Dear Chairman,

The Commission would like to thank the House of Commons for its Reasoned Opinion concerning the Commission’s Proposal for a Directive on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings (COM (2013) 821 final).

In the Stockholm Programme endorsed by all Member States, the European Council underlined that the protection of procedural rights is essential in order to maintain mutual trust between Member States and public confidence in the European Union. In this context, it has invited the Commission to address the issue of presumption of innocence as part of the work in the field of procedural rights and to strengthen mutual trust between the different judicial systems of the European Union. The Commission, after having thoroughly analysed the situation in the Member States and consulted relevant stakeholders, has concluded that progress in the protection of presumption of innocence and related fair trial rights at EU level is needed to foster mutual trust and to improve the functioning of mutual recognition of judicial decisions between Member States which could only be reached by means of an EU Directive.

Indeed, mutual recognition of decisions from other Member States can only operate in a climate of mutual trust. It is therefore necessary that, everywhere in the European Union, when suspected or accused persons are subject to intrusive measures conducted in a Member State, the judicial authorities of that Member State fully respect the basic principles of the presumption of innocence. Insufficient protection of this right affects mutual trust negatively, something which in turn undermines confidence in cross-border instruments. This is the logic underlying EU action with regard to procedural rights for suspects and accused persons, based on Article 82(2) of the TFEU.

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Further information on the rationale of this proposal can also be found in the Commission’s Communication\(^1\) adopted on 27 November 2013 — "Making progress on the European Union Agenda on Procedural Safeguards for Suspects or Accused Persons – Strengthening the Foundation of the European Area of Criminal Justice".

On the issue of respect for the principle of subsidiarity, the fact that there is limited statistical and quantifiable evidence on insufficient trust between the Member States does not mean that there is not a difficulty, but simply that it is not easy to quantify it. Mutual trust is based upon perceptions of practitioners, and any experience of lack of respect for rights of the defendant in the criminal justice system of any Member State undermines trust. The Commission received evidence that full respect of the presumption of innocence and the right to be present at trial is a concrete concern for stakeholders and plays a vital role in building mutual trust across the EU.

For instance, as pointed out in the Impact Assessment annexed to the Commission’s proposal, there are indications of unease among judicial practitioners about divergent standards among Member States, as can be seen, for example, from the evidence of Lord Justice Thomas to the UK Parliament’s Scott Baker inquiry concerning the European arrest warrant. The Impact Assessment also describes the evidence of an absence of trust from stakeholders, in particular defence lawyers who are at the forefront in all Member States of identifying and challenging judicial mispractices and miscarriages of justice in national courts.

The lack of mutual trust between judicial authorities, even if difficult to quantify, and the need to improve it have been the underlying justification of each of the different measures proposed by the Commission in this field, in particular following the entry into force of the Treaty of Lisbon. Three procedural rights measures have already been adopted by the EU legislators: Directive 2010/64/EU of the European Parliament and of the Council on the right to interpretation and translation in criminal proceedings; Directive 2012/13/EU of the European Parliament and of the Council on the right to information in criminal proceedings; Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty.

Additionally, the Commission recognises that the European Court of Human Rights plays an important role in the protection of fundamental rights, including the presumption of innocence and the right to be present at trial, as a last resort when all other safeguards at national level have been exhausted. However, the Impact Assessment study showed that certain aspects of the protection of the presumption of innocence have not been dealt with by the European Court of Human Rights. Moreover, the redress mechanisms available to citizens in case of breach of an EU directive – such as the possibility to invoke, under certain conditions, the provisions of such a directive in a pending case in national Courts, the possibility for national Courts to request preliminary rulings from the Court of Justice of the EU, the possibility for the Commission to launch infringement proceedings against Member

States that do not comply with obligations laid down in a EU directive – can be, and have proven to be, a more efficient redress mechanism to ensure protection of citizens’ rights at EU level.

In particular, the Impact Assessment showed that the European Court of Human Rights' redress mechanisms have not been sufficient to prevent EU Member States from too often violating the standards the Court has developed for the respect of the presumption of innocence. This is the case despite the Court’s well-established case law on certain key requirements of the presumption of innocence principle. Indeed, sixty per cent of the cases in which the European Court of Human Rights finds violations originate in failures to comply with the European Convention on Human Rights which have already been identified by the Court.

In addition, the proposal of the Commission raises the standards of the case-law of the European Court of Human Rights in relation to the protection of the right not to incriminate oneself and not to cooperate and of the right to remain silent, which are at the core of a fair trial.

The protection of the presumption of innocence by judicial authorities can therefore be improved in the EU by a directive containing higher standards to ensure mutual trust among judicial bodies, which would be applicable in all instances and not only after all domestic remedies have been exhausted.

As the Directive would contain minimum standards in compliance with Article 82(2) of the TFEU, these mechanisms do not exclude, but are on the contrary complemented by, the decisive role of the European Court of Human Rights in protecting fundamental rights.

The points made above are based on the initial proposal presented by the Commission which is currently in the legislative process involving both the European Parliament and the Council at which your government is represented.

The Commission hopes that these clarifications address the concerns raised by the House of Commons and looks forward to continuing our political dialogue in the future.

Yours faithfully,

Johannes Hahn
Member of the Commission