, even if the indictment was not properly served.

Following transposition, the national report states that the practice of summoning the accused by telephone may be in breach of the Directive; similarly, it is noted that whether or not a 'diligent search' was actually carried out remains in the discretion of the judge and has not been provided for properly in a legislative enactment.

4.2 Romania

Article 364 of NCPC provides for the defendant's right to be present at trial, the defendant's presence is described as mandatory. A trial can take place in absentia where the defendant having been duly summoned fails to appear; also, the defendant has the right to request for the trial to take place in his absence when he is represented by a lawyer, but the court may reject such a request if it considers that his presence is necessary. Where the defendant is unable to attend due to ill health the court may order postponement of the trial.

Article 446 of NCPC provides for the reopening of criminal proceedings in the event of conviction in *absentia* and the convicted person requests re-trial within a month and a day from when he became aware that there was a criminal case against him.

Following transposition of the Directive the proposed parliamentary amendment to article 364 of NCPC provides that a trial in absentia may only occur when the defendant has been properly summoned and is fully informed of proceedings and decisions. In addition, the amendment provides that in the event of a final judgment issued in absentia the defendant should be informed of the right to a new trial or appeal which would allow a new trial on the merits.

4.3 Austria

Under § 6 StPO the accused has a "duty to be present during court proceedings" and the right to contribute to the entire criminal proceedings. According to § 427 (1) StPO a trial in absentia may only be held in the following circumstances: the offence is classified as a misdemeanour (*Vergehen*), which means that the offence was committed in negligence (fahrlässig), or was a non-negligent act punishable by deprivation of liberty for not more than three years; the accused has been properly informed of all charges and participated

during the earlier stages of criminal proceedings; the accused was formally summoned so that he was provided with all necessary information regarding the consequences of non-appearance and the possibility of a trial in absentia (§ 472 StPO: *Abwesenheitsverfahren*; see also § 491 StPO*: Mandatsverfahren*). Austrian legislation provides that if these conditions prevail, the judge has the discretion to decide whether the presence of the accused necessary for the comprehensive evaluation of the case or if a trial in absentia can be held.

Under national case law an accused adult may waive his right to be present during any stage of the trial by making a personal and unequivocal declaration to that effect (RIS-Justiz RS0115797).

The accused has the right to appeal a verdict that was taken in absentia within 14 days of its delivery. The appeal is successful only if the accused proves that his presence was not possible in which case the verdict is reversed and a re-trial will take place. The accused must prove that an irrefutable obstacle (*unabweisbares Hindernis*) prevented him or her from being present at trial.

4.4 Cyprus

In Cyprus, Articles 11 (2) (c) and 30 (3) of the Constitution guarantee the right of the accused to be present during their trial. In addition, article 63 of the Criminal Procedure Law provides for the right to be present and for the Court' s discretion to remove the accused and hold the trial in his absence or allow the accused not to be present during any stage of the trial (*Republic v Demetriades*, 1973, citing *R v Jones*, 1972 with further reference to *R v Abrahams*, 1895).

Historically, a trial in absentia is very rare in Cyprus.

In the process of the Directive's transposition, the draft Article, proposed by the Law Office of the Republic in implementation of the Directive's provisions allowing a trial in absentia when the conditions stated in Article 8(2) of the Directive were met, was abandoned following the opposition by the Supreme Court of Cyprus, which argued that the existing common law regime was more protective, in its application, of the rights of accused persons to be present that the proposed legislative enactment, which would have been perceived as removing the courts' discretion to stay proceedings.

4.5 Slovakia

According to the country report national legislation in Slovakia provided for all aspects of the right to be present at trial before the transposition of the Directive and therefore no amendments to the CPC were necessary. § 2(7) CPC guarantees the right to be present at

trial. Trial in absentia is allowed if certain conditions are met cumulatively: the indictment was duly served and the defendant was properly summoned to the hearing; the defendant was given the opportunity to participate during criminal proceedings before law enforcement authority and was advised of his right to review the file of his case and file relevant petitions; the defendant was advised that the trial may be held in absentia and the court considers that a trial in absentia can be held without compromising the proper administration of justice.

