



**ECBA PLEA TO EU POLITICS:  
FOLLOW THE RULE OF LAW – HUMAN RIGHTS SHOULD NOT BE NEGOTIABLE**

**ECBA RESPONSE TO THE COMMISSION'S PROPOSAL FOR A  
DIRECTIVE ON CERTAIN ASPECTS OF THE PRESUMPTION OF INNOCENCE  
AND OF THE RIGHT TO BE PRESENT AT TRIAL**

**I. The ECBA**

1. The European Criminal Bar Association (ECBA) is an association of independent specialist defence lawyers. The association was founded in 1997 and has become the pre-eminent independent organisation of specialist defence practitioners in all Council of Europe countries. We represent over 40 different European countries including all 28 EU Member States. The ECBA's aim is to promote the fundamental rights of persons under investigation, suspects, accused and convicted persons, not only in theory, but also in the daily practice in criminal proceedings throughout Europe. More information on the ECBA can be found at [www.ecba.org](http://www.ecba.org).

**II. The Stockholm Programme and fundamental advisements**

2. The ECBA commends the work of the European Commission in the pursuit of the aims of the Stockholm Programme.<sup>1</sup> The **Proposal for a Directive on the Presumption of Innocence is welcomed** wholeheartedly by the ECBA. The Commission accurately explains the context of the proposal in recital 6: "In case of persistent breach of presumption of innocence in the Member States, the objectives of the procedural rights' agenda could not be fully achieved ... to materialise the principle of the right to a fair trial."
3. The ECBA notes the **erosion of the rule of law across Member States** (and in particular the fundamental principles and human rights that sustain it) in favour of pragmatic regulations which progressively enhance the power of the state at the same time that they diminish the rights of the suspected or accused person. In this context, the Directive on the Presumption of Innocence, as one such fundamental principle, is of central importance.
4. Whilst this response sets out the criticisms of the ECBA, we are firmly of the view that the **Directive is absolutely vital to ensure certain procedural safeguards** in criminal proceedings and human rights (in the European Convention on Human Rights ["ECHR"]) and fundamental rights (in the EU Charter of Fundamental Rights and Freedoms ["CFREU"]). Art 82 paragraph 2 of the Treaty on the Functioning of the EU ("TFEU") demands **minimum standards for procedural rights in criminal proceedings** to sustain the principle of mutual recognition that must be based on mutual trust of EU Member States and on the confidence of their citizens<sup>2</sup>. Since, at the latest, the European Court of Human Rights ["ECtHR"] ruling in the Salduz case in 2008 it should be axiomatic in all Council of Europe states that for example the right to (early) access to a lawyer is closely connected to the right not to incriminate oneself including the right to remain silent and the fundamental safeguards against ill-treatment and torture. As a matter of course suspects and accused persons must be informed of charges as well as of certain rights and they must understand the language of the criminal proceedings before any questioning or hearing. The Stockholm Programme and its road map on procedural safeguards along with the Directives of 2010, 2012 and 2013<sup>3</sup> which followed were therefore significant steps for the EU. These **core**

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<sup>1</sup> OJ C 115 4.5.2010, p. 1.

<sup>2</sup> See recital 2 of the proposed Directive and paragraphs 2 and 9 of the explanatory memorandum.

<sup>3</sup> See recital 5 of the Proposed Directive and paragraph 4 of the explanatory memorandum.

**procedural rights will, however, only be effective if they operate in conjunction with each other**, and in such a way as to be legally enforceable. **Implementation in a selective or piecemeal fashion may render these rights illusory or theoretical.**

5. However, the real **legal and philosophical basis of certain fundamental rights and the principle of the rule of law is the dignity of human persons**, not only as a fundamental right itself but as principle: human dignity is inviolable. It must be respected and protected. It cannot be subject to political negotiation that change from day to day. Certain fundamental rights are absolute and, as Art 1 CFREU makes clear, "inviolable". The right to life (Art 2 CFREU), the right to physical and mental integrity (Art 3 CFREU) and the prohibition of torture and inhuman treatment (Art 4 CFREU) emphasise the significance of dignity in human life.
6. **Human dignity is absolutely fundamental to the issues raised in the proposed Directive.** Criminal law and procedure by their very nature impose sanctions on human freedom and behaviour and thus go to the heart of the interaction between the state and the individual. Criminal law gains its legitimacy from an adherence to fundamental legal and ethical principles.<sup>4</sup> The respect for the **principle of human dignity is a source of this legitimacy**, from which the imperative that the **burden of proof must be borne by the state** derives. Hence, the principle of presumption of innocence and the right not to incriminate oneself and the right to silence are obviously closely connected to each other, but also, as elements of the principle according to which the burden of proof is borne by the state, are intrinsically linked to the principle of human dignity. **Additionally** the right not to incriminate oneself and the right to silence are not only "an" aspect of the presumption of innocence<sup>5</sup>, "an" aspect of the fair trial principle<sup>6</sup> or "a" defence right.<sup>7</sup> **The right not to incriminate oneself and the right to silence affect the individual in terms of personal human dignity directly:** the human being must have liberty to simply be a human being without any duty (for example to testify) and with the freedom to remain neutral in the framework of compulsory criminal proceedings. Therefore we stress the fact that the **primary principle of EU law, that protects all human beings in all the activities in the EU and that is legally binding since 01 December 2009, is human dignity.**<sup>8</sup> It must be strictly observed, for example by careful consideration of the right to silence and the right not to incriminate oneself. This important legal and political aspect is missing from both the Commission's proposal and the arguments for the implementation of the Directive.

