Transnational Virtual Criminal Trials in the European Union

Reflections on Occasion of Joined Cases C-255/23 (AVVA and Others) and C-285/23 (Linte) at the CJEU

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ABSTRACT

In the wake of the COVID-19 pandemic, the convening of "virtual" and "hybrid" meetings through videoconferencing technology has become a common practice. This trend has also reached the sphere of criminal justice, as more and more jurisdictions, such as Hungary, are authorising hearings and trials to be held without the physical presence of all persons involved. At the same time, yet other criminal justice systems, such as that in Germany, are highly sceptical about any weakening of the requirement that the accused be physically present in the courtroom.

Recently, a Latvian court requested guidance from the CJEU as to whether criminal trials employing videoconferencing technology may be held across intra-EU borders, in particular when use of the European Investigation Order (EIO) is made. On procedural grounds, the CJEU, in its judgement of 6 June 2024, refrained from deciding issues relating to the interpretation of Directive 2014/41/EU in different but authentic languages as well as whether the accused not only has a right but also a duty to be present at trial.

In our contribution, we approach the topic of transnational virtual criminal trials in the EU through the examples of the Hungarian and the German criminal justice systems and through the two cases put before the CJEU. We will focus on the main trial, excluding other phases of the criminal procedure, such as hearings and questioning of the accused or of witnesses in the pre-trial investigation. We will also elaborate on principles of criminal justice as well as on the availability of the EIO when conducting virtual trials. Lastly, a discussion will follow with an outlook on future legislative options.

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I. The Emergence of Virtual Criminal Trials

Technological developments in the last few decades, such as the emergence of electronic communication, have undoubtedly raised challenges for the criminal justice system. However, they have also opened up opportunities to transform communication between authorities and the persons involved in the proceedings. This digital transformation of the criminal process facilitates the exercise of procedural rights,[1] and its benefits include increased cost-effectiveness, sustainability, the speeding up of procedures, and – by avoiding physical interaction – improved witness protection.[2]

As will be elaborated in more detail below (II.1.), the right to a fair trial is a fundamental principle of a democratic society, and the right of suspects or accused persons to be present at trial is based on this right and must be guaranteed throughout the European Union. Consequently, one of the specific features of trials *in absentia* is that an element of the right of the defence and an element of the right to a fair trial is missing: the possibility for the accused to exercise their rights whilst physically present. Moreover, the principles of immediacy and oral presentation of evidence, and potentially also the search for the "substantive" truth, may be achieved more effectively if the accused is (physically?) present at the trial. However, the emergence of virtual criminal trials has complicated the situation and warrants a detailed analysis.

1. Expansion of virtual criminal trials – the example of Hungary

In Hungary, the Criminal Procedure Act (CCP)[3], which has been in force since 1 July 2018, represents a break with the country's previous approach: the presence of the accused at the (main) trial is no longer an obligation, but a right of the accused. Accordingly, the accused may decide to waive their right to attend the trial (§ 430 CCP). Moreover, an accused may also decide to attend the trial via a closed telecommunications network, e.g., when they are abroad (§ 121 CCP). The court, the prosecution service, or the investigating authority may order the use of a telecommunications device *ex officio* or in response to a motion filed by the person obliged or authorised to attend the procedural act (§ 121(1) CCP). The use of a telecommunications device is mandatory in cases where a procedural act requires the attendance of an aggrieved party needing special protection, or where a witness or defendant who is detained is under personal protection or in a protection programme (§ 122(1) CCP). Additionally, a recent amendment allows for the virtual attendance of other actors in the criminal proceedings, extending beyond witnesses and experts to include the defence and the prosecutor (§§ 126/C-D CCP) (so-called simplified telecommunication attendance).[4]

The rationale behind the use of simplified telecommunication attendance is that, since the communication takes place through the personal device of the person being heard, the procedural act can be conducted in a separate place where only the person being heard is present, without the involvement of any other authorities, even if the person concerned is currently in a different Member State. This legal instrument was created as a matter of necessity by the exceptional legislation in force during the COVID-19 pandemic. Subsequently, it has become a widely adopted practice and was specifically introduced into the CCP in response to positive feedback from legal practitioners. However, due to the lower credibility of these channels, the legislation only authorises the use of devices capable of simultaneous transmission of video and audio recordings, with appropriate guarantees, such as explicit consent and active cooperation (§§ 126/A-B CCP).