The CPC provides for criminal proceedings against fugitives and accused with the status of "vulnerable persons" so that their procedural rights to be informed of the charge against them and to be present during trial are duly protected. In the case of fugitives, the CPC provides for legal remedies in the event that the conditions for holding a trial in absentia are not met such as an appeal (or an extraordinary appeal).

4.6 Portugal

Article 332/1 of the CPC provides that the presence of the accused is mandatory at the trial hearing. However, a trial in absentia seems to be allowed if the accused is "unjustifiably absent" and the court does not consider that his presence is necessary to the hearing. The national report acknowledges that there are problems in properly notifying the accused regarding the date of the hearing and judgment. As things stand available notification does not ensure that the accused was made aware of the criminal charge. The current legislation does not provide a legal remedy for the breach of the right of the defendant to be present.

Since 15 December 2000, the method of notification by simple post has acquired clear relevance, to the detriment of notification by personal contact and by means of registered mail, as a measure of simplification and in order to prevent procedural delays. The introduction of the simple post (mere deposit, with no assurance of reception by the accused) as a form of notification, was considered as justified by the legislator, paying attention to the duty of the accused to notify the police, and Public Attorneys' office of any change of residence. The accused is obliged, under Portuguese Law, to notify his absence from his residence for a period longer than 5 days, and on him/her falls also the obligation to report change of residence. In case the accused violates his procedural obligations by not reporting his new address or by giving an incorrect address he/she shall be considered notified with the mere deposit of the summons at the address that is mentioned in the records. Article 373/3 states that, when the accused is absent, the sentence is read before his attorney, the accused is considered to have been notified of the decision; Similarly, paragraph 372/4 adds that reading is tantamount to the notification of the procedural subjects that are to be considered as present.

That is to say, that an act which is the decisive moment in which the court issues the verdict of guilt or innocence, determines the liability and its effects, grounds the reason for what has been decided.

5 Comparative Remarks and Implementation of the Directive

In this Section, we shall consider in more depth the three main aspects of the legal treatment of the right to be present: notification (5.3); trial in absentia (5.4); and remedies such as the right to a new trial (5.6). Each sub-section includes comparative observations and a consideration of best practices that emerge from this study.

5.1 The Directive

The right of suspects and accused to be present at their own trial is one of the critical aspects of the right to a fair trial and all member states should ensure that it is properly safeguarded (Recital 33).

A suspect or accused must be properly informed of the trial by being summoned either in person or otherwise but in such a way as to make available to him/her all the necessary information regarding the date and place of the trial and informing him/her of the consequences of non-appearance (Recital 36). Whether or not the way a person has been notified of an impending trial in a way as "to ensure the person's awareness of the trial", will depend on the particular "diligence" shown by the authorities in so informing that person as well the diligence by the person in receiving the relevant information Recital 38).

The provisions regarding the proper notification of the suspect or accused are crucial in that a trial in absentia may be held (Article 8. (a)) and an enforceable decision on guilt or innocence handed down, when it can be demonstrated that the person concerned had been duly informed of all the details regarding the trial and of the consequences of non-appearance. In the event that an accused cannot be located despite "reasonable efforts" having been made, a trial in absentia may be held but the accused or suspect has the right to request a new trial once informed of the decision (Article 8.4).

5.2 General observations as to Implementation

There are none or only minor amendments or proposed amendments (Bulgaria, Romania), following transposition of the Directive. In Cyprus, the legislator prefers to retain the discretion of the judge, rather than legislating for the specific circumstances under which a trial in absentia may be legitimately held, the argument being that the court's discretion would promote better compliance with the Directive on this issue. In Austria, the judge

discretion is only exercised once the specific requirements regarding the cases in which a trial in absentia can be held have been met (§ 427 StPO).

The Bulgaria national report underlines a couple of issues with existing legislation post transposition in relation to properly notifying/summoning the accused which can be easily tackled as they are already singled out.

