



European Criminal Bar Association

Statement of Principles

on the use of

Video-Conferencing in Criminal Cases

in a Post-Covid-19 World

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A. INTRODUCTION

1. **The European Criminal Bar Association (ECBA) is an association of independent specialist defence lawyers. The association itself is wholly independent and free from outside interference. The primary purpose of ECBA is to be a leading group of independent criminal defence lawyers in the Council of Europe promoting the fundamental rights of persons under criminal investigation, suspects, accused and convicted persons.**
2. Over the last months the COVID-19 pandemic has affected the functioning of justice systems all over the world. Faced with the serious difficulties of conducting investigations and criminal proceedings in a manner compatible with the prevention of the spread of the infection, judicial authorities in Europe and elsewhere have introduced or intensified the use of remote technologies, in particular video-conferencing, as a replacement for the physical presence of the suspect, accused, witnesses, experts, defence and prosecution lawyers, court clerks and even judges.
3. The increased use of these technologies during the pandemic has generated diverging reactions, both favourable and adverse. There seems to be, nonetheless, a general trend in European justice systems pushing for increased use of remote technologies as means of replacing physical presence, and digitisation of justice systems more broadly, turning these exceptional means into the “new normal”.
4. On the one hand, the ECBA sees these developments as a chance to introduce the use of remote video hearings in situations in which such hearings may serve as a tool for avoiding severe delays in the criminal justice process, but also furthering the fair trial rights of the suspect or the accused, such as the right to be heard, and to effectively participate in the acts concerning him or her, as well as a tool to avoid the use of unnecessary coercive measures.
5. However, experience shows that the use of remote technologies equally entails a serious risk of undermining the right of the suspect or accused to a fair trial, including the right to personally participate in the acts, and his or her rights of defence, if such means are applied in a general manner and without the necessary legal procedural and technical safeguards.
6. Virtual attendance is not equivalent to actual physical presence and, as in relation to the vital affairs of human life in which people seek direct and in-person contact, this should no less be the case for criminal proceedings in which the deprivation of liberty and of other essential aspects of human life are ruled upon.
7. This is why the rights to be present in person and to be heard in respect of the most important decisions made in criminal cases and to actively participate in one’s criminal case is a quintessential element of a fair trial, recognised internationally (see Article 14, International Covenant on Civil and Political Rights, Article 6 of the European Convention on Human Rights and Article 47 and 48 of the Charter of Fundamental Rights of the European Union).
8. In addressing this issue, a two-fold distinction must be made between:
 - a. Firstly, the use of remote hearings in domestic and in cross-border cases; and

- b. Secondly, the use of remote technology for conducting interviews of the suspect or accused in the pre-trial stages of proceedings and its use for the trial hearings.
9. These distinctions are crucial, since the seriousness of the interference with the fair trial rights and the rights of defence of the suspect or accused in each situation differs, as do the circumstances that must be weighed in order to assess whether such restrictions are proportionate, adequate and necessary.
10. Further distinctions in terms of the types of procedural acts may also be relevant, depending on the legal systems. For example, further distinguishing merely bureaucratic procedural acts from other acts in which substantial procedural or substantive matters are dealt with, allowing for more flexibility in terms of the permission of remote hearings for the first group. We do not deal with these particular acts and leave this point open. However, we underline that any act in which there is a ruling about matters that are not merely administrative (for example, agreeing on a deadline for a procedural act, as opposed to a substantive question such as extending pre-trial detention) should not be considered irrelevant for the rights of the defence. A further distinction could be the stage of execution of sanctions and penitentiary law, which we do not analyse in this paper. Another example would be the case of jurisdictions in which geographic distance could be so significant that the situation may call for the putting remote procedures in place for a broader range of situations, in particular for urgent cases. In any event, at the current stage of technological development and technological abilities of individual persons, the ECBA believes, that, as a rule, a Member State must guarantee the right to be physically present in all relevant procedural acts to any accused person, if he or she wishes so, including, if needed, supporting the person in terms of travel arrangements where the geographical distance is remote.
11. Looking at the current developments from this perspective, this statement aims to set out the principles that may be considered to be fundamental to the rights of defence if means of remote participation per video remain in place after the end of the pandemic outbreak.

B. CROSS-BORDER CASES

B.1. INTERVIEW OF THE SUSPECT OR ACCUSED BY VIDEO IN CROSS-BORDER CASES AT THE PRE-TRIAL STAGE – IS IT APPROPRIATE?

