The Directive on the Presumption of Innocence and the Right to Be Present at Trial

Genesis and description of the new EU-Measure

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Article

ABSTRACT

The article traces the genesis and adoption of Directive (EU) 2016/343 on the presumption of innocence and the right to be present at trial, the fourth measure under the Roadmap on procedural rights. Cras and Erbežnik outline the political debates in Council and Parliament, the compromise reached in trilogues, and the Directive's main provisions: protection against premature public references to guilt, rules on presentation of suspects, allocation of the burden of proof, the right to remain silent and not to incriminate oneself, safeguards on trials in absentia, and remedies for violations. The Directive largely codifies ECtHR case law while setting EU minimum standards, balancing mutual trust with respect for national legal traditions.

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I. Introduction

On 9 March 2016, the European Parliament and the Council adopted 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.[1] The Directive is the fourth legislative measure that has been brought to pass since the adoption, in 2009, of the Council's Roadmap on procedural rights for suspects and accused persons. This article describes the genesis of the Directive and provides a description of its main contents.

II. Genesis of the Directive

1. Background: Roadmap and Stockholm programme

In November 2009, on the eve of the entry into force of the Lisbon Treaty, the Council (Justice and Home Affairs) adopted the Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings.[2] The Roadmap provides a step-by-step approach[3] – one measure at a time – towards establishing a full catalogue of procedural rights for suspects and accused persons in criminal proceedings. Taking into account the objective of Art. 82(2) TFEU, the aim of the Roadmap is to foster the application of the principle of mutual recognition of judicial decisions, for example in the context of the Framework Decision on the European Arrest Warrant[4] or the more recent Directive on the European Investigation Order.[5] The Roadmap also seeks to improve the balance between the measures aimed at facilitating prosecution, on the one hand, and the protection of procedural rights of the individual, on the other.

The Roadmap calls on the Commission to submit proposals for legislative measures on five rights (A–E).[6] During the negotiations in the Council that led to the adoption of the Roadmap, some Member States presented suggestions for other rights to be included in the Roadmap, in particular the right to remain silent and the presumption of innocence.[7] Since there was no majority in the Council for these suggestions, the list of five rights was maintained. As a compromise, however, it was specified, in point 2 of the Council resolution on the Roadmap, that the rights included therein "could be complemented by other rights."

In December 2009, the European Council welcomed the adoption of the Roadmap and made it part of the Stockholm programme.[8] During the negotiations that led to the adoption of this programme, some Member States again presented their suggestions for rights other than those mentioned in the Roadmap and in respect of which, in their opinion, legislative proposals should be presented by the Commission. Italy, in particular, reiterated the suggestion that the Commission should also present a proposal on the presumption of innocence. The Swedish Presidency, being favourable to this suggestion, proposed a compromise consisting of mentioning the presumption of innocence as an *example* of one of the rights that could complement the rights mentioned in the Roadmap. This proposal was agreed on and, in the Stockholm programme, one can therefore read that the European Council "invites the Commission to examine further elements of minimum procedural rights for suspected and accused persons and to assess whether other issues, *for instance the presumption of innocence*, need to be addressed." Since the Stockholm programme, unfortunately, does not quote the measures of the Roadmap, the presumption of innocence is the only right that is explicitly mentioned in that programme. It hence could not be ignored.

2. The Commission's proposal

The first three measures on the basis of the Roadmap were adopted within a rather short time frame: Directive 2010/64/EU on the right to interpretation and translation (measure A) was adopted on 20 October

2010;[9] Directive 2012/13/EU on the right to information (measure B) was adopted on 22 May 2012;[10] and Directive 2013/48/EU on the right of access to a lawyer (measure C1+D) was adopted on 22 October 2013.[11]

In November 2013, the Commission presented a package of three further measures to complete the rollout of the Roadmap, as integrated in the Stockholm programme: a proposal for a Directive on provisional legal aid (measure C2-),[12] a proposal for a Directive on procedural safeguards for children (measure E-),[13] and a proposal for a Directive on the presumption of innocence (the "example" of the Stockholm programme).[14]

The proposal on the presumption of innocence is based on the exploratory work that the Commission carried out in view of its Green Paper on this issue in 2006[15] and on the views that it subsequently gathered from academics, practitioners, judges, defence lawyers, prosecutors, and other stakeholders. The Commission was also able to benefit from the consultations that had been carried out in respect of other initiatives in the field of procedural rights.

The Commission tested its ideas for the proposal of a Directive during a meeting on 19 February 2013 with representatives of ministries of justice of the Member States and of Croatia, which at that time was an acceding Member State. The information gathering was completed by means of an on-line survey that was launched in the context of the consultation for the impact study relating to the proposal and in respect of which more than 100 responses were received.[16]

3. Criticism of the proposal

From the moment of its presentation, the proposal met with criticism. Various Member States reiterated the doubts that they had expressed in the meeting with the Commission on 19 February 2013. The criticism concerned mainly the fact that the proposal for a Directive, apart from addressing the issue of presumption of innocence, also contained provisions on the right to be present at the trial, on trials *in absentia* and on the right to a new trial (Arts. 8 and 9).[17] The Member States observed that these provisions were requested neither in the Roadmap nor in the Stockholm programme, and that they would not be compatible with Framework Decision 2009/299/JHA on trials *in absentia*.[18]

A few Member States, such as the Netherlands, went even further and questioned the added value of the entire proposal; they considered it neither necessary nor advisable for the Union to adopt legislation on the presumption of innocence, since provisions of national law, and of Union and international law, already provide sufficient protection in this field. In this context, reference was made, in particular, to Art. 48 of the EU Charter of Fundamental Rights (Charter) and to Art. 6(2) of the European Convention on Human Rights (ECHR), according to which "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law." It was observed that the application of the presumption of innocence is monitored both by national courts and by the European Court of Human Rights (ECtHR), and that this latter Court had found an infringement of this principle in relatively few cases. It was also felt to be unwise to attempt to legislate the issue of the presumption of innocence at this point in time, since the case law of the ECtHR was still in full development, and any legislation could impede a dynamic development of this case law.[19]

In this context, it is worth noting that the Commission itself, in its explanatory memorandum to the proposal, had noted that "the level of safeguards in Member States' legislation is, in a general way, acceptable and there does not seem to be any systemic problem in this area." According to the Commission, however, points still existed in which legal safeguards could and should be improved.

