

Proposal for a Directive of the European Parliament and of the Council on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings

4 April 2014

The CCBE has examined the proposal on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings.

We note that, within the broad topic of the presumption of innocence, the proposal deals only with “certain aspects”. It should be made clear that the proposed Directive is not comprehensive in including all aspects of the presumption of innocence and that it remains necessary to cover other aspects of the presumption of innocence in future proposals (we wish to avoid a situation whereby the impression that all aspects regarding the presumption of innocence have been dealt with).

The CCBE has the following comments to make:

CCBE Comments on the explanatory memorandum

10. We welcome the linking of this proposal with the reference to the proposal for a European Public Prosecutor, insofar as the reference includes procedural safeguards to apply in EPPO cases.

14. We welcome the strong statement that *“The European Court of Human Rights also recognises the existence of a clear link between the presumption of innocence and other fair trial rights in the sense that when such rights are breached, the presumption of innocence is inevitably also at stake; the right not to incriminate oneself, the right not to cooperate and the right to silence and the right to liberty (and not to be placed in pre-trial detention).”*

23. We welcome the strong statement that *“moreover breaches of presumption of innocence do still occur too often across the European Union”* – this is a reference to decided cases in Strasbourg.

26. We can accept the logic behind the measure applying initially to natural persons rather than legal persons. However, a point in time may come when it will be necessary to harmonise protections.

30. We welcome the strong statement that the prohibition on public reference to guilt before conviction applies to all Public Authorities.

32. We welcome the analysis that, in general terms, the burden of proof should remain on the prosecution.

33 – 37 These paragraphs contain very strong expressions in favour of the right not to incriminate oneself and not to cooperate and, right to remain silent. In particular Paragraph 36 which reads *"any inferences drawn from the fact that suspects or accused persons who make use of these rights should be excluded. Without this the right would be merely illusory if the suspect or accused had to fear that their non cooperation or their silence would be used against them later in the criminal proceedings. This is the sole way to ensure the effective exercise of these rights by suspects or accused persons without fear that such exercise can be used against them at a later stage. Therefore the Directive also provides the specific and immediate remedy that any use of evidence obtained in breach of these rights is not allowed, save in those very exceptional cases where the use of such evidence will not prejudice the overall fairness of the proceedings."*

It is regrettable that the actual proposed wording in the articles themselves are not as strong as this aspiration. The test of the overall fairness of the proceedings is also a difficult one to apply and we wish for this to be clearer.

57 In dealing with this subsidiarity principle we appreciate and recognise that an important statement is made to the effect that the court in Strasbourg alone does not ensure a full protection of a presumption of innocence, and we note in particular that the redress procedure at the court intervenes only ex post, after exhaustion of all internal remedies.

Comments on the Recitals

6. The Directive specifically will only apply to criminal proceedings and not administrative proceedings, including tax proceedings. Some Member States have chosen to use civil and administrative measures to bypass the evidential tests in the criminal law and effectively to criminalise by the back door the very significant financial penalties on citizens.

8. We welcome the fact that the Directive will apply from the very first point that a person has become a suspect even if they are not so advised.

15. This provides that the reversal of the burden of proof being kept *"within reasonable limits"* which take into account the importance of what is at stake and that they are rebuttable, for example, by means of new evidence on extenuating circumstances or on a case of *"force majeure"*. We are concerned at the greater circumspection around the possibility to reverse the onus.

16, 17 and 18 deals with the privilege against self incrimination and in particular acknowledges that some compulsion is permissible, particularly search warrants.

In 17 it is stated *"Any compulsion used to compel the suspect or accused person to provide information should be limited. To determine whether the compulsion did not violate those rights the following should be taken into account, in the light of all the circumstances of the case: the nature and degree of compulsion to obtain the evidence, the weight of the public interest in the investigation and punishment of the offence at issue, the existence of any relevant safeguards in the procedure and the use to which any material so obtained is put. However the degree of compulsion imposed on suspects or accused persons with a view to compelling them to provide information relating to charges against them should not destroy the very essence of their right not to incriminate oneself and the right to remain silent, even for reasons of security and public order."*

The wording *"Any compulsion used to compel the suspect or accused person to provide information should be limited"* appears to imply that compulsion, in order to achieve a statement from a suspect or accused person can be legitimate if certain criteria concerning issues of proportionality are taken into account. Such an assessment of the possible use of compulsion would not comply with the case law of the ECtHR. The ECtHR never

acknowledged any compulsion in order to achieve a statement from a suspect or an accused person (see *Funke vs France*; *Heany and McGuinness v Ireland*). The CCBE therefore recommends that recital 17 be deleted.

26. We welcome that an effective remedy is one that puts an accused person in the same position in which they would have found themselves had the breach not occurred.

