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

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

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

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1 Introduction

1.1 The Directive 2016/343 in its Context

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

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

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

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

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

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

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

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

1.2 The PRESENT Report

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

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

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

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

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

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

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

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

Part I. Presumption of Innocence

2 Aspects of the Presumption of Innocence

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

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

2.1.1 Bulgaria

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

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

2.1.2 Romania

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

2.1.3 Austria

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

2.1.4 Cyprus

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

2.1.5 Slovakia

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

2.1.6 Portugal

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

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

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

2.2.1 Bulgaria

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

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

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

2.2.2 Romania

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

2.2.3 Austria

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

2.2.4 Cyprus

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

2.2.5 Slovakia

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

2.2.6 Portugal

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

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

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

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

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

2.3.1 Bulgaria

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

2.3.2 Romania

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

2.3.3 Austria

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

2.3.4 Cyprus

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

2.3.5 Slovakia

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

2.3.6 Portugal

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

2.4 Burden of proof

2.4.1 Bulgaria

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

2.4.2 Romania

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

2.4.3 Austria

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

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

2.4.4 Cyprus

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

2.4.5 Slovakia

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

2.4.6 Portugal

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

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

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

2.5.1 Bulgaria

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

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

2.5.2 Romania

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

2.5.3 Austria

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

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

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

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

2.5.4 Cyprus

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

2.5.5 Slovakia

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

2.5.6 Portugal

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

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

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

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

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

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

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

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

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

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

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

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

3.4 Burden of proof

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

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

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

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

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

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

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

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

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

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

Part II: Right to be present

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

4.1 Bulgaria

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

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

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

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

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

4.2 Romania

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

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

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

4.3 Austria

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

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

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

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

4.4 Cyprus

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

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

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

4.5 Slovakia

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

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

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

4.6 Portugal

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

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

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

5 Comparative Remarks and Implementation of the Directive

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

5.1 The Directive

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

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

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

5.2 General observations as to Implementation

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

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

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

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

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

5.3 Notification of the suspect/accused

5.3.1 Bulgaria

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

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

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

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

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

5.3.2 Austria

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

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

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

5.3.3 Romania

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

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

5.3.4 Cyprus

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

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

5.3.5 Slovakia

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

5.3.6 Portugal

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

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

5.3.7 Observations and best practices

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

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

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

5.4 Trial in the absence of the accused

5.4.1 Bulgaria

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

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

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

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

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

5.4.2 Austria

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

(i) The crime in the case is considered to be a misdemeanour (*Vergehen*). This means that the offence was committed in negligence (fahrlässig), or was a non-negligent act punishable by deprivation of liberty for not more than three years

(ii) (ii)he accused was already heard in the case i.e. the accused was informed about the charges and his right and/or the possibility to deny them during the interrogation; the interrogation provided information about the charges, the facts of the case and their legal consequences. It is noted that under Austrian legislation, the statements of the accused during interrogation may be read out in Court if the accused does not appear at trial after being formally summoned (*audi alteram partem*).

(iii) (The accused has been formally summoned with all the necessary information having been made available to them.

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

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

5.4.3 Romania

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

5.4.4 Cyprus

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

5.4.5 Slovakia

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

5.4.6 Portugal

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

5.4.7 Observations and best practices

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

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

Certain practices may be highlighted:

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

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

5.5 Legal remedies - right to a new trial

5.5.1 Bulgaria

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

5.5.2 Austria

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

5.5.3 Romania

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

5.5.4 Cyprus

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

5.5.5 Slovakia

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

5.5.6 Portugal

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

5.5.7 Observations and best practices

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

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

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

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

6 Conclusion

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

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

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

Notes:

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

References:

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