In the end, though, there was only one Member State (United Kingdom) which used the possibility to issue a reasoned opinion, on the basis of Protocol No. 2 to the Lisbon Treaty, stating that the proposal of the

Commission did not comply with the principle of subsidiarity.[20] This opinion was one of the reasons why the United Kingdom decided not to participate in the adoption of the Directive, in application of Protocol No. 21 to the Lisbon Treaty. On the same basis, Ireland also decided not to participate. Moreover, Denmark did not participate, as it nowadays never does in the area of Freedom, Security and Justice, in accordance with Protocol No. 22 to the Lisbon Treaty.

4. Discussions in the Council and in the European Parliament

In the Council, the discussions on the proposal did not begin immediately, since the Greek Presidency, which held office in the first semester of 2014, devoted all its efforts and resources to the proposal for a Directive on procedural safeguards for children.[21] It was therefore for the Italian Presidency, which held office in the second semester of 2014, to launch the discussions on the proposal for a Directive on the presumption of innocence. This was appropriate, since Italy had been the main advocate for the proposed Directive. Working intensively at various levels,[22] the Italian Presidency managed to have the Council reach a general approach on 4 December 2014.[23]

In the European Parliament, the file was attributed to the Committee on Civil Liberties, Justice and Home Affairs (LIBE Committee). *Renate Weber* (Romania, ALDE), who was appointed first responsible member (*rapporteur*), prepared a working document relating to the proposal.[24] The document called for setting higher standards in the Directive, observing that the ECHR only provides minimum rules and that, according to Art. 52(3) of the Charter, Union law may provide more extensive protection. The report was critical in respect of several elements of the Commission proposal, for example regarding the use of compulsion – which the text as proposed by the Commission seemed to endorse[25] – the reversal of the burden of proof, and the admissibility of evidence.

After the 2014 elections of the European Parliament, Ms Weber did not return to the LIBE Committee. Subsequently, *Nathalie Griesbeck* (France, ALDE) was appointed *rapporteur*. Under her guidance, the LIBE Committee adopted its orientation vote, with draft amendments to the Commission proposal, on 31 March 2015.[26] The orientation vote followed the line of thinking set out in the said working document and demanded, *inter alia*, an extension of the scope of the proposed Directive to legal persons, application of the proposed Directive not only to criminal proceedings but also to "similar proceedings," deletion of the reversal of the burden of proof, definition of the right to remain silent as an "absolute right," stringent rules concerning "*in absentia* trials," and a strict inadmissibility rule impeding courts and judges to take account of evidence that has been collected in breach of the rights set out in the Directive.

5. Start of the trilogue negotiations

In mid-April 2015, the orientation vote of the European Parliament was available in a workable format. As a consequence, the two co-legislators, with the assistance of the Commission, were able to start (trilogue) negotiations in order to reach a compromise on the text of the draft Directive. As was the case in the negotiations for the already adopted procedural rights Directives, the intention of the negotiators was to reach an agreement in first reading, since this would avoid the strict deadlines applicable in the remainder of the ordinary legislative procedure of Art. 294 TFEU.

The Latvian Presidency, which held office in the first semester of 2015, had hoped to close the file under its Presidency, but two months were simply not enough to do the job. Two trilogues were held, however, in which much progress was made.

6. The surprising compromise offer of the European Parliament

On the first day of the Luxemburg Presidency, 1 July 2015, the third trilogue was held. At the fourth trilogue, mid-September 2015, the *rapporteur* of the European Parliament surprised the Council and the Commission by presenting – at this very early stage – an overall compromise package. In exchange for the deletion of Art. 5(2) on the reversal of the burden of proof (or the use of "presumptions" as in the Council general approach, see further below) and some other minor modifications, the European Parliament indicated that it could accept the text as it stood at that moment in the negotiations (and which was still very close to the general approach of the JHA Council).

At first, the Luxemburg Presidency reacted negatively, since Art. 5(2) was considered to be the "crown jewel" of the Council general approach. However, after a more detailed study of the offer of the European Parliament (as explained by the latter in an informal talk), the Luxemburg Presidency decided that it was worth testing this offer with the Member States. After having gained confidence, through informal consultations, that the offer of the Parliament might "fly," the Presidency presented it to the Council working party at a meeting at the beginning of October 2015.[27]

During this meeting, the Member States indicated that they could agree to the offer of the European Parliament, subject to some minor modifications. The Commission, however, expressed doubts on the possible compromise, considering the deletion of Art. 5(2) not to be legally sound. It was said that the Commission might have to deliver a negative opinion, in application of Art. 294(9) TFEU, which would require the Council to act unanimously.

In the subsequent weeks, a quite unique power play developed. A lot of pressure was exercised on the Commission, both by the European Parliament and by the Council, in order to persuade it to accept the compromise that had been reached by the two co-legislators. The file went to the highest institutional levels, a situation which had never occurred before in the rollout of the Roadmap.

In the end, the Commission decided that it could accept the compromise, while issuing a declaration stating that, although regretting the deletion of Art. 5(2), it would not stand in the way of the adoption of this Directive.[28]

7. Swift conclusion

On 27 October 2015, the fifth and final trilogue took place. After two hours of intense negotiations, a text with all the details of the compromise was agreed upon in the exact form as it had been tabled by the Luxemburg Presidency. Coreper agreed to the result on 4 November 2015, concluding the negotiations in record time and with relatively few trilogues (the Directives on the right to information and on the right of access to a lawyer needed double the amount of trilogues).

Following legal-linguist examination of the text – always a delicate affair – the European Parliament and the Council formally approved the Directive. On 9 March 2016, the Directive was signed in Strasbourg. On behalf of the Council, it was signed by Jeanine Hennis-Plasschaert, a former Member of the European Parliament and its LIBE Committee. By attributing this task to her, the Netherlands Presidency made its own small but fine contribution to the adoption of the Directive.

The Directive was published in the *Official Journal* on 11 March 2016; it has to be implemented by the Member States by 1 April 2018.

III. Description of the Main Contents of the Directive

In this section, the main contents of the Directive are described. It is a selection; some elements, such as the (non-)application of the Directive in case of written proceedings,[29] have been left out. The description shows that the Directive is, to a large extent, a codification of the case law of the ECtHR.

1. Scope of the Directive

a) Rationae personae

In the first three Directives adopted on the basis of the Roadmap, it was not specified whether these instruments would only apply to natural persons or also to legal persons. However, the negotiations on these Directives had clearly been conducted in the spirit that they would apply to natural persons only.