12. During the pre-trial stage, the suspect or accused may be interviewed or heard for multiple purposes, but mainly for the following broad categories:
 - a. interviews for the purpose of advancing the investigation (normally by police or prosecuting authorities, but in certain States also by investigating judges);
 - b. interviews with the aim of deciding on pre-trial detention (normally by a court, but in certain States also by prosecutors); and

- c. interviews at the pre-trial screening stage, after a formal indictment has been brought, with a view to avoiding trial.
13. Across Europe, there are countless criminal cases in which a suspect or accused is physically located in a state different from the state conducting the investigation or criminal proceedings at pre-trial stages in general. In many instances, the actual physical presence of the suspect or accused for an interview during these stages, albeit meaningful, is not indispensable.
14. In such instances, where the suspect or accused is located in a different state, the alternatives to a hearing are normally the following:
 - a. The issuing of a European Arrest Warrant (EAW), or an International Arrest Warrant (IAW), normally circulated by SIS or INTERPOL systems, with a view to removing the person to the state in which the investigation is conducted;
 - b. The issuing of an European Investigation Order or a Letter of Request with a view to organising an interview by the authorities of the State of residence;
 - c. The issuing of such requests in order to organise a hearing by video-conference;
 - d. Advancing the proceedings without interviewing the suspect or accused person.
15. However, some states require the physical presence of the suspect or accused for certain procedural acts, in particular the first interview carried out during the investigation, presentation of the charges, or when deciding on pre-trial detention, or make the exercise of the rights of the accused dependent on such physical presence, which frequently leads to the issuing of an EAW or IAW.
16. The potential for the suspect or accused to participate in such procedural acts in the cross-border context by means of video-conference would be beneficial, particularly in those cases in which EAWs or IAWs are ordered disproportionately, simply to secure the physical presence of the suspect or accused, when there is no flight risk or where the flight risk is wrongly assumed based on the mere ground that the suspect or accused lives in another EU Member State. Benefits that would follow are set out below:
 - a. It would render it unnecessary for states to issue an EAW or IAW in order to bring the person to the state of prosecution where his or her physical presence is not necessary but the law still requires that the person is heard: this could be satisfactorily done by video-conference, thereby offering a solution that is more proportionate than issuing an EAW;
 - b. It would enable the suspect or accused to be present and to participate in the procedures and exercise his or her rights from the beginning of a criminal investigation;
 - c. It would offer more immediacy than not hearing the person at all or hearing the person by means of a rogatory letter or an EIO sent to the state of residence or location of the suspect or accused;

- d. It would make it easier to comply with the procedural safeguards applicable in both states, when compared to a hearing conducted only in the presence of the authorities of the state of residence;
 - e. It would also involve a reduction in costs (according to the European Added Value Assessment accompanying the European Parliament's legislative own-initiative report, a conservative estimate of the average costs of enforcing an EAW is around €20,000 per case);
 - f. It would facilitate the exercise of dual defence in those cases in which the suspect or accused does not have financial means to pay for lawyers in the two Member States to attend the hearing in person and also mean a cost saving to both Member States (since effective legal aid in both states would require covering the travel costs of the lawyer of the issuing state to the executing state, paying for the travel costs of the suspect or accused from the state of residence to the state of the investigation).
17. **This is particularly relevant in cases in which imprisonment is unlikely, which is frequently the case in low and medium criminality (the recently [published European Parliament Research Service Report](#) states that many EAWs are issued for low level offences), but also in those cases in which pre-trial detention is unlikely to be ordered, and bail measures can be applied and executed without the suspect or accused having to leave his or her state of residence, and finally in such cases in which the case is not trial ready. In these cases, an EAW should not be issued, since it would be disproportionate, and the suspect or accused should be heard by video-conference.**
18. It is also relevant in cases in which an EAW was issued before trial, since the interview of the suspect or accused by remote means during the EAW proceedings might lead to the conclusion that continued detention is not necessary and hence to the withdrawal of the EAW and the underlying domestic arrest or detention order. Such an interview, conducted by the issuing state authorities by means of a video-link, would also allow the issuing state lawyer to participate.
19. In particular, the ECBA recalls that according to the Article 5 of the European Convention on Human Rights and Article 6 of the Charter of Fundamental Rights of the European Union the right to liberty is the rule and any measures depriving a person of her liberty, including detention pending trial in cross-border cases, is an exceptional and *ultima ratio* measure.
20. The ECBA also recalls that according to those provisions, everyone arrested or detained with a view to being brought before a competent authority on reasonable suspicion of the commission of an offence shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial (if necessary subject to bail measures) and that every person detained is entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
21. The current situation in certain Member States, in which the lawyer in the issuing state cannot consult the case files and effectively challenge detention before the requested person

is actually physically removed to the issuing state, even if that person remains in detention throughout the EAW proceedings in the executing state, is particularly concerning and, in the ECBA's view, is not compliant with the above-mentioned fundamental rights.

