

## Reasoned Opinion of the House of Commons

Submitted to the Presidents of the European Parliament, the Council and the Commission, pursuant to Article 6 of Protocol (No. 2) on the Application of the Principles of Subsidiarity and Proportionality.

concerning

### **a Draft Directive on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings<sup>1</sup>**

#### **Treaty framework for appraising compliance with subsidiarity**

1. In previous Reasoned Opinions, the House of Commons has set out what it considers to be the correct context in which national parliaments should assess a proposal's compliance with subsidiarity. The House of Commons continues to rely on that context without restating it.

#### ***Proposed legislation***

2. The proposed Directive aims to set common minimum standards throughout the European Union on certain matters that the European Commission ("the Commission") has identified in relation to the rights of suspects and accused persons to be presumed innocent until proven guilty; and to be present at one's trial.

3. In 2010, the European Council in agreeing the Stockholm Programme invited the Commission, *inter alia*, to examine further elements of minimum procedural rights for suspected and accused persons, and to assess whether other issues, for instance the presumption of innocence, needs to be addressed, to promote better cooperation in this area.

4. The proposal is made under Article 82(2) of the Treaty on the European Union (TFEU) which provides that the European Parliament and the Council may, by means of Directives, establish minimum rules to the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross border dimension.

5. The Commission's explanatory memorandum which accompanies its proposal explains that the proposal is needed to strengthen the right to be presumed innocent and that it builds on the relevant provisions of the European Convention for the Protection of Human

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<sup>1</sup> COM (13) 821

Rights and Fundamental Freedoms (ECHR), chiefly Article 6, and the Charter of the Fundamental Rights of the European Union.

6. The proposal lays down minimum rules concerning certain aspects of the presumption of innocence and the right to be present at trial. The specific areas covered include: (a) a requirement to ensure that suspects or accused persons are presumed innocent until proven guilty according to law; (b) rules to protect against suspects or accused persons being presented as guilty by public authorities prior to conviction; (c) rules to provide that the burden of proof rests with the prosecution and that any reasonable doubt as to an accused's guilt leads to the accused's acquittal; (d) rights of suspects or accused persons not to incriminate themselves and not to cooperate; (e) rights of the accused to remain silent; and (f) the right to be present at trial.

### ***Subsidiarity***

7. In its explanatory memorandum the Commission says there is a significant variation in the legislation of the Member States on the right to be presumed innocent and to all its aspects. Case law of the European Court of Human Rights (ECtHR) shows that violations of presumption of innocence and its related fair trial rights have steadily taken place. This leads to the lack of mutual trust between judicial authorities of different EU Member States. As a result, according to the Commission, judicial authorities are reluctant to cooperate with each other. The Commission relies on its impact assessment as showing that the ECtHR alone does not ensure a full protection of presumption of innocence: some aspects of presumption of innocence have not been recently or extensively considered by the ECtHR, and the redress procedure at the ECtHR intervenes only after exhaustion of all internal remedies. This Directive is therefore intended to complement the safeguards provided for by the ECtHR and ensure that presumption of innocence is protected from the start of the criminal proceedings, including the possibility of recourse to EU redress mechanisms.

8. The Commission argues that the objective of the proposal cannot be sufficiently achieved by Member States alone as the aim of the proposal is to promote mutual trust; it has to be action taken by the European Union, which will establish consistent common minimum standards that apply throughout the whole of the European Union. This has been confirmed by the Stockholm Programme, in which the European Council invited the Commission to address the issue of presumption of innocence. The proposal will approximate Member States' procedural rules regarding certain aspects of the right to be presumed innocent and regarding the right to be present at one's trial in criminal proceedings, the aim being to enhance mutual trust. The proposal therefore complies with the subsidiarity principle, the Commission concludes.

### **Aspects of the Regulation which do not comply with the principle of subsidiarity**

#### *i) Failure to comply with essential procedural requirements*

9. By virtue of Article 5 of Protocol (No. 2) "any draft legislative act should contain a detailed statement making it possible to appraise compliance with the principles of subsidiarity and proportionality". The requirement for the detailed statement to be within

the draft legislative act implies that it should be contained in the Commission's explanatory memorandum, which forms part of the draft legislative act and which, importantly, is translated into all official languages of the EU. The fact that it is translated into all official languages of the EU allows the detailed statement to be appraised for compliance with subsidiarity (and proportionality) in all the national parliaments of Member States of the EU, in conformity with Article 5 of Protocol (No. 2). This is to be contrasted with the Commission's impact assessment, which is not contained within a draft legislative act, and which is not translated into all the official languages of the EU.

10. The presumption in the Treaty on European Union<sup>2</sup> is that decisions should be taken as closely as possible to the EU citizen. A departure from this presumption should not be taken for granted but justified with sufficient detail and clarity that EU citizens and their elected representatives can understand the qualitative and quantitative reasons leading to a conclusion that "a Union objective can be better achieved at union level", as required by Article 5 of Protocol (No. 2). The onus rests on the EU institution which proposes the legislation to satisfy these requirements.

11. For the reasons given below, we do not consider that the Commission has provided sufficient qualitative and quantitative substantiation in the explanatory memorandum of the necessity for action at EU level. This omission, the House of Commons submits, is a failure on behalf of the Commission to comply with essential procedural requirements in Article 5 of Protocol (No. 2).