In the proposed Directive on the presumption of innocence, however, the Commission suggested *explicitly* restricting the scope of the proposed Directive to natural persons. The Commission observed in this context that the Court of Justice of the European Union (CJEU) has recognised that the rights flowing from the presumption of innocence do not accrue to legal persons in the same way as they do to natural persons.[30] In competition cases, for example, the CJEU has allowed that enterprises might sometimes be obliged to provide information that could incriminate them.[31]

While the Council could accept the approach of the Commission, the European Parliament requested that the Directive also apply to legal persons in Member States in which the concept of criminal liability of legal persons exists. However, there would be no need for the Directive to apply to legal persons in Member States in which this concept does not exist. In support of its request, the European Parliament pointed out that Union law in the field of criminal law already criminalises legal persons in connection with certain offences and provides for sanctions against them. It referred specifically to Directive 2013/40/EU on attacks against information systems[32] and Directive 2011/92/EU on combating sexual abuse against children.[33].

The Council and the Commission, which was under the pressure of its competition directorate not to give in on this point, fiercely opposed the request of the European Parliament. They argued that the approach of the European Parliament would result in a patchwork of applicability of the Directive across the Union, which would run counter to the objective of establishing harmonised minimum rules.

In the end, the European Parliament dropped its request. It was agreed, however, to underline in the recitals that the presumption of innocence with regard to legal persons should be ensured by existing legislative safeguards, notably as set out in the ECHR and as interpreted in the case law, and that it should be determined in the light of the evolution of such case law whether there would be a need for any Union action.[34]

b) Rationae temporis

The first three Directives that were adopted in the field of procedural rights all provide similar wording, stating that these instruments apply from the moment the persons concerned have been made aware – by official notification or otherwise – that they are suspected or accused of having committed a criminal offence.

All three institutions felt, however, that in order for the principle of the presumption of innocence to be effective, it should apply at the earliest stages of the proceedings, and even before the persons concerned have been made aware that they are suspects or accused persons.

Therefore, Art. 1 of the Directive, as finally adopted, simply states that it applies "from the moment when a person is suspected or accused of having committed a criminal offence, or an alleged criminal offence." It is also pointed out in this article that the Directive applies at all stages of the criminal proceedings. The reference to the "alleged criminal offence" is meant to refer to cases in which something has actually happened (e.g., a dead body is found) and it is not yet certain whether or not a criminal offence has been committed (murder, homicide, or death by natural causes or an accident). The reference was added with the aim of extending the scope of the Directive as much as possible, but it is probably redundant, since without this reference (as is the case in the other, already adopted Directives) the scope also seems to allow investigating or judicial authorities to conclude that no criminal offence has been committed.

The Directive applies until the decision on the final determination of whether the person has committed the criminal offence in question, "has become definitive." This is normally the case when appeal is no longer possible. It is clarified in the recitals that legal actions and remedies that are available only once a decision has become definitive, including actions before the ECtHR, do not fall within the scope of the Directive.[35]

c) Notion of criminal proceedings

The Commission proposed that, as in the other three adopted Directives, this Directive should also apply only to "criminal proceedings." It would therefore not apply to administrative proceedings and civil proceedings.

The European Parliament was afraid that Member States could avoid the application of the Directive by a "creative" classification of their proceedings, for example by organising proceedings having a criminal nature under the guise of administrative proceedings. It therefore requested providing in Art. 2 that the Directive would apply to criminal proceedings "and similar proceedings of a criminal nature leading to comparable sanctions of a punitive and deterrent nature." The EP also proposed making a reference in an accompanying recital to the so-called *Engel* criteria of the ECtHR as to the notion of "criminal charge."[36]

The Council and the Commission, however, objected that such an addition would create substantial confusion, since it was not contained in the other three already adopted Directives. They also felt that the addition requested by the European Parliament would not be necessary, since "criminal proceedings" is an autonomous notion of Union law, as interpreted by the CJEU.

A compromise was reached by adding in the recitals that the Directive should apply only to criminal proceedings as interpreted by the CJEU, without prejudice to the case-law of the ECtHR.[37]

2. Public references to guilt

Art. 3 basically repeats Art. 6(2) ECHR and Art. 48(1) of the Charter: suspects and accused persons should be presumed innocent until proven guilty according to law.

Art. 4 concerns the concrete action, or non-action, that should be taken by the Member States in this respect. According to paragraph 1, public authorities should not make public statements that refer to a person as guilty as long as that person has not been proven guilty according to law.

The Commission had proposed adding to "public statements" a reference to "official decisions," but the Council rejected this proposal because there was no basis for such a reference in the case law of the ECtHR and because the term "official decisions" is extremely vague – how would one define such a decision?

The request of the European Parliament to add a reference to "judicial decisions" was more difficult to ignore, however, since the case law of the Strasbourg court explicitly makes reference to such decisions, for example in the *Matijasevic* case.[38] After substantial hesitation, the Council accepted a reference to "judicial

decisions," on condition that the clarification "other than those on guilt" would be added: indeed, a (final) judgment of a court finding a person guilty of a criminal offence is without doubt a "judicial decision," but it clearly should not be governed by the rule that such a decision should not refer to the guilt of a suspect or accused person.

The Council also made clear that a number of other acts should be exempted from the general rule, in particular acts on the part of the prosecution, which precisely aim to prove the guilt of the suspect or accused person, such as the indictment, and preliminary decisions of a procedural nature, such as decisions on pre-trial detention.

Art. 4(3), as explained in the recitals,[39] contains a general exception: 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 if this is strictly necessary for reasons relating to the criminal investigation. This could be the case, for example, when video material is released and the public is asked to help in identifying the alleged perpetrator of the criminal offence. Information containing references to persons as being guilty could also be legally disseminated if it is in the public interest, such as when inhabitants of an area are informed of an alleged environmental crime for safety reasons, or when the prosecution or another competent authority provides objective information on the state of criminal proceedings in order to prevent a disturbance of public order.