2. Reservations against virtual criminal trials – the example of Germany

By contrast, German criminal procedures generally, as set forth in §§ 145(1), 226(1), 230(1), 338 No 5 of the German Code of Criminal Procedure (*Strafprozessordnung – StPO*)[5], require the physical presence of all necessary participants (that is, the court, the public prosecutor, the defendant and, in cases of mandatory

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defence, their counsel)[6] for the main trial in criminal matters. In exceptional circumstances and in cases of minor importance, the requirement for the defendant to be present may be waived (§§ 233(1), 329(2) StPO). Furthermore, in proceedings involving several defendants, the judge may grant leave of absence to individual defendants and their counsel for parts of the trial "unless these parts of the hearing concern them" (§ 231c StPO). Yet these provisions do not allow for virtual presence to replace physical presence. The only exception is that witnesses may be interviewed and interpreters may work from a different place with a bidirectional audiovisual connection (§ 247a StPO, § 185(1a) GVG[7]).

While trials in civil matters may be conducted online since 2013 (§ 128a of the Code of Civil Procedure (*Zivilprozessordnung – ZPO*)), and court hearings in the execution of a sentence since 2021 (§ 463e StPO), there are considerable reservations against virtual criminal trials in Germany.[8] Further evidence of this scepticism can be found in the current discussions surrounding recent legislation which enables courts dealing with appeals to hold hearings by videoconference (§ 350(3) StPO[9]). Several political actors have expressed opposition to this provision,[10] while others have indicated that such a "virtualisation" must not spread to the main trial in criminal matters.[11]

3. Emerging transnational tensions – the background on CJEU Joined Cases C-255/23 and C-285/23

In view of such differing approaches, the Latvian Economic Court (*Ekonomisko lietu tiesa*) has raised the issue of virtual criminal trials to the CJEU. In the Joined Cases C-255/23 (*AVVA and Others*) and C-285/23 (*Linte*), the defendants, who are nationals of different EU Member States (Lithuania and Germany), currently reside in their respective home countries and wish to participate in the main trial remotely by videoconference. In particular, for the German defendant in the *Linte* case (C-285/23), the requirement to be physically present poses a significant burden:

"[He] is a 71-year-old pensioner who does not have sufficient income to pay his travel costs and who, with his wife, cares for his 92-year-old mother-in-law, who lives with them and needs care as a person with disability. [He] has never lived in Latvia and does not speak Latvian. Under those circumstances, it is unreasonable to expect him to move to Latvia in order to be present throughout the proceedings. [He] nevertheless wishes to participate in the trial by videoconference from Germany."[12]

However, the Latvian Supreme Court (*Senāts*) indicated that the Latvian Criminal Procedural Code, and in particular its provision allowing for the performance of "procedural acts using technical means (teleconference, videoconference) if the interests of the criminal proceedings so require" (Section 140(1) CCP) is limited in scope to the territory of Latvia[13] and cannot be applied transnationally, as this would interfere with the sovereignty of another country. Therefore, a transnational participation in a criminal trial requires "recourse to an instrument of judicial cooperation."[14] Against this background, the Latvian Economic Court asked the CJEU whether Directive 2014/41/EU regarding the European Investigation Order (EIO) in criminal matters[15] is such an instrument allowing for transnational virtual criminal trials.

In *AVVA and Others* (C-255/23), the court asked whether Directive 2014/41/EU provides a sufficient framework, even without the issuance of an EIO and with the consent of the defendant, as long as the court is "able, by technical means, to verify the identity of the person in the other Member State and provided that person's rights of the defence and assistance by an interpreter are ensured."[16] In *Linte* (C-285/23), the court also wanted to know whether the right to be present at trial as set out in Art. 8(1) Directive (EU) 2016/343 is also met in the case of a videoconference. Otherwise, Germany would have a strong argument to refuse the execution of an EIO on the basis of Art. 11(1)(f) Directive 2014/41/EU, as this would be incompatible with the fair trial guarantee enshrined in Arts. 47 and 48 CFR.

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As the Latvian court did not stay the proceedings in either case but continued to hear evidence, the CJEU responded in its judgment of 6 June 2024 that

"[s]uch procedural steps [...] are liable to render the questions referred for a preliminary ruling [...] devoid of purpose and of relevance to the main proceedings, and are therefore liable to prevent the referring court from complying, in the context of the main proceedings in both cases, with the decisions by which the Court would reply to the references for a preliminary ruling."[17]

It was the CJEU's worry that "the effectiveness of the cooperation mechanism provided for in Art. 267 TFEU" could be undermined and that its answers might come too late and would then be "purely advisory." On this basis, it ruled that "there is no need to rule on the questions referred for a preliminary ruling."[18] As the CJEU did not even give any indication on the substance of the questions referred to it, the underlying and emerging transnational tensions remain, and warrant further analysis.