### III. Progress since the 2006 Green Paper and current political process

7. In 2006, the European Commission presented a Green Paper on the presumption of innocence.<sup>9</sup> It concluded, largely on the basis of *Murray v UK*,<sup>10</sup> that the right to silence 'is not absolute' and that adverse inferences could be called as long as: (a) there was a prima facie case calling out for an answer; and (ii) the burden of proof remained on the prosecution.<sup>11</sup>
8. The ECBA welcomed the Commission's decision to include the presumption of innocence in its work on ensuring EU-wide evidence-based safeguards; however, its firm response at the time ([www.ecba.org](http://www.ecba.org)) was that there should, contrary to the Green Paper's conclusions, be an effective, i.e. an absolutely protected and not only a symbolic and in effect (in some Member States) theoretical right to silence. It criticised an overreliance on 'isolated

<sup>4</sup> See, for example, the *ultima ratio* principle and the principles of legality as embodied in Art 49 CFREU.

<sup>5</sup> Art 48 paragraph 1 CFREU.

<sup>6</sup> Art 47 paragraph 2 CFREU.

<sup>7</sup> According to Art 6 paragraph 3 ECHR and Art 48 paragraph 2 CFREU.

<sup>8</sup> Art 1 CFREU.

<sup>9</sup> COM (2006) 174.

<sup>10</sup> 18731/91 (6 February 1996).

<sup>11</sup> As they are, for instance, in England (see Criminal Justice and Procedure Act 1994, s. 34), Ireland and the Netherlands.

*fragments* of the *Murray* case, and highlighted the risk inherent in using the judgments of the ECtHR as a vehicle to establish minimum standards for criminal procedure.

9. This **criticism did not fall on deaf ears**. As part of the Stockholm Programme, the European Council asked the Commission to address this subject. In response, the Commission published the 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'* in November 2013, and made this part of the political agenda today.<sup>12</sup> The **explanatory memorandum** prefacing the draft Directive makes clear commitments to the right to silence, identifying it as one of the **'generally recognised international standards which lie at the heart of the notion of a fair trial'**; the memorandum states, furthermore, that **'any inferences drawn from the fact that suspects or accused persons make use of these rights should be excluded'**.<sup>13</sup> The ECBA recognises that this is a significant step forwards, and that relationships between the Commission and those advocating an absolute right to silence (including certain Member States, the ECBA as well as national bars and also many parliamentarians of the European Parliament) have been fruitful ones. Nonetheless, it is the ECBA's position that there is still progress to be made.
10. We observe with concern the **omission of any mention of the witnesses' position and rights in criminal proceedings**. The importance of the inclusion of an article in the Directive which covers the rights of witnesses not to incriminate themselves and to remain silent, and a provision which covers the consequences of a failure to apply these rights (see at the end of this ECBA statement) must be emphasised.
11. The ECBA is aware of the **current political process in the Council which is deeply disturbing in the context of the rule of law, the protection of human rights (ECHR) and fundamental rights (CFREU)**.
12. We read with deep concern the record of the discussions taking place in the Working Party. For example:<sup>14</sup>

"[...] shifting the burden of proof is justified by a presumption based on general rules of experience [...]"<sup>15</sup>;

"[...] the exercise of the right not to incriminate oneself or the right to remain silent [...] should be without prejudice to national rules or systems which allow a court or judge to take account of the silence [...] as an element of corroboration or confirmation [...]"<sup>16</sup>;

"[...] Member States should ensure that in the assessment of statements made [...] or of evidence obtained in breach of the right not to incriminate oneself or the right to remain silent, the rights of the defence and the fairness of the proceedings are respected".<sup>17</sup>
13. The **ECBA's plea to EU politicians** is: FOLLOW THE RULE OF LAW – human rights and fundamental rights should not be negotiable.