3. Presentation of suspects and accused persons

Art. 5 on the presentation of suspects and accused persons was not part of the original Commission proposal. Following a suggestion by LEAP (Legal Experts Advisory Panel of Fair Trials), the LIBE Committee proposed inserting an additional article in the text of the draft Directive obliging Member States to ensure that suspects or accused persons would not be presented in court or in public in a manner that would suggest their guilt prior to the final conviction. It was explained in a proposed recital that such presentation – in glass boxes, handcuffs, leg irons, or prison clothes – could create an impression of guilt from the outset. The amendment clarified that the proposed rule should not prevent Member States from applying measures that are genuinely required for case-specific security reasons, on the basis of specific identified risks posed by the individual suspect or accused person.

The amendment was clearly influenced by the case law of the ECtHR on Art. 3 ECHR, which prohibits torture and "inhuman or degrading treatment or punishment." According to the Strasbourg Court, measures of restraint, such as handcuffing, do not normally give rise to an issue under Art. 3 of the Convention if they have been imposed in connection with lawful arrest or detention "and do not entail the use of force, or public exposure, exceeding what is reasonably considered necessary in the circumstances."[40] In respect of metal cages, the unjustified or "excessive" use of such a measure of restraint was often found to constitute a violation of Art. 3 ECHR.[41]

While the Commission supported the amendment of the European Parliament, the Member States in the Council were reluctant to introduce this new rule, since it would be too intrusive of their criminal law procedures. The Member States pointed out that the issue raised by the Parliament dealt with Art. 3 ECHR, regarding inhuman or degrading treatment or punishment, whereas the Directive was meant to deal with Art. 6(2) ECHR, regarding the presumption of innocence. The Member States also put forth the argument that judges are independent and that it would hence be impossible for the Member States to "ensure" the new rule as proposed by the European Parliament; according to the Member States, they could merely take "appropriate measures," such as setting up an adequate legal framework and providing relevant information.

During the trilogue negotiations, however, the European Parliament emphasised that this was a very important issue for a majority of its Members. The Parliament also pointed out that there was a clear link between the presentation of suspects and accused persons in court or in public, on the one hand, and the presumption of innocence, on the other, since the use of measures of physical restraint (such as when a suspect or accused person wears handcuffs in a courtroom) automatically creates an impression of guilt, which should be avoided as much as possible. Moreover, the European Parliament remarked that the ECtHR had established a link between a violation of Art. 3 ECHR and the presumption of innocence in its case law. The Parliament referred, in particular, to the judgment in the *Svinarenko* case in which the ECtHR had stated that "the fact that the impugned treatment [keeping suspects and accused in a metal cage] took place in the courtroom in the context of the applicant's trial brings into play the principle of presumption of innocence in criminal proceedings as one of the elements of a fair trial."[42]

In the end, the Member States agreed to a text according to which they should take appropriate measures to ensure that suspects and accused persons are not presented as being guilty, neither in court nor in public, through the use of measures of physical restraint (such as handcuffs, glass boxes, cages, and leg irons).[43] However, it was made clear that this should not prevent Member States from applying measures of physical restraint that are required for case-specific reasons, relating to one of the following: 1) security, including to prevent suspects or accused persons from harming themselves or others or from damaging any property; 2) the prevention of suspects or accused persons from absconding; or 3) the prevention of such persons from having contact with third persons.[44]

The European Parliament had specifically insisted on the use of the word "case-specific" because it wanted to ensure that there should be an individual assessment in each case as regards the proportionality of the use of measures of physical restraint, in line with the case law of the ECtHR[45] and other international instruments.[46] At the request of the Council, however, it was specified that the possibility of applying measures of physical restraint "does not imply that the competent authorities are to take any formal decision on the use of such measures."[47] Indeed, the police and other law enforcement authorities should not be hindered from carrying out their tasks in an efficient manner.

4. Burden of proof

During the negotiations, the provision on the burden of proof was extensively discussed. All parties agreed that, in accordance with Art. 6(2) ECHR, as interpreted in the case law of the ECtHR, the presumption of innocence presupposes that the burden of proof is on the prosecution and that any doubt as to guilt should benefit the suspects or accused persons (*in dubio pro reo*).

Two main questions arose in this context: firstly, could the burden of proof shift to the defence (and, if so, under which circumstances)? And, secondly, what would the consequences be in case of doubt as to the guilt of the suspect of accused person?

a) Reversal of the burden of proof

The Commission in its proposal had suggested that it should be possible to shift the burden of proof to the defence. In fact, Art. 5(2) of the Commission proposal stated that Member States should ensure that "any presumption, which shifts the burden of proof to the suspects or accused persons, is of sufficient importance to justify overriding that principle and is rebuttable."

During the discussions for the Council general approach, several Member States indicated that they would prefer to abstain from explicitly stating that the burden of proof could shift to the defence because this could easily lead to misunderstandings. The Member States suggested referring only to the possibility of using

presumptions of fact or law, since these are tools which most Member States are familiar with. During the debate in the Council, it emerged that such presumptions work in the way that a fact is considered proven by a reasoning that infers the existence of an unknown fact from a known fact.[48]

It should be noted that such presumptions are often used in practice, for instance in relation to traffic offences, such as speeding, when the person in whose name a vehicle has been registered is presumed to have driven it at the moment the traffic offence was committed.[49] In the areas of environmental crime, financial crime, and drug-related crime, Member States often also use presumptions.

In the case law of the ECtHR, the use of presumptions of fact and law is recognised. In the *Salabiaku* case,[50] for example, the Strasbourg Court ruled as follows: "Presumptions of fact and law operate in every legal system. Clearly, the Convention does not prohibit such presumptions in principle." However, the ECtHR indicated several conditions under which such presumptions could be used: "[The Convention] does, however, require the contracting states to remain within certain limits in this respect as regards criminal law. […] Article 6(2) does not therefore regard presumptions of fact or of law provided for in the criminal law with indifference. It requires States to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence."[51]

The Council general approach reflected this case law. Art. 5(2) of the text provided as follows: "Member States may provide for the use, within reasonable limits, of presumptions of facts or law concerning the criminal liability of a person who is suspected or accused of having committed a criminal offence. Such presumptions shall be rebuttable; in any case, they may only be used provided the rights of the defence are respected."[52]

The European Parliament was very much against a reversal of the burden of proof and also against mentioning, in the operative part of the text, the possibility of using presumptions of fact and law. According to the Parliament, such presumptions would bear the risk of eroding the very principle of the presumption of innocence and could easily be "misused" in view of the broad definition proposed by the Council.