II. The Fundamental Question: a Right to Be Present – or a Duty to Be Present?

1. The right to be present at trial

The right of the accused to be present in person at trial is part of the right to a fair trial as provided for in Art. 6 European Convention on Human Rights (ECHR). However, the European Court of Human Rights (ECtHR) has consistently held that this right is not absolute. In certain circumstances, the accused may, of their own free will, expressly or implicitly but unequivocally, waive that right. As regards the use of videoconferencing technology in legal proceedings, the ECtHR has determined that this form of participation in proceedings is not in itself incompatible with the concept of a fair and public trial.[19] However, online hearings are subject to the fundamental requirement that they must be used only in justified cases and must always be aimed at achieving a legitimate aim. Furthermore, for a defendant to be participating in a trial online, it must be guaranteed that they can effectively participate in the trial through the chosen means of communication and that any limitation of rights caused by the online presence must be compensated by the court through other means. Effective participation by online means includes access to the technical means, uninterrupted visibility, audibility of the proceedings on both sides, and continuous participation without technical obstacles. In addition, in the ECtHR's jurisprudence, it is of paramount importance to ensure effective and confidential communication between the accused and the defence during the online trial.[20]

As far as the European Union is concerned, Art. 8(1) Directive (EU) 2016/343 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 also states that defendants have the right to be present at their trial. The Council Framework Decision 2009/299/JHA of 26 February 2009 enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial also states that attendance is a right, rather than an obligation. Therefore, the recognition and execution of a decision rendered following a trial at which the person concerned did not appear in person should not be refused, provided that the person concerned was aware of the scheduled trial and was defended at the trial by a legal counsellor mandated by them.[21]

Moreover, neither the above-mentioned Directive (EU) 2016/343 nor the Framework Decision 2009/299/JHA concerns the way the trial is conducted. They do not provide that a "trial" is to be understood to mean only the physical presence in person, excluding any forms of virtual attendance.

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In light of the above, it remains uncertain how EU law aligns with the Hungarian simplified telecommunication attendance and similar approaches, whereby a Member State unilaterally provides online access to persons participating in proceedings without the involvement of another Member State. Furthermore, it could be argued that this raises the issue of sovereignty: does the concept of simplified telecommunication attendance require the involvement (at least by notification) of the state from which a person connects remotely to the trial – at least if this person is neither a citizen nor a resident of the state conducting the trial?

2. A duty to be present at the trial?

As illustrated above, the German criminal justice system pays extraordinary attention to the presence of the accused at the main trial. In the event of a defendant's absence without leave, they will be brought before the court by force or sought for by means of an arrest warrant (§ 230(2) StPO), potentially also by a European Arrest Warrant. Likewise, in Hungary, if the accused does not confirm their attendance at the trial, the court considers them to not have waived it, and if they fail to appear when duly summoned, it may enforce their presence by means of a summons or warrant (§§ 432–433 CCP).

But is this encroachment on the liberty of a defendant who is forced to be present in the courtroom actually justified?

a) Unfounded arguments in favour of physical presence

The guarantees of criminal procedure enshrined in Art. 6 ECHR and in Arts. 47, 48(2) CFR are not affected by a trial where the court and the prosecution are present in the courtroom and only the defendant (and potentially their counsel) joins by videoconference; hence, a duty to be present cannot be based on these factors. In particular, the trial may remain a public hearing.[22] Defendants can be heard by the court on all matters of relevance; they can examine witnesses; and they are also able to intervene in discussions on matters of fact and of law remotely, at least if the technical equipment is of sufficient quality.[23]

The truth-finding mission of courts, which is – for instance – deeply embedded in the German criminal justice system, is also not impeded, in particular if the defendant joining the trial remotely makes use of their right to remain silent, as established in Art. 7 Directive (EU) 2016/343. Furthermore, involuntary nonverbal cues – such as sweating or blushing of a defendant – must not be taken into account by the court as evidence.[24] It is therefore highly problematic that the German Federal Constitutional Court has repeatedly referred to the "impression" the defendant makes upon the court as the reason for justifying their duty to be present.[25] However, if the defendant makes verbal statements, these can be transmitted sufficiently well by videoconferencing technology, as can voluntary nonverbal cues such as nodding.[26] It is also accepted practice for witnesses to be heard by videoconference.

Moreover, a duty to be present cannot be justified by referring to the purposes of subsequent punishment or by arguing that the defendants – or the public – should "feel" justice being done.[27] This would imply, from the outset of the trial, that defendants are in fact guilty and that they should therefore feel the pressure of criminal justice. Yet such an argument evidently contradicts their fundamental right to "be presumed innocent until proved guilty according to law" (Art. 48 (1) CFR).[28]

b) Upholding the rights of the defendant

Nevertheless, the physical presence of the defendant in the courtroom will oftentimes be in their best interest. In settings where some persons are present in a room while others are connected via videoconferencing technology, the latter group will often be at a disadvantage in terms of being heard and in conveying

their "message" effectively.[29] Moreover, those participating via videoconferencing technology might become too easily distracted; they might miss subtle cues and chances to intervene to their advantage, and be unaware of the gravity of the situation. In their absence, the trial, the judgement, and the sentencing risk may lose their human dimension and fail to adequately address the impact on the defendant.