Comments on the Articles

2. Applies only to natural persons.

4. Article 4 refers to - Public references to guilt before conviction

"Member States shall ensure that, before a final conviction, public statements and official decisions from public authorities do not refer to the suspects or accused persons as if they were convicted. Member States shall ensure that appropriate measures are taken in the event of a breach of that requirement."

It would be advisable and more effective to specify that the reference to guilt before conviction applies to all Public Authorities **in any circumstances (including interviews and communications through media**, not affecting the freedom of the press), especially in Countries where, pending the trial, to give information to the public does not constitute a contempt to Court.

5.2. *"Member States shall ensure that any presumption which shifts the burden of proof to the suspects or accused persons, is of sufficient importance to justify overriding that principle and is rebuttable. In order to rebut such a presumption it suffices that the Defence adduces enough evidence as to raise a reasonable doubt regarding the suspect or accused person's guilt."*

We are concerned with this provision.

6.3 and 6.4 Exercise of the right not to incriminate oneself or of the right not to cooperate shall not be used against a suspect or accused person at a later stage of the proceedings and shall not be considered as corroboration of facts.

While we welcome that statement, we have concerns in relation to Article 6.4 *"any evidence obtained in breach of this article shall not be admissible unless the use of such evidence would not prejudice the overall fairness of the proceedings"*.

We in particular wish to have a strict exclusionary rule in order to ensure from a practical perspective the need to have a deterrent against abuse of power. We therefore believe this phrase should be deleted.

7.3. and 7.4 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.

There are of course some examples where silence is treated as corroboration of other evidence. However, the inference provisions are not strictly speaking corroboration provisions. We suggest that there should be an express out ruling of inferences especially having regard to the content of Article 7.4 *"any evidence obtained in breach of this Article shall not be admissible unless the use of the evidence would not prejudice the overall fairness of the proceedings"*.

Art. 6.4 and 7.4, which refer to the *"overall fairness of the proceedings"* reflect the ECHR case law. However, the general rule which has been established by the ECHR assessing any infringements of rights from the hind side in relation to the *"overall fairness of the*

proceedings" is not suitable to serve as a rule to establish the presumption of innocence in the Member States.

The wording "*any evidence obtained in breach of this Article shall not be admissible unless the use of the evidence would not prejudice the overall fairness of the proceedings*" is an open door to abuse and would permit too much discretionary interpretation by the national Court, which is contrary to the aim of the proposal which is to harmonise the practical procedural standard that applies in each Member State in order to grant a fair trial.

No police officer, no prosecutor and no judge will ever be able to assess the overall fairness of the proceedings before questioning a suspect or accused person. The questioning will always take place before the proceedings are terminated and before it is possible to assess the overall fairness. If the directive provides for a rule saying that infringements of the presumption of innocence are tolerable as long as they do not hamper the overall fairness, there is the danger, that the investigating authority will use forbidden compulsory measures to achieve a statement – just relying on the prospect that the overall proceedings will be fair enough to cover the infringement in the beginning of the proceedings. The CCBE does not see the added value in comparison with the ECtHR case law to provide Member states with such an "open door" for infringements of the presumption of innocence as drafted in Art. 6.3 und 7.4.

In conclusion, this phrase should be deleted.

7.2 Article 7.2 specifies that "*Member States shall promptly inform the suspect or accused persons of their right to remain silent, and explain the content of this right and the consequences of renouncing or invoking it.*"

While the suspect will invariably be informed of the right to silence when he/she is detained, there is no requirement for such a caution to be given (or repeated) at the commencement of the interview. The suspect may have forgotten about this right during a lengthy, and usually stressful, period of detention.

We suggest that the following sentence be included at the end of the 7(2): "*The suspect or accused person shall also be informed of this right immediately prior to the commencement of any interview.*"

8. We welcome the test of proof of actual knowledge of the case taking place as a pre-condition on a trial *in absentia*.

However we do not welcome 8.3.b which allows a State to proceed where an accused does not demand a re-trial or an appeal. This would be particularly difficult in the case of vulnerable or unrepresented persons.

9. We welcome the strong statement requiring a fresh determination of the merits of the case.

10. We welcome the strong statement that Member States shall ensure that suspects or accused persons have an effective remedy if their rights under this directive are breached.

We wish to add that, regarding the right to be present in person at the trial, it should be stressed, and it is not obvious, that all the information given about the charge, the venue and the date, as well as the rights, should comply with the standard of effectiveness granted by the already existing Directives on *in absentia* proceeding, the right to translation and interpretation, the right to information and the right to have access to a lawyer and communicate upon arrest.

Moreover, it should be granted to the accused person, if held in custody, to have easy access to his lawyer and to the Court. In a few words, the provisions of the new proposal

should not be deemed to be the sole rules to comply with, since, even for remedies, they appear to be more generic and requiring a lower degree of safeguards.