As outlined above in Section II, in order to ensure the removal of the reference to presumptions of fact and law from the operative part of the text, the European Parliament was ready to accept many wishes of the Council by endorsing by and large the Council general approach (complemented with an article on the presentation of suspects and accused persons, the current Art. 5). Hence, Art. 6 in the text finally agreed upon does not make reference to the possibility of reversing the burden of proof or of using presumptions of fact or law.

The possibility of using such presumptions is, however, still clearly recognised in Recital 22. The Council generally believed that, although it would have been preferable to mention the possibility of using presumptions of fact and law in the operative part of the text, it also seemed satisfactorily to mention this in the recitals only. This consideration was supported by two arguments: firstly, it was put forth that the use of presumptions is not a true exception to the general rule regarding the burden of proof but more a modified application of this rule (the presumptions only come into play when the authorities already have incriminating evidence, such as a photo of a speeding car) and, secondly, the possibility of using presumptions of fact and law is already recognised in the case law of the ECtHR.

Various Member States wondered if it was wise on the part of the European Parliament to request deletion of the provisions regarding the presumptions of fact and law from the operative part of the text. In view of the fact that these presumptions are applied on a daily basis by Member States in various fields, it might have been more helpful for citizens for this fact to be recognised in the operative part of the text, while simultaneously defining the limitations within which the presumptions should apply.

b) Consequences in case of doubt as to guilt

All parties agreed that any doubt as to guilt should benefit the suspects or accused persons. The question arose as to what the consequences of such doubt should be.

The European Parliament considered that when there is "doubt" as to the guilt of a suspect, the accused person should be acquitted.

The Council felt that this reasoning would be too simple, since 100% certainty is rare. Would any doubt, even the slightest one, have as a consequence that the person concerned should be acquitted? Moreover, the Council had the more principal objection that the European legislator should not impose any concrete instructions on courts and judges as to what to decide in a criminal case.

In the end, a solution was found by stating, in Art. 6(2), that Member States should ensure that any doubt as to the question of guilt is to benefit the suspect or accused person, "including where the court assesses whether the person concerned should be acquitted."

5. Right to remain silent and right not to incriminate oneself

a) Absolute right?

The right to remain silent and the right not to incriminate oneself are not specifically mentioned in the ECHR, but the ECtHR has derived these rights from the right to a fair procedure under Art. 6 ECHR.[53]

In the Commission proposal, the right to remain silent and the right not to incriminate oneself were presented in separate articles (former Arts. 6 and 7 of the Commission proposal). The Commission had also added the right "not to cooperate," but this right was deleted during the trilogue negotiations, since it is not a right that is explicitly recognised in the ECHR, as interpreted in the case law of the ECtHR.

The Commission defined the right to remain silent and the right not to incriminate oneself as absolute rights, meaning that they can be exercised without any conditions or qualifications and that there are no negative consequences attached to the exercise of these rights. As regards the right to remain silent, the text of Art. 7(3) as proposed by the Commission read as follows: "Exercise of the right to remain silent shall not be used against a suspect or accused person at a later stage in the proceedings and shall not be considered as a corroboration of facts."

In this regard, the Commission distanced itself from its Green Paper of 2006, in which it had considered the right to remain silent not to be absolute. In fact, referring to the judgment of the ECtHR in the *John Murray* case,[54] the Commission in the Green Paper had noted that "adverse inferences could be drawn from a failure to testify" and that, under certain circumstances, "evidence obtained using indirect pressure may be used." The judgment in the *John Murray* case, however, attracted a lot a criticism,[55] as did the Commission's (preliminary) position in its Green Paper.

The European Parliament, aiming at setting high standards of protection for citizens, therefore very much welcomed the revised position of the Commission with its definition of the right to remain silent and the right not to incriminate oneself as absolute rights. In this context, the European Parliament had in mind that setting such high standards favours the application of the principle of mutual recognition, since a judicial authority in one Member State could consider not cooperating with a judicial authority in another Member State if it felt that the standards of protection in that other Member State were not at an appropriate level. In addition, not setting high standards of protection could prejudice the relationship between the Court of Justice and national (constitutional) courts as regards the primacy of Union law,[56] since the latter courts

could be inclined to deny such primacy and apply instead the higher standards applicable in their Member State.[57]

The Council, in its general approach, merged the provisions regarding the right to remain silent and the right not to incriminate oneself into one article, an idea that was later agreed to by the European Parliament and the Commission. However, in view of the fact that the case law of the ECtHR had explicitly stated that both rights are not absolute,[58] the Council made some changes in the text. It first stated that "the exercise of the rights should not be considered to be *evidence* that the person had committed the offence concerned." Secondly, the Council added wording in the recitals in order to take account of Member States having a system of free assessment of evidence, providing that "this should be without prejudice to national rules or systems which allow a court or a judge to take account of the silence of the suspect or accused person as an element of corroboration of evidence obtained by other means, provided the rights of the defence are respected."[59]

The European Parliament and the Commission very much opposed the latter addition, which was therefore deleted from the recitals. The text as finally agreed upon in Recital 28 now reads as follows: "The exercise of the right to remain silent or the right not to incriminate oneself should not be used against a suspect or accused person and should not, in itself, be considered to be evidence that the person concerned has committed the criminal offence concerned. This should be without prejudice to national rules concerning the assessment of evidence by courts or judges, provided that the rights of the defence are respected."

While Art. 7 of the Directive seems to provide a clear prohibition on deriving any adverse inference from the right to remain silent, the words "in itself" and the last sentence of Recital 28, read together with Art. 10(2) on remedies, appear to indicate that *John Murray* is still hanging (a bit) around.

b) The use of compulsion

One of the European Parliament's major criticisms of the initial Commission proposal concerned Recital 17, in which the Commission appeared to endorse the use of compulsion (force/coercion exercised on a person in order to persuade him/her to provide information). In fact, the said recital stated *inter alia* that "Any compulsion used to compel the suspect or accused person to provide information should be limited."

The EP working document of March 2014 requested the deletion of this recital, since it would be incompatible with the absolute right of Art. 3 ECHR (prohibition of torture, inhuman and degrading treatment), as interpreted in the case law of the ECtHR.[60] This line of reasoning was subsequently followed in the orientation vote of the LIBE Committee.

The Council agreed that Recital 17 of the Commission proposal had not been drafted in the most fortunate way. It proposed to substitute the recital with an entirely new one (Recital 27), in which it is now said that "the right to remain silent and the right not to incriminate oneself imply that competent authorities should not compel suspects or accused persons to provide information if those persons do not wish to do so." The Council insisted, however, on adding an explicit reference to the (developing) case law of the ECtHR, in the light of which it should be interpreted whether there would be a violation of the right to remain silent and the right not to incriminate oneself.