22. The ECBA further recalls that the rights of defence which form an integral part of the right to a fair trial are applicable from the earliest stages of proceedings, including pre-trial stages (in this regard, see Directives 2010/64/EU, 2013/12/EU, 2013/48/EU, 2016/1919/EU, 2016/343/EU). Due to the crucial importance of such stages in modern-day criminal proceedings (in which much of the evidence collected beforehand will be used in court and in which many cases will not even reach the trial stage, due to the use of plea bargaining schemes), it is vital to give the suspect or accused the chance to actively participate in pre-trial proceedings and to present his or her defence at that stage.
23. In the European Union context, there is a legal basis for the participation of the suspect or accused by video-conference in the pre-trial stages in the European Investigation Order (Article 24 and Recitals 24 to 26), in the European Supervision Order (Article 19, para 4, and Recital 10, FD 2009/829/JHA) and in the European Arrest Warrant (Articles 18, para 1, lit. a), and 19 FD 2002/584/JHA). However, video-conferencing is significantly under-used in practice.
24. Hence, in the context of an EAW, the prompt organisation of a hearing by the issuing State authorities per video-conference pursuant to Articles 18, para 1, lit. a), and 19 FD 2002/584/JHA, is essential.
25. The ECBA recalls that Article 18 states that “[w]here the European arrest warrant has been issued for the purpose of conducting a criminal prosecution, the executing judicial authority must: (a) either agree that the requested person should be heard according to Article 19 [“by a judicial authority, assisted by another person designated in accordance with the law of the Member State of the requesting court”]; (b) or agree to the temporary transfer of the requested person”.
26. **If conducted appropriately, hearing by video-link can serve as a better alternative to a temporary transfer, which should be reserved for serious cases in which physical presence is absolutely necessary, or lengthy times pending the decision on surrender or the actual surrender taking place (often while the person is in detention in the executing Member State): in this context, [the EU Council has already recognised the potential of such hearings by video-conference](#).**

B.2. PARTICIPATION OF THE ACCUSED BY VIDEOCONFERENCE IS HIS OR HER TRIAL IN CROSS-BORDER CASES – IS IT APPROPRIATE?

27. In this paper we are mainly concerned with “remote trials” in which the accused is not physically present. However, we do not define what a “remote trial” is exhaustively. A remote trial may range from a trial in which only one witness participates by video-link, to that in

which the court and all participants participate by video-link. Any instruments dealing with “remote trials” should seek to define a remote trial.

28. It must be underlined that the ECBA considers that a trial conducted remotely may not, in any event, be considered the full equivalent of a trial in the physical presence of the accused person.
29. Trial in the physical presence of the accused should remain and always be the rule, especially in domestic cases (we do not address those here, *see below Chapter C.2, on domestic trials*), and a remote trial should never be conducted without the presence of the accused if he or she did not consent to it.
30. **However, from the practical experience of its members, the ECBA recognises that in the cross-border context the accused often has no real alternative other than participating by video-conference, or not participating at all** (or, as outlined above, being disproportionately held in pre-trial detention before and pending trial with a view to participating in his or her trial, in a situation where that would never happen were the accused to live in the Member State where the trial is conducted; the same concerns as referred to above in §§ 13 and ff. apply here).
31. In fact, in cases in which imprisonment is unlikely, Member States will often summon the accused, but will not fund his travel expenses to attend trial.
32. Hence, if the accused does not appear by his or her own means, he or she will often be tried *in absentia*, in those Member States which allow for such trials.
33. This entails a total deprivation of the right of the accused to be present and to participate in his or her trial.
34. Hence, the choice is rather between a total deprivation of the right and a restriction of such rights, which participation by means of video-conferencing technologies entails.
35. **In addition to this, issuing an EAW or an IAW in such cases would be unacceptable since it would be disproportionate. An EAW or IAW is not a means to ensure the right to be present at one’s trial, but an exceptional measure of deprivation of liberty that is only allowed when it is reasonably considered necessary to prevent the commission of an offence or a flight risk. Imposing pre-trial detention pending trial with a view to ensuring the participation of the accused in his or her trial in a situation where that would never happen, were the accused to live in the Member State where the trial is conducted, is manifestly disproportionate and a violation of the fundamental right to liberty established in Article 5, para. 1, lit c, ECHR, and Article 6 CFREU.**
36. **Providing the opportunity for the accused to participate by videoconference in his or her trial in cross-border cases should thus be possible, as long as it is done at his or her request.**
37. Such a solution, would bring the following benefits:
 - a. Member States would not need to issue an European Arrest Warrant in order to request the attendance of a person at her trial hearing, where that person’s physical

presence is not necessary but where the law nevertheless requires that the person is heard or attends in some capacity; and