#### **IV. Response to Proposed Directive**

##### ***Central principle: human dignity***

14. It remains the position of the ECBA that human dignity should be protected as a matter of principle: it is on this basis that suspects should, as human subjects, have an unqualified

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<sup>12</sup> SWD (2013) 478 and 479.

<sup>13</sup> At paragraphs 34 and 36.

<sup>14</sup> All quotations from 2013/0407 COD 12196/1/14 REV 1, dated 04 August 2014.

<sup>15</sup> Recital 15b referring to Art 5 paragraph 2.

<sup>16</sup> Recital 20b referring to Art 6 and 7.

<sup>17</sup> Recital 20c referring to Art 6 and 7.

right to silence.<sup>18</sup> As we state above, Art 1 CFREU makes it clear that this principle is at the heart of European law: **'Human dignity is inviolable. It must be respected and protected.'**<sup>19</sup> The context to the proposed Directive explains that the already adopted EU Directives (on the right to interpretation and translation, on the right to information, or the right to access to a lawyer) *'have a wider aim; they are ... tools to materialise the principle of the right to a fair trial'*.<sup>20</sup> The ECBA argues that compromising the right to silence, by leaving a suspect with no realistic possibility to remain neutral and not to speak, infringes the principle of human dignity. The Directive should act as a *'tool to materialise'* this crucial right; it should, therefore, go one step further than it does now: **Both Article 6 (1) and Article 7(1) should state, explicitly, that the right not to incriminate oneself and the right to silence are protected absolutely as part of the principle of human dignity.**<sup>21</sup> The central legal consequence of the principle of human dignity is already provided for in the Proposed Directive as currently drafted. We strongly oppose any alteration of the current wording of both Article 6 (3) and Article 7 (3) so that **any inferences drawn from a suspect exercising these rights are excluded from future criminal proceedings throughout the EU.**

15. Although the Commission has drafted the Directive so that its articles do not mirror exactly the decision in *Murray*, the influence of that judgment is pronounced. **Transposing European Convention of Human Rights (ECHR) jurisprudence into an EU Directive, as the ECBA has consistently argued, is misguided.** Even the explanatory memorandum to the Directive itself notes 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'*.<sup>22</sup>
16. A Directive should, as MEP Renate Weber points out,<sup>23</sup> establish *'minimum rules'*<sup>24</sup> to protect rights. This minimum should not however normally be coterminous with the *'lowest common denominator'* based on the ECHR. Weber examines Article 52(3) of the CFREU, which states that: *'In so far as this Charter contains rights which correspond to rights guaranteed by the Convention ... the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.'*<sup>25</sup> The **Directive should, in the ECBA's view, provide different and greater protection than ECHR jurisprudence.** This is the legal purpose of minimum safeguards in criminal proceedings **according to Art 82 par 2 TFEU, specifically to improve mutual trust between Member States and to improve the confidence of all EU citizens.** The EU area of freedom, security and justice must be provided with standards which are greater, more consistent standards (which are enforceable and not illusory) than the broader Council of Europe area where the ECHR is applicable.
17. Furthermore, the Court's decisions are ex post, acting as a retrospective control on national criminal proceedings; the proper role for a Directive such as this is to embody, ex ante, a principled *'result to be achieved'*:<sup>26</sup> to ensure that an absolute right to silence becomes a procedural safeguard with real force. The **ECtHR steps in at the end of the criminal**

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<sup>18</sup> This is not a new idea: the ECBA noted in response to the Green Paper the 1995 ruling of the German Federal Constitutional Court, the *Bundesverfassungsgericht*, that the right to silence is *'derived from human dignity'*.

<sup>19</sup> The rights enshrined in the CFREU are recognised by Art. 6(1) TEU; Recital 28 of the Proposal also specifically states that the Directive *'upholds the fundamental rights and principles recognised in the Charter.'*

<sup>20</sup> At paragraph 6.

<sup>21</sup> See the Statement of the ECBA on the Green paper Presumption of Innocence.

<sup>22</sup> At paragraph 47. The ECHR does not contain an explicit provision regarding human dignity, in contrast to Art 1 of the CFREU. The protection of the presumption of innocence by Art 6 ECHR and the protection by Art 48 (1) CFREU differs to some extent because Art 1 CFREU declares the human dignity principle to be inviolable and therefore all issues of, for example, burden of proof must be considered within the context of the legitimacy of criminal proceedings against individuals and their protection by the human dignity clause.

<sup>23</sup> Rapporteur for the Working Document on this subject (published 17 March 2014).

<sup>24</sup> Recital 2.

<sup>25</sup> See p. 2 of 6.

<sup>26</sup> Art. 288 TFEU.