*ii) Failure to comply with the principle of subsidiarity - necessity*

12. The first limb of the subsidiarity test provides that the EU may only act "if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level".<sup>3</sup>

13. The Commission relies on the Conclusions of the European Council on the Stockholm Programme as an encouragement for EU action, but the words used, as highlighted in paragraph 3 above, make clear that the presumption of innocence was among a number of areas the Commission was asked to consider; they also make no recommendation about whether action is necessary.

14. For the following reasons the House of Commons submits this limb of the test — necessity for action at EU level — has not been met.

- *Evidence of obstacles to mutual recognition arising from different presumption of innocence standards in Member States*

15. For the EU to act in this field, it has to demonstrate that legislation is necessary at EU level to overcome obstacles "to facilitate mutual recognition"<sup>4</sup> of decisions in criminal matters. The Commission's impact assessment at annex IV points to various failures on

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<sup>2</sup>Article 5.

<sup>3</sup>See Article 5(3) TEU.

<sup>4</sup> Article 82(2) TFEU.

behalf of eleven Member States to comply with ECHR standards on the presumption of innocence. But, crucially, the Commission does not demonstrate through any measurable evidence how these have caused an obstacle to the facilitation of mutual recognition in cross-border proceedings governed by EU law. It relies in the impact assessment primarily on anecdotal evidence from NGOs and defence lawyers, who are not placed to say how the failure to respect the presumption of innocence in a particular Member State is affecting mutual recognition proceedings across the EU. Indeed, the Commission recognises that there is:

“limited statistical quantifiable evidence on insufficient mutual trust between the Member States. Member States do not collect data on the number of judicial cooperation requests that are challenged or refused. Therefore it is also difficult to quantify the problem”.<sup>5</sup>

16. Similarly, Annex VII of the impact assessment lists examples of cases which “can” hinder judicial cooperation, but not which have done so. It is to be noted that only two of the cases cited concern the presumption of innocence. Without this evidence, there can be no justification for EU action.

17. For these reasons we do not think that EU action in this field is justified in accordance with Article 82(2) TFEU, which requires evidence of necessity to facilitate mutual recognition (see paragraph 4 above) for EU criminal legislation to be justified. We are concerned that in this instance the Commission has misapplied Article 82(2) to bring in significant changes to the presumption of innocence at a national level.

18. The Justice Committee of the Scottish Parliament wrote to the European Scrutiny Committee of the House of Commons on 21 January outlining its concerns over the absence of evidence for EU action:

“At its meeting on 21 January, the Justice Committee considered the Commission 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 (COM (2013) 821).

“The Committee noted the Commission’s view that action at EU level is needed because there is a lack of mutual trust between judicial authorities of different member states and reluctance amongst these authorities to co-operate with each other. We also noted that the UK Government is not necessarily satisfied with the quality of evidence provided by the Commission to support its decision to act at EU-level and that it intends to seek further clarification during the negotiation process.

“We further considered correspondence from the Scottish Government which also questions the limitations in evidence on which the Commission’s conclusions are based and asserts that “the necessity for the EU to act to ensure EU judicial authorities

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<sup>5</sup> P.18 of the impact assessment (ADD 1).

co-operate with each other is not made out”. The Scottish Government further states that it has no evidence of any reluctance in co-operation between other member states and Scottish authorities.

“On balance, the Committee agrees with the UK and Scottish governments that the Commission has yet to provide sufficient evidence to demonstrate the need for EU action. This lack of evidence combined with a short timescale in which to examine this proposal means that we are unable to rule out the possibility that the proposal does not comply with the subsidiarity principle.”

- *Evidence of necessity for EU law to supplant ECHR law*

19. The impact assessment explains that, in the Commission’s view, Article 6 ECHR has not been able to ensure respect for the presumption of innocence in the EU Member States to the necessary standard; it therefore proposes this Directive, which will go further than the safeguards in Article 6 and will be enforced more effectively by the Court of Justice.

20. Were the Commission’s bold premise to be right, it would have to provide evidence why a further supranational approach, in other words EU law, would succeed where ECHR law failed. Here, too, a difficulty lies. The impact assessment shows that for many of the components of the presumption of innocence, the problem lies not in an absence of national legislation, overseen as it is by national courts and the ECtHR, but in the “culture” of the Member State concerned. Culture, in our opinion, changes incrementally, and is something best addressed nationally. The reasons the Commission prefers the EU to the ECHR approach are the reasons we say the ECHR approach should remain, allowing as it does for a margin of appreciation for national practice and culture:

“The ECtHR's reluctance to lay down prescriptive requirements in these areas, which can be seen as a rationale for an EU measure. The approach of the ECtHR has not been especially activist in developing detailed and prescriptive rules in the area of Article 6(2) of the ECHR. It has left a margin of flexibility for presumption of innocence and related rights in light of the requirement to balance the fair trial rights of suspects or accused persons with the general public interest, as well as the diverse legal traditions of Member States. The court’s preferred approach is to set out generally expressed principles or minimum standards in its case law, to which contracting states are obliged to adhere pursuant to Article 53 ECHR.”<sup>6</sup>

21. We note in particular the comment that the ECtHR is not “especially activist”. This trait is something we strongly welcome, by contrast, and consider should inform the decisions of any supranational court.

22. For the above reasons we doubt whether an EU approach in place of the existing ECHR framework would achieve the objectives the Commission claims.

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<sup>6</sup> Page 16 of the explanatory memorandum.