Ultimately, in line with the case law of the ECtHR (e.g., the *Saunders* case[61]), it was clarified that the exercise of the right not to incriminate oneself should not prevent the competent authorities from gathering evidence that may be lawfully obtained from the suspect or accused person through the use of legal powers of compulsion and that has an existence independent of the will of the suspect or accused person, such as material acquired pursuant to a warrant; material in respect of which there is a legal obligation of retention and production upon request; breath, blood, or urine samples, and bodily tissue for the purpose of DNA testing.[62]

6. Right to be present at the trial and the right to a new trial

Arts. 8 and 9, relating to the right to be present at the trial and the right to a new trial, caused quite some headaches in the Council. Under Italian Presidency, by far the most time in the discussions on reaching a general approach was dedicated to these two articles.

The basic idea of the Commission proposal, which was laid down in the first paragraph of Art. 8 (suspects and accused persons should have the right to be present at their trial) did not cause many problems. However, some clarifications were introduced, in particular that this right is without prejudice to national rules allowing the court or the judge to temporarily exclude a person from the trial if this is necessary in the interest of securing the proper conduct of the criminal proceedings. This exception could, for instance, apply when the person concerned behaves violently in the courtroom or when he/she insults the court or the judge. According to the Commission, this provision would just be common sense and, as a "modality," it would be better placed in the recitals. The Member States, however, wanted it to be crystal-clear that the right to be present at the trial is not absolute, and therefore this exception has been introduced into the operative part.[63]

The provisions regarding trials *in absentia*, which the Commission had proposed in paragraphs 2 and 3 of Art. 8, were more problematic. Here, the Commission had almost copy-pasted provisions of Framework Decision 2009/299/JHA on trials *in absentia*.[64] As a consequence, the Commission proposal contained some very detailed rules on the conditions under which Member States could proceed with a trial despite the absence of the suspect or accused person.

Member States had two basic objections to the transfer of the rules from the Framework Decision to the proposed Directive. The first one was that the Framework Decision was meant to operate in a completely different setting than the Directive: whereas the objective of the Framework Decision was to introduce optional grounds for refusal in respect of certain mutual recognition instruments (including the Framework Decision on the European Arrest Warrant), the Directive was meant to harmonise/approximate the laws of the Member States by establishing minimum rules. The second objection of the Member States was that the provisions proposed by the Commission were far too detailed and did not at all constitute "minimum rules" in the sense of Art. 82(2) TFEU.

After various rounds of discussion, both in the working party and at the level of directors of justice (CATS),[65] the Member States reached a compromise on a much lighter and more readable text, while keeping the spirit of the original text of the Commission. Clarity in the text was notably achieved by transferring substantial parts of the text to the recitals. As a result of this structure – which, after initial objections[66] and some minor changes, was ultimately endorsed by the European Parliament – Arts. 8 and 9 are now accompanied by ten recitals (33-42).

The Directive has brought clarity on an important point. In fact, in the Framework Decision it was not clear whether in respect of suspects or accused persons whose location is unknown a trial *in absentia* could be held and whether the resulting decision, including a custodial sentence, could be enforced immediately, in particular if the person concerned has been apprehended. Indeed, one could interpret the Framework Decision to mean that the authorities would not be able to immediately enforce a decision taken *in absentia* but should first wait for the person to make up his/her mind on whether or not to request a new trial (during which time the person could again flee). In order to tackle crime effectively, it was important for various Member States that it be clarified, in Art. 8(4), that it is possible to hold a trial *in absentia* in respect of a suspect or accused person whose location is unknown and to enforce the decision taken *in absentia* immediately, in particular once the person concerned has been apprehended.

Important conditions apply, however: firstly, Member States may only use the possibility to hold a trial *in absentia* if they have undertaken "reasonable efforts" to locate the suspects or accused persons. Secondly, the Member States must inform those persons, in particular upon being apprehended, of the decision taken *in absentia* as well as of the possibility to challenge this decision and the right to a new trial or other legal remedy.

Art. 9 specifies that such a new trial or "other legal remedy" should allow a fresh determination of the merits of the case, including examination of new evidence, and it should enable the original decision to be reversed. The provision is not entirely satisfactory on the point of the "other legal remedy," since this concept is also meant to include an appeal: if a person has been tried *in absentia* and this person subsequently is only offered an appeal (not a new trial), he/she basically looses one instance (i.e., the decision *in absentia* has been taken by the court of first instance; after having been apprehended, the person claims a new trial but is only offered the possibility of another legal remedy consisting of an appeal before the appeal court; if the person then loses the case before the appeal court, he/she most often can not have recourse to another instance to defend him- or herself).

7. Remedies

There is no effective right without effective remedies. During the rollout of the Roadmap, more attention has gradually been paid to the issue of remedies: whereas Directive 2010/64/EU on interpretation and translation does not contain a general reference to remedies, Directive 2012/13/EU on information in criminal proceedings contains such a general reference,[67] which has subsequently been made more specific in Directive 2013/48/EU on access to a lawyer.[68]

The major question in the discussions on the Directive on the presumption of innocence was: what could or should a judge do with evidence that has been obtained in breach of the right to remain silent or the right not to incriminate oneself? Should that evidence be automatically excluded from the file or could the judge examine and use that evidence and, if so, under which circumstances?

It should be noted that the criminal law systems of the Member States as regards "admissibility of evidence" are very different. Some Member States apply an exclusionary rule, others look at the fairness of proceedings, and yet others apply a system of free assessment of evidence by judges. Many variations exist, also within these categories. Admissibility rules are very important in the legal orders of the Member States: if they are not of a constitutional nature, they are often at least closely connected to constitutional rights.[69]

In its proposal for the Directive on presumption of innocence, the Commission included admissibility rules in Arts. 6 and 7 regarding the right not to incriminate oneself and the right to remain silent. The Commission proposed applying the standard of "fairness of the proceedings," by providing that "any evidence obtained in breach of [these rights] shall not be admissible, unless the use of such evidence would not prejudice the overall fairness of the proceedings."

In its orientation vote, the European Parliament requested replacing the rule on the "fairness of the proceedings" with a full-fledged inadmissibility rule and suggested putting the relevant text in Art. 10 on remedies.