**proceedings**; the ECBA calls for the **right to silence and the right not to incriminate oneself to be integral and reliably guaranteed from the very beginning of criminal proceedings throughout the EU.**

**Article 2: No application to legal entities**

18. Article 2 confines the scope of the Directive to natural persons. The explanatory memorandum and the Proposal refer to case law of the Court of Justice which (in relation to the right not to incriminate oneself in cartel cases) ruled that the needs and degrees of protection regarding natural persons and legal persons were different.<sup>27</sup> The Proposal adds that it is premature to legislate at Union level given the current state of development of national legislations and of case law at the national level and that of the Court of Justice.<sup>28</sup> The **protection of legal person should be ensured by existing legislative safeguards and case law.**<sup>29</sup>
19. This stance is **misguided on two grounds.** First, case law relating to **EU cartel cases** is not appropriate; it deals exclusively with a **specific type of administrative law** at best and does not take into account the characteristics of criminal law. Secondly, the **EU cannot wait for the "evolution" of case law or national legislation.** The protection of natural and legal persons is inextricably intertwined in cases where both natural and legal persons are targeted. In cases where there are proceedings against corporations and its directors, it is clear that rights of natural persons are not protected if the legal entities do not enjoy the same protection under the presumption of innocence principle and its important aspects – in particular the protection from self-incrimination.<sup>30</sup>
20. The scope of the **Directive should thus be extended to legal persons.** Under criminal law, as well as under law that is labelled differently but is equivalent in its effects, there is no fundamental need to differentiate between natural and legal persons. The principle of "human" dignity does not, of course, apply to legal entities. Nevertheless human beings are the representatives of legal entities and will be affected by criminal proceedings against legal entities. Hence, legal entities should have the same rights as natural persons in criminal proceedings.

**Article 5: Burden of proof**

21. Article 5 is a commitment, in very general terms, to the burden of proof being on the prosecution. Whilst the ECBA endorses the general tenor of this commitment, it is too abstract. Moreover, the ECBA does not agree that the test for reversing this burden should be whether such a presumption is '*of sufficient importance to justify overriding that principle and is rebuttable*' (Article 5(2)): an abstract commitment to the prosecution bearing the burden coupled with a similarly nebulous qualification is unhelpful. In principal, the ECBA opposes any reversal of burden of proof in criminal proceedings. If the Directive is to '*facilitate the practical application*' of the principle set out above, **Article 5 should (at least) set out a full and specific list of the areas where reverse burdens are acceptable:**<sup>31</sup> cases where such areas have been considered by the ECtHR (although the list need not, of course, be limited to or solely dictated by these) include: *Salabiaku v France*; *Barberà, Messegué and Jabardo v Spain*; and *Telfner v Austria*.<sup>32</sup>
22. It is, in addition, **unclear how Article 5 relates to provisional measures:** arrest warrants and freezing orders can be justified on the basis that they are provisional; there

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<sup>27</sup> Paragraph 26 and recital 9.

<sup>28</sup> Recital 10.

<sup>29</sup> Recital 11.

<sup>30</sup> Cf recital 19.

<sup>31</sup> Recital 7.

<sup>32</sup> 10519/83 (7 October 1988); 10590/83 (6 December 1988); and 33501/96 (20 March 2001). See paragraph 32 and footnote 21 of the Context of the Proposal.

must, though, be clearly defined limits. Article 5 should be the place to set this out.

23. Article 5 should, therefore: be more specific in its exposition of the burden of proof; give a full list of circumstances where reverse burdens would be appropriate; set out a test for reverse burdens which has more substance than 'sufficient importance'; and make explicit reference to provisional measures. Further comment is impractical until more clarification is provided.

**Article 6: Right not to incriminate oneself and not to co-operate and Article 7: Right to remain silent**

24. One of the features of the erosion of the rule of law across Member States referred to at paragraph 3 above is a movement away from the fundamental principles set out in Article 5 (burden and standard of proof) in which the **prosecution prove their case based on factual evidence to the criminal standard** and towards an over-reliance on confession. In this context, the **ECBA strongly supports the work of the European Commission** in the proposal for this Directive in strengthening the rights of the defendant.
25. If however this Directive is to strengthen the right to remain silent and not to compromise it, **permitting the 'fruit of the poisoned tree'** by allowing evidence obtained in breach of Article 7 if '*such evidence would not prejudice the overall fairness of the proceedings*' **is not acceptable**. It weakens what the Directive should strengthen, and fails to establish that the right to silence itself goes to the heart of the overall fairness of the proceedings. On a practical level, the proposed provision would allow police officers to read evidence that is, *prima facie*, forbidden to them by Article 6, and to make use of it either directly or indirectly, with little to no obstruction, by relying on Article 6(4). This cannot be right.
26. **Recital 17 appears to sanction the use of compulsion in certain (albeit very limited) circumstances.** The case of *Allan v UK* is cited in the explanatory memorandum at paragraph 36, in support of the suggestion that there may be very exceptional cases where the use of such evidence will not prejudice the overall fairness of the proceedings. It is not, however, clear from the paragraph relied upon in the explanatory memorandum that this is a correct distillation of that case. That paragraph states that the role of the court is not to lay down rules on the admissibility of evidence but to determine whether the proceedings as a whole, including the way in which evidence was obtained, were fair.<sup>33</sup> At paragraph 50, the case goes on to say the following:

*While the right to silence and the privilege against self-incrimination are primarily designed to protect against improper compulsion by the authorities and the obtaining of evidence through methods of coercion or oppression in defiance of the will of the accused, the scope of the right is not confined to cases where duress has been brought to bear on the accused or where the will of the accused has been directly overborne in some way. The right [...] serves in principle to protect the freedom of a suspected person to choose whether to speak or to remain silent when questioned by the police. Such freedom of choice is effectively undermined in a case in which, the suspect having elected to remain silent during questioning, the authorities use subterfuge to elicit, from the suspect, confessions or other*

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<sup>33</sup> Paragraph 42: "The Court reiterates that its duty, according to Article 19 of the Convention, is to ensure the observance of the engagements undertaken by the Contracting States to the Convention. In particular, it is not its function to deal with errors of fact or of law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention. While Article 6 guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence as such, which is therefore primarily a matter for regulation under national law (see *Schenk v. Switzerland*, judgment of 12 July 1988, Series A no. 140, p. 29, §§ 45-46, and, for a more recent example in a different context, *Teixeira de Castro v. Portugal*, judgment of 9 June 1998, Reports of Judgments and Decision 1998-IV, p. 1462, § 34). It is not the role of the Court to determine, as a matter of principle, whether particular types of evidence – for example, unlawfully obtained evidence – may be admissible or, indeed, whether the applicant was guilty or not. The question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair. This involves an examination of the "unlawfulness" in question and, where a violation of another Convention right is concerned, the nature of the violation found."

*statements of an incriminatory nature, which they were unable to obtain during such questioning and where the confessions or statements thereby obtained are adduced in evidence at trial.*<sup>34</sup>

27. This demonstrates the **dangers of lifting phrases from ECtHR's decision**;<sup>35</sup> paradoxically, though, another line of ECHR jurisprudence which would have provided a useful analogy appears to have been ignored: case law in relation to Article 3 (torture, inhuman and degrading treatment). As Renate Weber notes, **any violation of Article 3 renders 'the proceedings as a whole automatically unfair'**.<sup>36</sup> **A violation of the right to silence should have the same effect.**
28. The ECBA is, moreover, **concerned to avoid the particular danger of 'legislative creep' inherent should the EU appear to sanction the use of compulsion in exceptional cases.** Specifically, once compulsion is permitted in certain types of cases and to specialist investigators who understand the significance of the powers that they have been granted, it lays the groundwork for similar powers being granted in an ever expanding number of circumstances and for investigators who may not appreciate the significance of the powers they have been given (and that they should be used sparingly and only in appropriate circumstances).<sup>37</sup>
29. The (subordinate) clause **'unless the use of such evidence would not prejudice the overall fairness of the proceedings'** should be deleted from Articles 6(4) and 7(4). This will make it clear that using the fruit of the poisoned tree in these circumstances is unequivocally proscribed. If use of evidence obtained in breach of the law is allowed in general, this will amount to these breaches being fostered by the law. This is clearly oxymoronic and runs counter to the rule of law.
30. In this regard the **suggestion made in Council negotiations** (to simply delete completely the paragraphs 4 of Art 6 and Art 7) **must be strongly resisted.** Whilst the ECBA also propose the deletion of the subordinate clause of these paragraphs (*'unless...'*), the true political intention behind the (complete) deletion of paragraph 4 as proposed in Council negotiations is revealed in the new recital 20c.<sup>38</sup>

It must be repeated: FOLLOW THE RULE OF LAW (not the breach of law).

31. The ECBA note a **worrying tendency** developing in some Member States in which an **acquitted defendant will be penalised by a reduction or, in some cases, a refusal to award costs** where a person has exercised their right to remain silent. The suggestion that an acquitted defendant has somehow contributed to their prosecution by failing to answer questions is a dangerous incursion into the principle of the presumption of innocence. As part of the explicit statement regarding the protection of the absolute right to silence proposed at paragraph 8 above, the **Directive should make clear that any refusal to answer questions will not have an impact on the recovery of legal costs following an acquittal.**

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<sup>34</sup> Allan v UK 48539/99 (5 November 2002), at paragraph 50.

<sup>35</sup> 48539/99 (5 November 2002), at paragraph 42.