In view of the objective to ensure fair trials (cf. Art. 6 ECHR, Art. 47 CFR), criminal justice systems must not ignore these risks associated with the physical absence of a defendant. Instead, they must, at a minimum, encourage defendants to make use of their right to be physically present at a criminal trial. Forcing them to be physically present is surely paternalistic, but may in fact be justified by the structural deficit of autonomy of accused persons.[30] It is far from unheard of that defendants are not fully aware of the severity of the situation they are in. In the context of the trial, they are faced with the state making use of the strongest sword in its arsenal: criminal justice. Therefore, it is rational for them to seize any lawful chance they have to influence the trial to their advantage – and that oftentimes includes, as set out above, being physically present in the courtroom. Not doing so is presumably based on economic needs, convenience, or ignorance, but not on a rational choice. As their physical presence in the courtroom tends to be strongly to their advantage, and defendants tend to lack autonomy to make a reasonable decision on this question, the state may generally require them to be physically present in court – even contrary to their (superficial) intentions.

However, there are circumstances in which this assumption does not hold. For instance, a defendant, well represented by counsel, may make a reasonable decision to waive their right to be (physically) present in court for less important parts of the proceeding, and opt for a participation by videoconference instead. The *Linte* case (C-285/23) described above (I.3. supra) may constitute a prime example of a situation where the particular burden of physical presence tilts the balance in favour of a mere virtual presence of the accused.

III. Using – or Mis-using? – the European Investigation Order for Transnational Virtual Criminal Trials

Considering that Latvia's legislative choice to allow for virtual criminal trials may, at least under some circumstances, be to the advantage of the defendant's situation, we now turn to the question whether this option is also available transnationally within the European Union.

1. Scope of the European Investigation Order

Within the Area of Freedom, Security and Justice of the EU, the European Investigation Order, created by Directive 2014/41/EU, is a cornerstone of the implementation of the principle of mutual recognition of judicial decisions. Yet it is doubtful whether a decision by a court – such as the Latvian Economic Court – to allow a defendant to join the trial using videoconferencing technology falls within the scope of Directive 2014/41/EU.

According to Art. 1 Directive 2014/41/EU, an EIO is intended to "have one or several specific investigative measure(s) carried out in another Member State […] to obtain evidence", or to "obtain[…] evidence that is already in the possession of the competent authorities of the executing State." Art. 3 Directive 2014/41/EU further clarifies that an EIO may "cover any investigative measure with the exception of the setting up of a joint investigation team and the gathering of evidence within such a team." It also follows from Art. 2(c)(I) and Art. 4 of the Directive that an EIO is not limited to the investigation or pre-trial phase but may also be issued by the trial court during an ongoing trial.

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According to its name – European Investigation Order –, and by limiting its use to "one or several specific investigative measure(s)," the general scope of the EIO is to obtain evidence in furtherance of the investigation or prosecution. Recitals 7 and 8 of the Directive clarify that EIOs are measures "aimed at gathering evidence." Nevertheless, questioning the defendant and giving defendants the opportunity to comment on the case at hand is only a limited part of their right to participation in the trial. The main rationale for their participation is securing their right to be heard and their right to defend themselves in the trial. Using an EIO to provide for the presence of a defendant during the trial beyond their questioning therefore seems to be outside of the scope of the EIO. This would, in turn, require recourse to different tools of judicial cooperation for transnational virtual trials.

2. "Hearing by videoconference" (Art. 24 Directive 2014/41/EU)

However, taking a closer look at Art. 24(1) subpara 2 Directive 2014/41/EU, the provision could be used to argue for an extension of the scope of an EIO, as it states that an EIO may be issued "for the purpose of hearing a suspected or accused person by videoconference."

a) "Hearing" in a narrower sense (as an investigative measure)

On the one hand, the term "hearing" may be construed narrowly and refer solely to the questioning of suspects and accused persons, including defendants. Such an interpretation is in line with the – equally authoritative – German language version of the Directive, which uses the term *Vernehmung*, which is best translated as "interrogation". This interpretation would also be consistent with the general scope of the Directive and its chapter IV, which outlines "specific provisions for certain investigative measures" and is coherent with subparagraph 1, which regulates the hearing of witnesses or experts.

b) "Hearing" in a broader sense

On the other hand, the term "hearing" is ambiguous and can be understood in a number of ways, especially from a Hungarian perspective. It can signify a hearing (*meghallgatás*), an interrogation (*kihallgatás*), or even the trial (*tárgyalás*) itself. To further complicate the situation, while the English version consistently uses "hearing" (and "hear") throughout Art. 24 of the Directive, the Hungarian language version of the Directive, which is equally considered authorative, uses the term *meghallgatás* in the title of Art. 24, but *kihallgatás* in paragraph 1, subpara 2. The latter term commonly refers to the procedural act of taking the statement of a witness, a suspect, or an accused person, initiated by a court or authority, at both the investigative and the judicial stages. We note – analysing Art. 24 as a whole – that the terminology is confusing and not further explained in the Directive, but in general the Hungarian jurisprudence is consistent in the separation of the aforementioned terms.