In the case of Portugal however, where there has been no transposition, existing legislation appears to be suffering from significant failures to safeguard the right to be present; no legal remedy for its breach is evident. Though it is stated that the presence of the accused is "mandatory" at trial in absentia is allowed when the accused is "unjustifiably absent" a vague and unclear reference to the circumstances under which the trial can be held in his absence. The report itself concludes that there are other problems relating to proper notification of the accused regarding the criminal offence and the date of the hearing amongst other. It is recommended that the legislator follow the example of Austria or Bulgaria in introducing legislative provisions to comply with the Directive.

Most of the country reports provide detailed information regarding the protection of the right to be present at trial, the circumstances under which a trial in absentia may be held as well as the possibility of retrial as a remedy for breach of the right. In general, the main requirements of the Directive seem to be fulfilled at national level (with the exception of Portugal), and there are legal provisions (or case law) regarding the formal summoning of the suspect/defendant to the proceedings, the provision of proper information regarding the charges and the consequences of not being present, the right to be represented by a lawyer instead and the circumstances under which a trial maybe held in the absence of the accused. In reviewing the reports and comparing legislation and case law (to the extent that it was made available and clear), certain observations and recommendations regarding compliance with the Directive and best practice are set out below.

5.3 Notification of the suspect/accused

5.3.1 Bulgaria

The ***Bulgarian*** report provides a comprehensive picture of the notification procedures which with only minor adjustments are the same as before transposition. Under Bulgarian procedure summons and other documents are delivered to the accused by Court officials, appointed following special selection procedures, or other appropriate officials. Apart from the accused, officials can deliver such documents to other responsible persons such as family members, employers, neighbours and the lawyer of the accused. The summon is served following a singing of a receipt. The means of summoning are used

cumulatively. The information provided includes the right of the accused to be present at Court and to have access to a lawyer as well as information regarding the consequences of not being present at trial. In case where the accused has provided the address to the authorities and subsequently was not found on that address, prevailing case law requires a "diligent search".

Following transposition of the Directive the same practices for conducting a diligent search continue to be followed and the courts always "make an ad-hoc assessment" whether the measures taken to find the accused were adequate. In the event that the court finds that the search was not sufficiently effective, it orders a retrial or reopening of proceedings at first instance. The Bulgarian report notes that the fact that what constitutes a "diligent search" is not provided in legislation (though clear under case law) can be problematic. A common consensus amongst judges is that proceedings in the absence of the accused are an exception and therefore there is a high standard in conducting a "diligent search" to notify the accused properly.

Bulgarian case law appears to follow ECHR jurisprudence in considering that an accused has waived their right to be present when, whilst under supervision measures, he cannot be found at the address provided. According to the Bulgarian national report it appears that after the transposition of the Directive the settled case law provides that "if the accused knew of the criminal charge, the courts consider that he or she knew of the proceedings even if the indictment was not duly served".

The summoning of accused outside the Bulgarian territory is conducted in accordance with international and/or bilateral treaties and the European arrest warrant whenever the address of the accused is within the EU and known to the authorities. In all cases when the accused is not within the territory of Bulgaria and their address it not known to the authorities, then the authorities should undertake all necessary/reasonable efforts to locate them. It appears that there is no provision for the accused to expressly waive their right to be present at trial.

5.3.2 Austria

In ***Austria*** the summons to the accused is sent by "registered personal delivery", which cannot be received by any other person than the recipient; the recipient signs a confirmation which is then filed under the internal system to which the criminal judge and his office has direct access. However, if the accused has failed to pick up the summons and the police has confirmed that they were at the address for a period of two weeks, then there is a presumption that the summons were still personally delivered. The information in the summons includes the date of the proceedings, the subject matter of the trial, the main facts of the case and their legal consequences, the consequences of non-appearance and the possibility of a trial in absentia. Under Austrian case law an adult can waive their

right to be present during any part of the trial by making a a personal and unequivocal declaration.

Since 2015 there exists a special procedure which allows under specific circumstances a penal order *(schriftliche Strafverfügung*) to be issued without holding a court proceeding (*Mandatsverfahren).* One of the preconditions for the admissibility of this procedure is that the accused had the right to be heard in the case and that he explicitly forgoes the possibility of a criminal proceeding to be held (§ 491 (1) 1 StPO).