<sup>36</sup> *El-Haski v Belgium* 649/08 (25 September 2012), at paragraph 85; Working Document on the presumption of innocence, p. 5 of 6.

<sup>37</sup> This can be charted in the UK. The Roskill Fraud Trials Committee was set up in 1983 to review the problems related to the investigation and prosecution of serious fraud and concluded that enhanced powers of investigation were required to enable these cases to be properly investigated and successfully prosecuted. The Serious Fraud Office (SFO) was created as an agency to investigate the most serious types of fraud cases and with such enhanced investigation powers to compel attendance at interview. Over the years, several other agencies have been granted similar enhanced powers when interviewing suspects and witnesses both for serious fraud and other offences.

<sup>38</sup> The new recital 20 c, quotation from 2013/0407 COD 12196/1/14 REV 1, dated 04 August 2014: "Member States should ensure that in the assessment of statements made [...] or of evidence obtained in breach of the right not to incriminate oneself or the right to remain silent, the rights of the defence and the fairness of the proceedings are respected") which proposes a broad rule allowing evidence obtained in breach of these rights to be admitted provided that fairness allows it."

**Article 8: In absentia trials**

32. Trials *in absentia* are by their very nature a **violation of the fundamental procedural rights of the accused**. The ECBA strongly opposes any proposals which include a provision that infringes fundamental human rights by allowing trials *in absentia*.<sup>39</sup> Attention must be drawn to the fundamental rights which are enshrined in the CFREU as well as the ECHR. Article 47 CFREU states that:
- “Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.”*
33. Furthermore, Article 6 ECHR guarantees that everyone has the right to a fair trial. The jurisprudence of the ECtHR clearly holds that **personal attendance during trial is a fundamental human right**, which is protected under Article 6 paragraphs 1 and 3 ECHR.
34. **Article 8 of the draft Directive** suggests that Member States may provide for the possibility for trials *in absentia*. The proposal includes the possibility of rendering a judgment in absentia, if the person either was summoned in person or “*by other means actually received official information of the scheduled date and place of that trial in such manner that it was unequivocally established that he or she was aware of the scheduled trial*”. This proposal (aside from the inclusion of a phrase of unclear meaning: “*by other means*”) sends a **dangerous political message** to the Member States.
35. The Proposal should include a strong message that trials *in absentia* are a violation of fundamental human rights, and therefore should only be possible in trivial cases unless, of course the accused in any case expressly, and on an informed basis, waives the right to be present, so long as he or she is then represented at the trial. The **ECBA’s view is that trials in absentia should only be possible in cases where the punishment is a fine** and there is no finding of dishonesty which may have adverse consequences for individuals. The proposal should include a **prohibition of trials in absentia, when the crime in question is punishable with a prison sentence**. In addition, it should nevertheless be possible to maintain or to establish summary (written) proceedings without the necessity of a trial where the criminal sanction is non-imprisonable.
36. The right to be present during one’s trial is a fundamental human right. Although not expressly mentioned in paragraph 1 of Article 6 ECHR, the object and purpose of the Article is that a person “charged with a criminal offence” is entitled to take part in the hearing. Furthermore Art 6 paragraph 3 (c), (d) and (e) guarantee a person “charged with a criminal offence” the right “to defend himself in person”, “to examine or have examined witnesses” and “to have the free assistance of an interpreter if he cannot understand or speak the language of the court”. These **procedural guarantees cannot be exercised without the person being present at trial**.
37. Even if legal counsel is mandated to defend a person charged with a criminal offence in his or her absence, one cannot speak of a proper defence, because the person charged with the

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<sup>39</sup> See ECBA press release and letter concerning the Framework Decision on In Absentia judgements: [http://www.ecba.org/content/index.php?option=com\\_content&view=article&id=526:in-absentia-judgement-ecba-press-release&catid=90:statements-and-press-releases&Itemid=118&highlight=WyJpbilslmFic2VudGhliiwiaW4gYWJzZW50aWEiXQ](http://www.ecba.org/content/index.php?option=com_content&view=article&id=526:in-absentia-judgement-ecba-press-release&catid=90:statements-and-press-releases&Itemid=118&highlight=WyJpbilslmFic2VudGhliiwiaW4gYWJzZW50aWEiXQ) and [http://www.ecba.org/content/index.php?option=com\\_content&view=article&id=528:in-absentia-judgements-ecba-open-letter-to-all-members-of-the-european-parliament&catid=90:statements-and-press-releases&Itemid=118&highlight=WyJpbilslmFic2VudGhliiwiaW4gYWJzZW50aWEiXQ](http://www.ecba.org/content/index.php?option=com_content&view=article&id=528:in-absentia-judgements-ecba-open-letter-to-all-members-of-the-european-parliament&catid=90:statements-and-press-releases&Itemid=118&highlight=WyJpbilslmFic2VudGhliiwiaW4gYWJzZW50aWEiXQ)



crime is (potentially) not able to work together with his or her counsel. Mandated defence is ethically and legally challenging and **should be resisted apart from in the most exceptional circumstances**. In reality it provides a 'fig leaf' of respectability to enable the proceedings to comply with the form, if not the substance of Article 6. In such proceedings, the likelihood of conviction is high, defence counsel has little credibility and, unless there has been some interview of the suspect, there is no guarantee that any known defence on the facts may be admitted in evidence. Inference of guilt from absence is inevitable.