The Council firmly objected to the position of the European Parliament. To this end, the Council referred to Art. 82(2) TFEU, according to which minimum rules should take into account the differences between the legal systems and traditions of the Member States. It stressed that several Member States, such as the Nordic countries, have a system of free assessment of evidence, which, as noted above, often has a constitutional nature. According to the Council, while Member States are free to use an exclusionary rule, it should

also be permissible, in the context of a Directive on *minimum rules*, that Member States with a system of free assessment of evidence be able to continue using it. It was observed, incidentally, that while an exclusionary rule might provide a high level of protection to suspects or accused persons, a system of free assessment of evidence might provide an even higher level of protection to victims of crime.

As a compromise, the Directive as finally agreed contains in Art. 10 on remedies a text that is similar to the one in Directive 2013/48/EU on the right of access to a lawyer. According to the provision, Member States should ensure that "in the assessment of statements made by suspects or accused persons or of evidence obtained in breach of the right to remain silent or the right not to incriminate oneself, the rights of the defence and the fairness of the proceedings are respected." It is made clear, however, that this is "without prejudice to national rules and systems on the admissibility of evidence." This is meant especially to include systems in which the court or the judge can freely assess all evidence in a case, whether or not such evidence has been "legally" obtained.

Upon request of the European Parliament, however, a strongly worded recital was added, containing a reference to ECtHR case law on inadmissibility of evidence gathered in violation of Art. 3 ECHR (prohibition of torture, inhuman and degrading treatment) and to the UN Convention against torture.[70] This addition is certainly an added value in the Directive because it reminds all Member States – including those having a system of free assessment of evidence – that they are bound by that case law and by the said Convention.

IV. Concluding Remarks

The advisability of the proposed Directive, which did not form part of the rights initially contained in the Roadmap for strengthening procedural rights, was not entirely clear to all Member States from the outset. It appears, however, that there is a general feeling that the Directive as finally adopted is a valuable contribution to the developing catalogue of procedural rights in the European Union.[71]

It was not possible for the Council to satisfy all requests of the European Parliament. This concerns, in particular, the requests for provisions that would immediately interfere with the manner in which criminal law cases are dealt with by courts and judges in the Member States. This remains indeed a sensitive matter for almost all Member States.

The added value of the Directive lays notably in the fact that it clarifies how the case law of the ECtHR should apply as minimum rules of Union law, to be interpreted by the CJEU, across 25 Member States.

In this context, it should be recalled that harmonisation (or approximation) of criminal procedural rights at the Union level is a gradual process that interplays with national (constitutional) rights and issues of sovereignty and legitimacy. One should therefore not expect a revolution but be satisfied with an evolution; like the development of the Roadmap itself, progress in the area of procedural rights goes step-by-step.

As has been observed in respect of the three earlier adopted Directives on procedural rights, one must now wait and see how this Directive will be applied by the Member States and interpreted by the CJEU. An interesting final question is to what extent this Directive, which has been strongly influenced by the case law of the ECtHR, will in turn have an influence on the case law of that Court.

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1. * This article reflects solely the opinion of the authors and not that of the institutions for which they work.
   OJ L 65, 11.3.2016, p. 1.↩
2. OJ C 295, 4.12.2009, p. 1.↩
3. The step-by-step approach was adopted after it had appeared to be impossible, in 2007, to reach agreement on a comprehensive text encompassing several procedural rights – see the never adopted proposal for a Framework Decision on certain procedural rights in criminal proceedings

throughout the European Union (COM 2004/0328; see, on the Roadmap, S. Cras, and L. De Matteis, "The Directive on the right to interpretation and translation in criminal proceedings", in *eucrim 4/*2010, p. 153).↩

4. OJ L 190, 18.7.2002, p. 1.↩
5. OJ L 130, 1.5.2014, p. 1. The Directive on the European Investigation Order represents the newest generation of mutual recognition measures and includes, *inter alia*, a fundamental rights non-recognition ground (see Art. 11 lit.f and Recital 39).↩
6. Measure A: Translation and interpretation; Measure B: Information on rights and information about the charges; Measure C: Legal advice and legal aid; Measure D: Communication with relatives, employers and consular authorities; Measure E: Special safeguards for suspected or accused persons who are vulnerable.↩
7. See Council doc. 12531/09.↩
8. OJ C 115, 4.5.2010, p. 1; point 2.4.↩
9. OJ L 280, 26.10.2010, p. 1. See, on this measure, S. Cras and L. De Matteis, op. cit. (n. 3).↩
10. OJ L 142, 1.6.2012, p. 1. See, on this measure, S. Cras, and L. De Matteis, "The Directive on the right to information", in *eucrim* 1/2013, p. 22.↩
11. OJ L 294, 6.11.2013, p. 1. See, on this measure, S. Cras, "The Directive on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings", in *eucrim* 1/2014, p. 32.↩
12. COM(2013)824.↩
13. COM(2013)822/2.↩
14. COM(2013)821.↩
15. COM(2006)174.↩
16. See point 1.2 of the explanatory memorandum to the Commission proposal.↩
17. See, e.g., Council doc. 11632/14.↩
18. OJ L 81, 27.3.2009, p. 24.↩
19. Council doc. 12196/14.↩
20. Council doc. 6655/14; ES, IT, and PT issued positive opinions.↩
21. The Greek Presidency reached a general approach in June 2014, see Council doc. 10065/14.↩
22. Under the Italian Presidency, the file was no longer referred to as "POI" (Presumption of Innocence) but as "PDI" (Presunzione di Innocenza), since "poi" is a common word in Italian, meaning i.a. "then" or "subsequently."↩
23. Council doc. 16531/14.↩
24. Doc. of 17 March 2014, EP code: PE<NoPE>530.088</NoPE><Version>v01.↩
25. See Recital 17, first sentence, of the Commission proposal: "Any compulsion used to compel the suspect or accused person to provide information should be limited." See also under Article 7.↩
26. Final version of 20 April 2015, EP code: A8-0133/2015. See also Council doc. DS 1228/15.↩
27. Council doc. 12497/15.↩
28. Council doc. 5098/16.↩
29. See, e.g., Arts. 7(6) and 8(6).↩
30. COM(2013)0821, points 26 and 27.↩
31. See, e.g., Case C-301/04 P, *Commission v SGL Carbon*, 29 June 2006, para. 41: "…the Commission is entitled to compel an undertaking, if necessary by adopting a decision, to provide all necessary information concerning such facts as may be known to it and to disclose to it, if necessary, such documents relating thereto as are in that undertaking's possession, even if the latter may be used to establish, against it or another undertaking, the existence of anti-competitive conduct."↩
32. OJ L 218, 14.8.2013, p. 8; see Art. 10 of this Directive.↩
33. OJ L 335, 17.12.2011, p. 1; see Art. 12 of this Directive.↩
34. Recitals 14 and 15.↩
35. Recital 12.↩
36. See *Engel and others v. Netherlands*, judgment of 23 November 1976 (Appl. no. 5100/71 et. al).↩
37. Recital 11.↩
38. ECtHR, *Matijasevic v. Serbia*, 19 September 2006 (Appl. no. 23037/04), para. 45.↩
39. See Recital 18.↩
40. See, e.g., ECtHR, *Raninen v. Finland*, 16 December 1997 (Appl. no. 152/1996/771/972), para. 56, and ECtHR, *Miroslaw Garlicki v. Poland*, 14 June 2011 (Appl. no. 36921/07), para. 74.↩
41. See, e.g., ECtHR, *Ramishvili and Kokhreidze v. Georgia*, 27 January 2009 (Appl. no. 1704/06) and ECtHR, *Khodorkovskiy v. Russia*, 31 May 2011 (Appl. no. 5829/04).↩
42. ECtHR, *Svinarenko and Slyadnev v. Russia*, 17 July 2014 (Appl. nos. 32541/08 and 43441/08), para. 131.↩
43. Art. 5(1) and Recitals 19 and 20. The obligation to wear prison clothes, which is not a measure of physical restraint, was dealt with in Recital 21.↩
44. Art. 5(2) and Recital 19.↩
45. See the case law cited above and also, e.g., ECtHR, *Gorodnitchev v. Russia*, 24 May 2007 (Appl. no. 52058/99), para. 101-102.↩
46. Such as the Standard Minimum Rules for the Treatment of Prisoners of the UN, in particular the Instruments of Restraint, points 33 and 34.↩
47. Recital 20.↩
48. See Council doc. 13538/14.↩
49. See, e.g., ECtHR, *Falk v. Netherlands*, 19 October 2004 (Appl. no. 66273/01).↩
50. ECtHR, *Salabiaku v. France*, 7 October 1988 (Appl. no. 10519/83), para.28.↩
51. Ibidem.↩