It should further be stressed that the Hungarian implementation does not limit the issuing or execution of a request for a videoconference to the investigative stage.[31] Rather, it interprets the opportunities offered by Art. 24 broadly, and includes, in light of the legislation cited above, the presence of the accused by videoconference at the (main) trial at which a verdict may be given.

At the same time, there is a divergence between the scope of application of the Hungarian legislation and the Directive. The Hungarian legislation lists[32] the witness, the accused, and the expert side by side as persons which may be heard based on Art. 24 Directive 2014/41/EU. By contrast, Art. 24(1) Directive 2014/41/EU mentions this possibility in connection with the testimony of witnesses or experts, but only makes a passing reference to the possibility of an EIO being issued in the case of a suspect or accused person. It is not evident from the Directive's wording whether this distinction extends beyond the reference to Art. 24(5) to (7) of the Directive. Presumably, this distinction derives from the previous rule in force, Art. 10(9) of the

Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union.[33] It allowed for the interrogation of an accused by videoconference only where it was deemed appropriate according to the Member States' discretion and with the consent of their competent judicial authorities; notably, this did not pose an issue in practice.[34]

Based on such a broad understanding of the term "hearing," the Hungarian approach is that the spirit of the EU and the cross-border accessibility of judicial matters should allow persons who wish to join the proceedings voluntarily from the territory of another Member State to do so. Based on this view, Art. 24 should not be interpreted restrictively, and should not exclude the possibility for Member States to unilaterally allow for virtual participation in criminal proceedings, even from the territory of another Member State and without the involvement of that other Member State.

c) Safeguards

In addition to the general rules[35], the execution of a European Investigation Order may be refused in the case of a request for a virtual hearing if the suspect or accused has not consented or if the carrying out of the investigative measure would be contrary to the fundamental principles of the law of the executing State.[36] The person concerned may give their consent to be questioned via telecommunications in writing, orally before a court or the prosecutor's office, or on the record.[37] In addition, according to the Directive, the suspect must be informed of all their rights and duties, and an interpreter must be provided if required.[38] We note that the Directive is vague on the right to interpretation, as it only refers to the need to apply[39] the Interpretation Directive.[40] As a further safeguard, Hungary requires that an EIO issued by a prosecutor for the interrogation by a closed telecommunications network during the investigation requires validation by the court.[41]

Moreover, for all variations of "online presence", it is necessary that the use of telecommunications equipment not negatively affect the exercise of the rights of persons participating in criminal proceedings, including the right to ask questions, to make comments and to make submissions. It must be ensured that persons present in court can see and hear those connected remotely, and that those connecting remotely are able to follow the proceedings in a meaningful way. Last but not least, if the accused is not present in the same place as their defence counsel, the direct and secure consultation between them must be made possible. According to Hungarian law, an electronic link with voice communication suffices in this regard (§ 124 CCP).

One conflict between the EIO and the Hungarian concept of simplified telecommunication attendance is, however, that the Directive, which is based on the principles of mutual recognition and loyal cooperation[42], requires the transfer of an EIO and therefore a consultation (and consent) of the other affected Member State. Involving another Member State also assists in verifying the identity of the remotely connecting person, and in assuring that no unauthorised person is present at the remote location. Hungarian law states that, in case of doubt, the court may immediately interrupt the procedural act (§ 126/B para 3 CCP).

3. The alternative suggestion in *AVVA and Others* and *Linte*: transnational virtual criminal trials without an EIO

Considering these difficulties aligning transnational virtual criminal trials with an EIO, it is not surprising that the Latvian Economic Court also raised questions regarding alternatives to issuing an EIO. However, the court's stance in *AVVA and Others* on how Directive 2014/41/EU may permit self-executing transnational procedural acts and justify the interference with the sovereignty of the other Member States affected remains unclear, as its clear focus is regulating the issuance of EIOs. The sole exception – Art. 31 on cross-border

interception of telecommunications without the assistance of the affected Member State – also requires the notification of the other Member State, and empowers it to demand the termination of the measure.