5.3.3 Romania

In ***Romania*** the accused (suspect and defendant) is summoned by "written citation" by Court officials or local police, post or courier service. However, the law allows for such summons to take place by telephone, telegraph or electronic mail. There is no mention of confirmatory receipt of summons and related documents. Under the law "the citation" may be sent to the suspect/defendant address, the place of work and at their lawyer's office. If all means provided under the legislation for delivering summons fail, then the notice may be posted at the Court house. If the suspect or defendant is abroad summons are carried out under the terms of applicable bilateral international treaties or by registered letter. Receipt or refusal to accept the registered letter is evidence that the summons was duly delivered.

The summons and related documents provide information that suspect/accused has the right to the lawyer, to be appointed by state in the event they do not have one, that they may consult the case file and of the consequences of not being present. It appears that there is no provision for accused to expressly waive their right to be present at trial.
Proposed amendments to the relevant article of the Romanian legislation in order to comply with Article of the Directive provides that a trial in absentia can take place only if the suspect/accused has not been properly summoned or informed of the place and date of the proceedings and of the possibility of a "default judgment".

5.3.4 Cyprus

Under the ***Cyprus*** Criminal Procedure Law (Cap. 155) summons addressed to an individual "shall be served either by delivering it to him personally or by leaving it with some adult person living with him or being in charge of the place in which he resides or of the place of his business or occupation" (Art. 46). The summons is served by a police officer or by an Officer of the Court which issued it; the service of summons is proved by the person who served it by means of an affidavit. If such service is considered impossible the Court may order that the summons may be served otherwise as provided by article 46(1)(a) of the Criminal Procedure Law (Cap. 155).

Every summons includes information regarding the time when and place where the accused must appear before the Court (Art. 45), name and description of the accused (Art. 38) as well as brief description of the offences with which the accused is charged. The accused cannot simply waive his right to be present, but the permission of the Court is required. The Court may allow the lawyer of the accused to appear instead however at any time during the proceedings the Court may order that the accused be present (Art. 44(1)). It is not clear under what circumstances the Court may compel the presence of an accused who is reluctant to appear. In practice, a high percentage of summons are not successfully served and consequently after several attempts at serving, the charges are withdrawn instead of continuing with the trial in the absence of the accused. At the same time, the summons does not include information regarding the consequences of non-appearance.

5.3.5 Slovakia

In ***Slovakia***, the summons to the "main hearing" is delivered to the defendant in person but summons is considered also validly delivered three days after it has been deposited "with the competent body that ensures delivery". It seems that as long as the accused "was instructed in the first hearing", documents are also deemed served even if returned to the law enforcement authorities because the addressee was not found. The report further states that the indictment has to be delivered to the defendant in person with a "confirmation return" and there is no alternative means of delivery. The defendant has the right to refuse to attend the trial, expressly requests that the trial be held in their absence even if in custody or serving a prison sentence. The presence of a defence lawyer is not required if the defendant so requests.

5.3.6 Portugal

The only information available regarding summoning of the accused under ***Portuguese*** legislation refers to notification by simple post under Article 196(3)(c) CPC, as long as the authorities are aware of the address of the accused as noted on an identity document (Termo de Identidade e residência: Article 196(1) and (3)(a)(c) and (d) CPC). if there was any change of address that has not been communicated to the Court by registered mail, all subsequent notifications will be sent to the original address by simple post. The report notes that this form of notification does not indicate whether or not the accused has actually become aware of the date of the trial; as a result, the accused is not in a position to explicitly waive their right to be present. The accused is obliged, under Portuguese Law, to notify his absence from his residence for a period longer than 5 days, and on him/her falls also the obligation to report any change of residence. In case the accused violates his procedural obligations by not reporting his new address or by giving an incorrect address , the accused is in clear violation of the obligation to cooperate with the court in the search for the truth. Therefore, under the assumption that the accused did

provide accurate information, he/she shall be considered notified with the mere deposit of the summons at the address that is mentioned in the records. The mere deposit of the summons by post is, according to Portuguese Law, sufficient proof that the accused was notified. For that reason, the court considers that the trial shall take place, even *in absentia* of the accused.