38. In a number of **judgments, the European Court of Human Rights** has ruled that the right to be present during one's trial is a fundamental human right, which is enshrined in Article 6 ECHR. In *Colozza v Italy*<sup>40</sup> the ECtHR clearly stated that a person charged with a criminal offence is entitled to take part in the hearings. This entitlement is based on the right to a fair trial and the right to a defence, both of which are required by the ECHR (Articles 6 paragraph 1 and 3). Furthermore, the ECtHR has stressed that a person convicted *in absentia* shall be entitled to a re-trial, once he or she becomes aware of the proceedings:

When domestic law permits a trial to be held notwithstanding the absence of a person "charged with a criminal offence" who is in Mr. Colozza's position, that person should, once he becomes aware of the proceedings, be able to obtain, from a court which has heard him, a fresh determination of the merits of the charge.

39. The ECtHR ruled in *Belziuk v Poland*<sup>41</sup> that the protection provided for in Article 6 paragraphs 1 and 3 does not cease with the decision at first instance. This means that a Member State is required to ensure that in appellate proceedings, persons also enjoy the fundamental guarantees of Article 6 ECHR.
40. In *Mariani v France*,<sup>42</sup> the ECtHR found violations of Article 6 paragraphs 1 and 3 (c), (d) and (e) as well as a violation of Article 2 of Protocol No. 7 ECHR. While reaffirming that it is of paramount importance that a defendant is present during trial, the ECtHR also pointed out that an accused who was being tried in absentia had no real possibility of being defended at first instance and could not have his or her conviction examined by an appeal court. Therefore it found a violation of Article 2 of Protocol No. 7 ECHR.
41. **It is clear from the jurisprudence of the Court that trials in absentia constitute a violation of fundamental human rights.**
42. The **ECBA offers its collaboration in this field of discussion**: as an association of practitioners, we are able to deliver a great deal of experience illustrating where the system of *in absentia* judgments continues to fail in practice.

### **Witnesses' rights**

43. The ECBA is gladdened to see that the Commission recognises that the rights of suspects or accused persons under Article 6 of the ECHR also apply to witnesses,<sup>43</sup> **whenever they are in reality suspected of a criminal offence**, as the formal designation of the person is immaterial, citing the case of *Brusco v France*.<sup>44</sup>
44. However, the **rights of witnesses not to incriminate themselves and to remain silent, are not addressed in the proposal**. The proposal only speaks of the "accused" and the "suspect". In certain situations, a witness might be neither one of them.

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<sup>40</sup> *Colozza v Italy*, 9024/80 (12 February 1985)

<sup>41</sup> *Belziuk v Poland*, 23103/93 (25 March 1988)

<sup>42</sup> *Mariani v France* 43640/98 (31 March 2005)

<sup>43</sup> Explanatory memorandum, paragraph 13

<sup>44</sup> *Brusco v France* 1466/07 (14 October 2010)

45. The ECBA emphasises the **importance of the inclusion of an article in the Directive which covers the rights of witnesses not to incriminate themselves and to remain silent, and a provision which covers the consequences of a failure to apply these rights**. The importance of this follows from the fact that in most/all Member States a witness is obliged to answer questions when they are called upon for a statement by the court. The various legal systems, however, do not always provide clear provisions stating under which circumstances the witness is relieved of this duty. In addition, **certain legal privileges of family members** must be guaranteed in this context, specifically, to have protection against compulsion to testify against one's parents if the truth would incriminate them.<sup>45</sup>
46. The ECBA suggest that the Commission appears to have interpreted the *Brusco* judgment too narrowly. After all, *Brusco* did not deal with the question of whether or not the applicant was allowed to remain silent when being questioned as a witness where his answers could incriminate himself. Instead, the ECtHR dealt with the question of whether the trial, as a whole, had been fair, in light of all the circumstances. In view of these circumstances, the **ECtHR concluded that the applicant should have had the same rights as a suspect** – i.e. the right to consult a lawyer, the right to remain silent etc.
47. As follows from the British Broadcasting Corporation decision (application no. 25798/94; 18 January 1996), the ECtHR does not distinguish between a "normal" witness and a "suspected" witness in relation to the right to remain silent:

The Commission considers that similar reasoning is applicable to the present case. The duty to give evidence in criminal proceedings is a good example of one of the normal civic duties in a democratic society: any person may be called on to give evidence as to matters witnessed by him, and, at least to the extent that he is not required to say anything which may incriminate himself, may be compelled to give evidence in the interests of the fair and proper administration of justice.(our underlining, ECBA)

48. The importance of the right of a witness to remain silent was once again stressed by the ECtHR in the Sievert judgment (Application no. 29881/07, 19 July 2012):

The Court also accepts that in the course of the ensuing trial the domestic courts were under an obligation to respect the witnesses' decision to avail themselves of their statutory right not to testify and that in order not to circumvent such right the trial court refrained from submitting questions prepared by the defence to witness H. The latter had, in any event, explicitly refused to answer any further questions by the trial court itself. The Court recalls in this context that it has recognised that, although not specifically mentioned in Article 6 of the Convention, the right to silence and the right not to incriminate oneself are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6 (see *Saunders v. the United Kingdom*, 17 December 1996, § 68, Reports of Judgments and Decisions 1996-VI). The Court further finds it relevant to note that it had been in particular the allegations by the applicant and another accused in the course of the trial, indicating that the witnesses had been involved in the events at issue, that were at the origin of the court's decision to grant the latter the right not to answer questions of the applicant and defence counsel. (paragraph 61, our underlining, ECBA)

49. Or, as the ECtHR put it in the case of *Craxi v. Italy* (5 December 2002, application no 34896/97):

En effet, dans certaines circonstances, il peut s'avérer nécessaire, pour les autorités judiciaires, d'avoir recours à des dépositions remontant à la phase de l'instruction préparatoire, notamment lorsque l'impossibilité de les réitérer est due

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<sup>45</sup> This opens up an additional legal category of procedural rights and therefore we do not argue this in more detail here.

à des faits objectifs, telle la mort de leur auteur (...) ou lorsqu'il faut protéger le droit du témoin de garder le silence sur des circonstances qui pourraient entraîner sa responsabilité pénale." (par. 86, our underlining, ECBA).

50. Finally, in the case of *Serves v. France* (20 October 1997, (82/1996/671/893) the ECtHR held:
- It is not for the Court to consider whether the investigating judge had an obligation under Article 105 of the Code of Criminal Procedure to charge the applicant. Its task is to decide whether the fining of the applicant pursuant to Article 109 of that Code amounted to coercion such as to render his right not to incriminate himself ineffective.
- It is understandable that the applicant should fear that some of the evidence he might have called upon to give before the investigation judge would have been self-incriminating. It would thus have been admissible for him to have refused to answer any questions from the judge that were likely to steer him in that direction." (our underlining, ECBA)
51. As the case law shows, the ECtHR does not distinguish between the legal 'status' of the person giving testimony when it comes to the right to remain silent and the right not to incriminate oneself. **Suspects, defendants, co-defendants and witnesses who could reasonably be considered to be a suspect at the time of questioning and witnesses for which it could not reasonably be foreseen that they might incriminate themselves when providing testimony, all enjoy the privilege against self-incrimination and the right to remain silent.**
52. This is also the position of **the Supreme Court of the United States**. At a criminal trial, it is not only the defendant who enjoys the Fifth Amendment right not to testify. Witnesses may refuse to answer certain questions if answering would implicate them in any type of criminal activity (not limited to the case being tried).<sup>46</sup>
53. Given the above, the current language of the Directive is too narrow. After all, it only provides for a right to remain silent for suspected or accused persons. Instead, and in order to comply with the ECtHR case law, the provision should be more general. The **ECBA propose a provision** which protects the right to silence for every person, regardless of the capacity in which that person makes a statement (suspect, accused, witness) from answering a question which may be self-incriminatory.
54. To guarantee the rights of the witness, it is also important to include in the proposed article an obligation for the authority interviewing the person in question to **inform (caution) him or her of the right to remain silent as soon as it becomes apparent** – for example, as a result of the answers given – that this right applies. If no caution is given and the witness subsequently incriminates himself the testimony should not be admissible in criminal proceedings against the witness. The Directive should provide that evidence obtained in breach of the privilege against self-incrimination cannot be used as evidence. If it is used as evidence, this would constitute a violation of Article 6 of the ECHR (compare *Brusco*).

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<sup>46</sup> See, for example, *Ohio v. Reiner*, No. 00—1028. Decided March 19, 2001. For a further analyses with reference to the applicable case law see, for example, <http://apps.americanbar.org/buslaw/blt/blt00may-shield.html>