A more promising aspect is its call in *Linte* that "the use of videoconferencing in criminal proceedings with a cross-border dimension enables EU citizens to effectively exercise their freedom of movement," and that Union law should therefore provide for such an opportunity.[43] However, it is still quite creative, and possibly too creative to state that the European right to be present at trial, Art. 8(1) Directive (EU) 2016/343, "includes the right of accused persons to participate effectively in the trial in a criminal case in a different Member State by videoconference from the Member State of residence."[44] It is certainly true though that such an interpretation "would fit well with the prevailing emphasis on facilitating and accelerating court proceedings."[45] However, the legal basis of the Directive – Art. 82(2)(b) TFEU –, its subject matter ("minimum rules concerning […] the right to be present at the trial in criminal proceedings", Art. 1 lit. b Directive (EU) 2016/343) and the concise wording of Art. 8(1) Directive (EU) 2016/343 ("Member States shall ensure that suspects and accused persons have the right to be present at their trial") all argue that the European legislature has not empowered Member States in this Directive – and without any safeguards – to conduct transnational virtual criminal trials, notably without any involvement of the Member States where the defendant is physically present.

In a similar vein, Advocate General *Medina* proposed on 18 April 2024 that Art. 8(1) Directive (EU) 2016/343 does not govern the use of videoconferencing in criminal proceedings; rather, this is a matter for Member States to decide. In particular, that provision does not regulate a situation in which a criminal court gives an accused person, who is obliged to be present at the trial according to national law, the possibility to participate by videoconference in the proceedings, despite the absence of an explicit provision in national law allowing for such a mode of participation.[46]

In her opinion, the limited scope of the harmonisation carried out by Directive 2016/343, and the fact that it does not regulate the question whether Member States may require the defendant to be present at the trial, leads to the conclusion that the issue of mandatory presence is a matter for national law alone. This line of reasoning can be applied by analogy to the question whether Member States may provide that the right to be present at the trial can be exercised by videoconference at the request of the defendant. Since the Directive does not specify the manner in which this right is to be exercised, it leaves some leeway to Member States when it comes to specifying the means of ensuring that this right is guaranteed in their judicial systems. This allows them to provide for additional means to secure presence at the trial, such as by videoconference or by other distance communication technology, at the express request of the accused person, as long as the right to a fair trial is upheld.[47]

IV. A Matter Better Decided by European Legislature

Based on our analysis, and despite the fact that the terms used in the different language versions of Art. 24 Directive 2014/41/EU are ambiguous, we are sceptical that transnational virtual criminal trials are within the scope of the EIO. In particular, authorising a "remote simplified telecommunication attendance" without even notifying the Member State the attendee is located in would bend the wording of the Directive and its foundation in the principle of mutual recognition. In a similar vein, interpreting Art. 8(1) Directive (EU) 2016/343 to include a right to a participation by videoconference, as suggested by the referring court in *Linte,* seems rather far-fetched. Despite the CJEU's reputation for advancing European integration even on subtle legal bases, it did not move forward here with expanding extra-territorial effects of criminal justice systems within the integrated European criminal justice systems.

Our analysis has shown that there are indeed situations in which the virtual presence of the accused – or of another party to the criminal proceedings – promotes the purposes of criminal justice and is of benefit to the persons involved, and where a transnational virtual criminal trial may also be more sustainable. In our view, this question should be addressed by the European legislature instead. The freshly started legislative term can provide an opportunity to discuss the appropriate legal framework, such as by amending Regulation (EU) 2023/2844,[48] which, in relation to criminal matters, is currently limited to specific hearings in matters concerning extradition and mutual legal assistance. In particular, this future framework could build upon Art. 8 Regulation (EU) 2023/1543[49] and differentiate between the need to notify – and/or the need for consent of – the Member State which the remotely connecting person is located in. For instance, a case could be made that there is no need for such notification if the person is a citizen or resident of the Member State conducting the trial. In any case, this legal framework needs to include clear and specific safeguards for conducting transnational virtual criminal trials in full conformity with the rule of law and human rights. In particular, such safeguards would need to be far more detailed than what is prescribed in Art. 24 Directive 2014/41/EU, and would need to make sure that no one who wants to enforce their right to *physical* presence is pressured to waive this right in favour of a mere *virtual* presence.