5.3.7 Observations and best practices

Even though the right to be present at trial is enshrined in the legislation of all the six countries participating in the PRESENT project, the provisions regulating proper summons including all the necessary information to be served on the accused differ so that certain countries may need to introduce amendments to their domestic legal systems in order to comply fully with the Directive.

We note that the means of serving and content of summons as provided under current Bulgarian legislation in their detail, constitute a comprehensive approach which is in compliance with the letter and spirit of the Directive. This is especially so in respect of the provision for "diligent search" as well as the final assessment by Courts regarding the proper summoning of the accused. Similarly, the Bulgarian approach to summoning accused outside their territory appears to take into consideration both international law and EU law. Other countries should also provide for diligent search or reasonable efforts to locate the accused but also stricter procedures regarding confirmation of receipt of summons.

Clear provisions regarding the conditions under which the accused are able to expressly and unequivocally waive their right to be present should be introduced in the national legislations as currently provided under Austrian law.

5.4 Trial in the absence of the accused

5.4.1 Bulgaria

In ***Bulgaria*** the presence of a person accused of a "serious crime" is mandatory at trial. However, under certain circumstances the proceedings may be conducted in the absence of the accused as long as such absence does not interfere with the "ascertaining of the objective truth". The latter is assessed by the judge ad hoc. If the judge decides that the ascertaining of the objective truth is impossible in the absence of the accused, a trial in absentia must not be conducted. The "ascertaining of the objective truth" is a subjective notion established in the Bulgarian Criminal Procedure Code. It is not legally defined and it is connected to the criminal procedure principle that the Court is obliged to find the facts related to every case which are objectively true. The courts make an ad hoc

assessment whether the case requires the presence of the accused in order for the objective facts to be ascertained.
The circumstances under which a trial in absentia may be conducted even in the case of serious crimes are the following:

a. the accused is not found at the address that they indicated to the authorities or changed their address without informing them;
b. the place of residence of the accused within the country is unknown and they have not been located following a "diligent search";
c. the accused is outside the territory of Bulgaria and their place of residence is not known, they cannot be summoned and despite being duly served fail to appear without justifying the absence.

When a person is not accused of a serious crime their presence is not mandatory as long as such absence does not interfere with "ascertaining of the objective truth".

In re-trial proceedings the presence of the accused is mandatory unless their absence can be justified. Following the introduction of a "preliminary hearing" the presence of the accused is not mandatory during this hearing as long as the same conditions listed above prevail.

5.4.2 Austria

In ***Austria*** a trial in absentia may be held in the following circumstances:

(i) The crime in the case is considered to be a misdemeanour (*Vergehen*). This means that the offence was committed in negligence (fahrlässig), or was a non-negligent act punishable by deprivation of liberty for not more than three years
(ii) (ii)he accused was already heard in the case i.e. the accused was informed about the charges and his right and/or the possibility to deny them during the interrogation; the interrogation provided information about the charges, the facts of the case and their legal consequences. It is noted that under Austrian legislation, the statements of the accused during interrogation may be read out in Court if the accused does not appear at trial after being formally summoned (*audi alteram partem*).
(iii) (The accused has been formally summoned with all the necessary information having been made available to them.

If all the above conditions prevail and the judge does not consider the presence of the accused necessary for the proper considerations of the case, then the trial may proceed and a decision of guilty or innocent may be issued. If the above conditions are not present the hearing is adjourned and an order to compel the appearance of the accused may be made by the judge.

If the accused cannot be located the investigation must be continued to the extent possible, while the proceedings remain suspended; apparently in practice, the judges may even call the accused to remind them of the hearing and postpone the trial and allow further time for the accused to attend.

5.4.3 Romania

In ***Romania*** the presence of the defendant is mandatory while certain exceptions are allowed: if the defendant having been duly notified fails to appear without providing reasonable explanation; the trial can occur in the absence of the defendant if there is a written request waiving the right to be present and mandating a lawyer in their place. However, the Court may compel the presence of the defendant if it considers it necessary.