52. The words "in any case" are meant to address a situation, which is sometimes possible in relation to minor offences (in particular minor traffic offences), in which the presumption in itself is not rebuttable but the person has other means of defence (example: as a registered vehicle owner, a person is presumed to have committed the criminal offence of speeding; this presumption cannot be rebutted, and the vehicle owner therefore will have to pay the fine imposed, but he/she can claim the money back from the person who actually drove the car at the moment the offence was committed).↩
53. See, e.g., ECtHR *Funke v. France*, 25 February 1993 (Appl. no. 10828/84), para. 44.↩
54. ECtHR, *John Murray v. UK*, 8 February 1996 (Appl. no. 18731/91).↩
55. See already the partly dissenting opinion of Judge *Pettiti*.↩
56. See, e.g., CJEU, case 6-64, *Costa/ENEL*, 15 July 1964; see also the Declaration No. 17 to the Lisbon Treaty, stating as follows: "The Conference recalls that, in accordance with well settled case law of the Court of Justice of the EU, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of the Member States, under the conditions laid down by the said case law." See also the *Melloni* judgment on the controversy between the Court of Justice and the Spanish Constitutional Court (case C-399/11, 26 February 2013).↩
57. See, e.g., the Solange doctrine of the German Federal Constitutional Court *(Bundesverfassungsgericht)*, in particular the judgments of 29 May 1974 (Solange I) and 22 October 1986 (Solange II). See also, more recently, the order of 15 December 2015, in which the Court held that, in an individual case, the protection of fundamental rights might include a review of acts of Union law if this is indispensable to protecting the constitutional identity of German Basic Law. Based on this doctrine, the Court refused a surrender to Italy based on a European Arrest Warrant for a judgment rendered *in absentia*, as the person would not have the right to a new evidentiary hearing in Italy (for a summary, see the news section "European Arrest Warrant" in this issue).↩
58. Apart from the judgment in John Murray, see, e.g., ECtHR, *Heaney and McGuinness v. Ireland*, 21 December 2000 (Appl. no. 34720/97), para. 47.↩
59. Recital 20b in the Council general approach, see Council doc. 16531/14.↩
60. See, e.g., ECtHR, *Saadi v. Italy*, 28 February 2008 (Appl. no. 37201/06).↩
61. ECtHR, *Saunders v. United Kingdom*, 17 December 1996 (Appl. no. 19187/91), para. 69.↩
62. Art. 7(3) and Recital 29.↩
63. See Art. 8(5).↩
64. For the Framework Decision, see also T. Wahl, "Der Rahmenbeschluss zu Abwesenheitsentscheidungen" in *eucrim* 2/2015, p. 70.↩
65. See, e.g., Council doc. 12955/14.↩
66. The EP even wanted to substitute an "or," as used in the Commission proposal, with an "and," thus cumulating two conditions (informing the person of the trial and having a lawyer), which would make it extremely burdensome to organise trials *in absentia*.↩
67. Art. 8 of Directive 2012/13/EU.↩
68. Art. 12 of Directive 2013/48/EU.↩
69. See more on the issue of admissibility of evidence in A. Erbežnik, "Mutual Recognition in EU Criminal Law and its Effects on the Role of a National Judge", in N. Peršak (ed.), *Legitimacy and Trust in Criminal Law*, *Policy and Justice*, 2014, pp. 131-152, and A. Erbežnik, "European Public Prosecutor's Office (EPPO) – too much, too soon and without legitimacy?" in *EuCLR* 2/2015, pp. 209-221, esp. p. 219.↩
70. Recital 45. The ECtHR case law clearly prohibits the use of evidence from torture (see, e.g., ECtHR, *Gäfgen v. Germany*, 1 June 2010 (Appl. no. 22978/05) or ECtHR, *El Haski v. Belgium*, 25 September 2012 (Appl. no. 649/08). Art. 15 of the UN Convention against Torture unequivocally states: "Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made."↩
71. The Directive was unanimously agreed to by all 25 participating Member States.↩

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