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1. See, in particular, E. Róth, "A digitalizáció és a terhelti jogok érvényesülése a büntetőeljárásban - Digitalisation and the enforcement of accused's rights in criminal proceedings", (2021) 2 *Miskolci Jogi Szemle*, 269.↩
2. A. Madarasi, "A tisztességes online tárgyaláshoz való jog – The right to a fair online trial" (2022) *Jogi Tanulmányok* <https://epa.oszk.hu/02600/02687/00010/pdf/EPA02687_jogi_tanulmanyok_2022_427-440.pdf>, 427, 428. All hyperlinks used in this article were last accessed on 7 December 2024.↩
3. Act XC of 2017 on the Code of Criminal Procedure (hereinafter CCP). An official translation is available at <https://njt.hu/jogszabaly/en/2017-90-00-00>.↩
4. The court in this case also sits in the courtroom equipped with a closed telecommunication system and controls the technical conduct of the hearing, while the other participants can hear and see what is happening in the courtroom and at other endpoints by clicking on a link sent to them via an online interface (without installing an application), in order to take advantage of the new communication habits associated with digitalisation and thus speed up proceedings.↩
5. · An unofficial translation of the German Code of Criminal Procedure in English is available at <https://www.gesetze-im-internet.de/englisch_stpo/index.html>.↩
6. See O. Arnoldi, in: Ch. Knauer/H. Kudlich/H. Schneider (eds.), *Münchener Kommentar zur StPO*, 2nd ed., 2024, § 230, mn. 6, 10 f.; M. Deiters, in: J. Wolter/M. Deiters (eds.), *SK-StPO. Systematischer Kommentar zur Strafprozessordnung. Mit GVG und EMRK*, 6th ed., 2024, § 226 mn. 4; M. Jahn, in: J.-P. Becker et al. (eds.), *Löwe-Rosenberg. Die Strafprozeßordnung und das Gerichtsverfassungsgesetz*, 27th ed., 2021, § 145 mn. 13; B. Schmitt, in: L. Meyer-Goßner/B. Schmitt (eds.), *Strafprozessordnung mit GVG und Nebengesetzen*, 66th ed., 2023, § 230 mn. 14; L. Sommerer, "Virtuelle Unmittelbarkeit? Videokonferenzen im Strafverfahren während und jenseits einer epidemischen Lage von nationaler Tragweite", (2021) *Zeitschrift für die gesamte Strafrechtswissenschaft (ZStW)*, 403, 406.↩
7. German Courts Constitution Act (*Gerichtsverfassungsgesetz - GVG*). An unofficial translation is available at <https://www.gesetze-im-internet.de/englisch_gvg/index.html>.↩
8. See, in particular, M. Meißner, "Corona und Strafprozess – Zum Einsatz von Videotechnik im Strafverfahren", *beck-blog* <https://community.beck.de/2020/05/10/corona-und-strafprozess-zum-einsatz-von-videotechnik-im-strafverfahren>; L. Sommerer, *op. cit.* (n. 6), 403, 445 f.; German Federal Bar (Bundesrechtsanwaltskammer, BRAK), Opinion (Stellungnahme) No. 8/2022, p. 14; and, in contrast, D. Brodowski, "Virtualisierung der strafprozessualen Hauptverhandlung", in: B. Brunhöber et al. (eds.), *Strafrecht als Risiko. Festschrift für Cornelius Prittwitz zum 70. Geburtstag*, 2023, p. 425, 436 ff.↩
9. Law for a further digital transformation of the judiciary (Gesetz zur weiteren Digitalisierung der Justiz), BGBl. I 2024, Nr. 234.↩
10. See, for instance, German Judges' Association (Deutscher Richterbund), Opinion (Stellungnahme) No. 28/23, p. 10; German Bar Association (Deutscher Anwaltverein), Opinion (Stellungnahme) No. 78/2023, p. 6 ff.↩
11. German Federal Bar (Bundesrechtsanwaltskammer, BRAK), Opinion (Stellungnahme) No. 65/2023, p. 10.↩
12. Latvian Economic Court (*Ekonomisko lietu tiesa*), 3 May 2023, request for a preliminary ruling in case C-285/23, unofficial English translation available at <https://curia.europa.eu/juris/liste.jsf?num=C-285/23>, mn. 4.↩
13. Latvian Economic Court, 3 May 2023, *op. cit.* (n. 12), mn. 7.↩
14. Latvian Economic Court (*Ekonomisko lietu tiesa*), 19 April 2023, request for a preliminary ruling in case C-255/23, unofficial English translation available at <https://curia.europa.eu/juris/liste.jsf?num=C-255/23>, mn. 7.↩
15. Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, OJ L 130, 1.5.2014, 1.↩
16. Latvian Economic Court, 19 April 2023, *op. cit.* (n. 14), question 1.↩
17. CJEU, 6 June 2024, Joined Cases C-255/23 and C-285/23, *AVVA and others / Linte*, para. 38. See also T. Wahl, "ECJ: No Ruling on Defendant's Right to Participate via Videoconference", *eucrim* 2/2024, 130.↩
18. CJEU, 06. June 2024, *op. cit.* (n. 17), para. 40 f.↩
19. ECtHR, 5 October 2006, *Marcello Viola v Italy*, Appl. no. 45106/04, para. 67.↩