5.4.4 Cyprus

As mentioned above, under ***Cyprus*** Criminal Procedure and recent case law the accused may only be absent from trial with the permission of the Court; the Court can issue a warrant to compel the attendance of the accused or allow the accused to be represented by counsel or respond in writing in the case of certain minor offences. Under case law, the Court, in the absence of the accused, may order the continuation of the proceedings. The Cypriot authorities have opted not to transpose the provisions of article 8 regarding the circumstances under which a trial in absentia may be held. Their position is that this would remove the court's discretion which under common law is considered to be more protective of the rights of accused. However, it is noted that trials in absentia are hardly ever held in Cyprus and considering the multiple failures to properly notify suspects one may conclude that in certain cases crime goes unpunished.

5.4.5 Slovakia

In **Slovakia** the right to be present at trial is considered a right and not a duty. A trial in absentia is allowed if the Court considers that the presence of the accused is not required for the proper conduct of the proceedings and certain conditions prevail: the indictment was duly served to the defendant and the defendant was duly and timely summoned to the hearing; the defendant had the opportunity to comment on the act, which is the subject of an indictment, before a law enforcement authority, and the accused was advised on the possibility to study the file and file petitions for the completion of the investigation or summary investigation; the defendant was advised on the consequences of non-appearance.

5.4.6 Portugal

In **Portugal** the presence of the accused seems to be relevant in two distinct situations: during "the instructional debate" and at the "trial hearing". Apparently under the law the accused must be notified to "appoint the day, time and place of the investigative debate"; in the unjustifiable absence of the accused the investigating judge may procced with the debate unless he considers that the presence of the accused is absolutely necessary and postpones the debate. In the second situation the presence of the accused is mandatory at the trial hearing; if the accused is unjustifiably absent the Court may proceed with the hearing unless it deems it absolutely essential that the accused is absent and postpones the hearing.

5.4.7 Observations and best practices

With the exceptions of Cyprus and Portugal, the other four countries participating in the PRESENT project appear to have enacted legislative provisions which comply with the general requirements of the Directive regarding the circumstances in which a trial may take place in the absence of the accused without infringing the right to a fair trial.

The rationale of these provisions as outlined above, which also underlines the requirements of the Directive, is that though the presence of the accused is mandatory where a serious crime is the subject matter of the proceedings, the court retains the discretion to proceed in the absence of the accused provided certain conditions are fulfilled.

Certain practices may be highlighted:

a. The requirement in Bulgaria to conduct "diligent search" to locate the accused before proceeding with a trial in absentia.
b. The condition mentioned in different ways by several of the participating parties regarding proper notification and sufficient information provided to the accused, thus ensuring that the accused is aware of all relevant facts regarding the charges and their consequences and of the date, place etc of the hearing.
c. The possibility, mentioned in some of the reports, of instructing a lawyer to appear in lieu of the defendant at trial.
d. The Austrian practice of ensuring that the accused has already been heard at a previous stage (investigation) of the proceedings and statements are available for production in court.
e. Allowing the defendant to explicitly request a trial in absentia as well as considering that the defendant's unjustifiable absence is in some circumstances a tacit waiver of the right.

In addition to the above practices it seems that in all countries the Court exercises its discretion to decide whether or not it is advisable, in the interest of justice, to proceed with a trial in absentia; similarly, the Courts may order the accused to be present. This exercise of discretion, though not explicitly provided under the Directive, may be considered as an additional safeguarding mechanism to protect the right to be present and especially so if deployed in conjunction with the specific circumstances listed under national legislation.

5.5 Legal remedies - right to a new trial

5.5.1 Bulgaria

Bulgarian Criminal Procedure provides that an accused who did not know of the proceedings against them and the trial was held in their absence, is entitled to the remedy of a re-trial. Alternatively, when all conditions regarding proper notification are met and the accused has failed to appear, Bulgarian case law indicates that the courts would rule that the accused has fled or absconded and therefore they have no right to a re-trial.

5.5.2 Austria

Under ***Austrian*** legislation, the accused or their lawyer may appeal a verdict reached in absentia within 14 days of its delivery. The appeal is successful if the accused can prove that an irrefutable obstacle (german: "unabweisbares Hindernis") prevented them from appearing; e.g. shortcomings in delivering summons. If an appeal is successful, the case will be sent to the court of first instance for a re-trial. As § 427 StPO – the circumstances under which trial in absentia may be held - protects the right to be heard and, hence, the right to a fair trial, a breach of the provision can lead to the nullity of the verdict. Together or instead of the appeal (Einspruch) the accused may use any other legal remedy which is admissible in the responsible court, namely the appeal an appeal for nullity (Nichtigkeitsbeschwerde - §§281 (1) 3 icw 427 StPO) or an appeal because of nullity (Berufung wegen Nichtigkeit - §§489 (1) icw 427 (3) StPO).

5.5.3 Romania

In ***Romania***, a person convicted in absentia may request re-opening of the proceedings within a month from becoming aware, "through any official notification" that a case has been brought against them. Apparently, any convicted person who has not been formally summoned to appear, is entitled to a remedy even if they 3had otherwise knowledge of the trial; unless such a person had appointed a defence lawyer to represent him at trial. Similarly, the same holds true for a convicted person for whom it was demonstrably impossible to appear before the court and inform the court accordingly.

5.5.4 Cyprus

In ***Cyprus***, there is no record and practice of trial in absentia and consequently no remedy is provided for.

5.5.5 Slovakia

In ***Slovakia***, when a trial takes place in the absence of the defendant and the conditions that allow trial in absentia are not met the defendant has the right to file an appeal or an "extraordinary appeal".

5.5.6 Portugal

Portuguese national law does not provide for a remedy for the infringement of the right to be present at trial.

5.5.7 Observations and best practices

Across all Member States surveyed, there appears to be a legislative consensus that, in the case of person convicted in breach of their right to be present, that convicted person is entitled to some form of re-opening of criminal proceedings. Best practice indicates clearly that the re-opening or re-trial is only available when certain conditions clearly listed in the legislation have been met.

Romanian legislation provides clearly that the time of requesting a re-opening starts to run from the moment that the convicted person becomes aware through official notification that a case has been brought against them. This appears to be the provision mostly in compliance with the Directive.

It is noted that the Directive requires that where Member States allow for trials in absentia where certain conditions are not met, they also require Member States to ensure that when the accused are informed of the decision, especially when apprehended, they should also be informed of their right to a new trial or another legal remedy (Article 8.4).

Partner Member States of project PRESENT should include relevant provisions in order to comply with the Directive in this respect and should clarify the time period allowed to the convicted persons to avail themselves of the legal remedy in the event of a breach of their right to be present at trial.

6 Conclusion

The Directive constitutes an ambitious, as well as vital, undertaking. Its importance to European legal integration, legal certainty and the EU freedoms is evident. But it has come into a legal landscape of diverse national, or even regional, attitudes and entrenched practices. We may share the same fundamental values but criminal processes often entail a balancing of competing interests – and rights – that creates its own challenges. This Report has hopefully brought to mind all these points, including the complex task faced by legislators, perhaps, and judges, especially.

The process of the Directive's transposition is not yet complete across the 28 Member States. This is not primarily a matter of formal legislation. On the one hand, in some instances, as in the case of Cyprus, it could indeed be argued that judges are more likely to uphold a higher standard of requiring the accused's presence to proceed with his or her trial if they continue to follow the English Common Law norms, than if they come to regard themselves as bound by a legislative rule such as Article 8 of the Directive. On the other hand, legislation will not suffice. Many Member States have transposed verbatim the text of the Directive – but it will take time and a persistent review loop before the new norms become truly ingrained into the legal system.

This process can be helped by "soft" and "strong" tools. The widest possible dissemination of information, education and hands-on training activities is an obvious strategy. Sustainable communication between the legal systems is equally important: it allows judges, lawyers and policymakers, just as it has allowed participating experts in the PRESENT project, us to exchange ideas; to share best practices but also to share common concerns and to elaborate common legal ideas.

Notes:

[1] This comparative analysis drew on the reports the six partners of the PRESENT consortium produced based on data evaluating national legislation before and/or after the date of transposition under the Directive.

References:

Popovi v. Bulgaria, 09/06/2016;
Gutsanovi v. Bulgaria, 15/10/2013)