20. See more ECHR Knowledge Sharing platform, *Guide on Article 6 of the European Convention on Human Rights* <https://www.echr.coe.int/documents/d/echr/guide_art_6_criminal_eng>, 158, 303; also ECtHR, *Marcello Viola v Italy*, *op. cit.* (n. 19), paras. 63-69; ECtHR, 27 November 2007, *Asciutto v Italy*, Appl. no. 35795/02; ECtHR, 9 November 2006, *Golubev v Russia*, Appl. no. 26260/02; ECtHR, 2 November 2010, *Sakhnovskiy v Russia*, Appl. no. 21272/03, para. 98.↩
21. Recital 10 of Council Framework Decision 2009/299/JHA, OJ L 81, 27.3.2009, 24.↩
22. D. Brodowski, *op. cit.* (n. 8), p.436 f.; L. Sommerer, *op. cit.* (n. 6), 403, 431 with further references.↩
23. D. Brodowski, *op. cit.* (n. 8), p. 436 f.; L. Sommerer, *op. cit.* (n. 6), 403, 431 with further references.↩
24. D. Brodowski, *op. cit.* (n. 8), p. 439, referring to M. El-Ghazi/A. Hoffmann, "Verwertbarkeit nonverbalen Verhaltens des Angeklagten bei der Urteilsfindung", (2020) *Strafverteidiger (StV)*, 864, 867 f. So far, the ECtHR has not judged on this matter in light of Art. 6(2) ECHR.↩
25. German Federal Constitutional Court (BVerfG), Decision of 14.06.2007 – 2 BvR 1447/05, para. 89; BVerfG, Decision of 15.12.2015 – 2 BvR 2735/14, para. 58.↩
26. D. Brodowski, *op. cit.* (n. 8), p. 438 f.↩
27. But see the reasoning by L. Sommerer, *op. cit.* (n. 6), 403, 419.↩
28. D. Brodowski, *op. cit.* (n. 8), pp. 439 ff. with further references.↩
29. D. Brodowski, *op. cit.* (n. 8), p. 437.↩
30. M. Jahn, in: J.-P. Becker et al. (eds.), *Löwe-Rosenberg. Die Strafprozeßordnung und das Gerichtsverfassungsgesetz*, 27th ed., 2021, § 140, mn. 2; M. Jahn/D. Brodowski, in: E. Hilgendorf/H. Kudlich/B. Valerius (eds.), *Handbuch des Strafrechts. Band 7 Grundlagen des Strafverfahrensrechts*, 2020, § 17, mn. 52.↩
31. Art. 64 of Act CLXXX of 2012 on the cooperation with the Member States of the European Union in criminal matters.↩
32. Chapter IV of Act CLXXX of 2012.↩
33. Convention established by the Council in accordance with Article 34 of the Treaty on European Union, on Mutual Assistance in Criminal Matters between the Member States of the European Union, OJ C 197, 12.7.2000, 3.↩
34. H. Csernák/K. Pencz/Z. Tasnádi/A. Bertaldó, "Az európai nyomozási határozat - vagy más jogsegély? I. - The European Investigation Order – or another legal assistance? I." (2021) 4 *JURA* 51, 79 <https://jura.ajk.pte.hu/JURA_2021_4.pdf >.↩
35. Art. 11 of Directive 2014/41/EU, *op. cit.* (n. 15).↩
36. Art. 24(2) of Directive 2014/41/EU, *op. cit.* (n. 15).↩
37. Art. 63/C (3) of Act CLXXX of 2012.↩
38. Art. 24(3) and (5) Directive 2014/41/EU, *op. cit.* (n. 15).↩
39. Recital 15 of Directive 2014/41/EU, *op. cit.* (n. 15).↩
40. Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, OJ L 280, 26.10.2010, 1.↩
41. Art. 53(4) of Act CLXXX of 2012.↩
42. Cf. Art. 4(3) TEU.↩
43. Latvian Economic Court, 3 May 2023, *op. cit.* (n. 12), mn. 12.↩
44. Latvian Economic Court, 3 May 2023, *op. cit.* (n. 12), mn. 13.↩
45. Latvian Economic Court, 3 May 2023, *op. cit.* (n. 12), mn. 13.↩
46. Opinion of Advocate General *Medina*, 18.04.2024, Case C-760/22, *FP and Others*, para. 75.↩
47. See AG Opinion, *op. cit.* (n. 46), paras. 60–63, 65.↩
48. Regulation (EU) 2023/2844 of the European Parliament and of the Council of 13 December 2023 on the digitalisation of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters, and amending certain acts in the field of judicial cooperation, OJ L, 2023/2844, 27.12.2023.↩
49. Regulation (EU) 2023/1543 of the European Parliament and of the Council of 12 July 2023 on European Production Orders and European Preservation Orders for electronic evidence in criminal proceedings and for the execution of custodial sentences following criminal proceedings, OJ L 191, 28.07.2023, 118.↩

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