- b. The accused could still attend and take part in the procedures and exercise his or her rights, instead of being tried *in absentia*, in those Members States where such a trial is possible.
38. This is particularly suitable to cases of low- and medium-level criminality in which imprisonment is unlikely.
 39. These recommendations should in no way be interpreted as suggesting that Member States that do not allow for a trial *in absentia* should permit one, or that in cases where a person does not consent to a remote trial a trial should be held *in absentia*.
 40. In the European Union context, there is a legal basis for the participation of the accused by video-conference in the trial stage in the European Investigation Order (Article 24 and Recitals 24 to 26) and possibly in Article 8 Directive 2016/343/EU. However, video-conferencing is significantly under-used in practice for trial cases.
 41. The causes for this under-use, where there is an application by the accused to that end, should be better assessed by comprehensive studies. However, the ECBA states that the practice of our Members shows that the causes for refusing cross-border trials in which the accused participates by video-link likely lie with:
 - a. Legal provisions that require the physical presence at the trial or are interpreted as requiring such a presence;
 - b. The view that the physical presence of the accused is necessary to safeguard his rights to participation. This assumption is generally correct but the convenience should be assessed on a case-by-case basis by the accused and his legal team, which should be able to consent to a video-link participation in cross-border cases, in particular in medium and low-level criminality. Further, when this assumption leads, in the cross-border context, to a situation in which where there is a request of the accused to participate by video-link that is refused, but trial *in absentia* is permitted, a refusal to conduct a video-link trial grounded on the rights of the accused is likely to result in a more severe restriction of his or her rights);
 - c. The existing technical barriers (e.g. the lack of appropriate technical infrastructure in the court system which would allow for a high quality and true-to-life participation by video; the lack of compatibility of the systems in place in different Members States, which makes it impossible to organize the connection).

B.3. ACTION TO BE TAKEN

42. **Following the above, the ECBA urges the European Union institutions and Member States' institutions and judicial authorities, as well as the Council of Europe and its Member States,**

to take practical and, if needed, legislative steps to enhance the use of video-conferencing in cross-border cases, namely:

- a. Consolidating the existing data from previous studies and organizing a comprehensive assessment of the reasons for the under-use of remote video-technology;
- b. Establishing explicitly the right of the accused to participate by video-link, at least in the cases in which this is the most proportionate solution, as referred to above;
- c. Developing appropriate and compatible legal standards for remote participation where that is permitted and appropriate (*see below Chapter B.4*);
- d. Promoting the development of appropriate and compatible technical infrastructures and solutions (which allow for true-to-life remote participation, and exercising of the procedural rights in this context – *see below Chapter D*).
- e. Considering the issues relating to the transparency and privacy in the use of remote technology in criminal trials (*see below Chapter E*)

43. This section does not refer to the domestic setting. In relation to the domestic setting, the ECBA refers to Chapter C below.

B.4. WHAT ARE THE REQUISITE LEGAL SAFEGUARDS IN CROSS-BORDER CASES?

44. The ECBA urges the European Union institutions and Member States' institutions and judicial authorities, as well as the Council of Europe and its Member States, to develop appropriate and compatible legal standards for remote participation in criminal trials.

45. Due to the importance of the right to be present and to participate in one's trial, there must be certain safeguards in place in order to allow for interviews of the suspect or accused in the pre-trial stages and, there are potential risks and drawbacks that must be considered before there is a headlong rush to expand the use of videoconferencing in cross-border criminal procedures at the trial stage.

46. In particular, use of videoconferencing should not undermine the fundamental principles of a fair trial, especially with respect to defence rights.

47. The ECBA considers the following safeguards to be essential:

- a. The right to be present in person at one's trial may only be waived knowingly, freely and unequivocally by the accused. Such a waiver may be withdrawn at any time during the trial;
- b. The use of videoconferencing must always be subject to the suspected or accused person's consent and to the consent of his or her defence lawyers. Consent must be given in a free and informed manner, after having received legal advice in the issuing state, recorded in the case file, and should be confirmed and recorded at the beginning of the video-conferencing hearing or trial. The form and the validity of the consent should be

compatible with the criminal laws of both the requested and the requesting Member States. If the suspect or accused is a vulnerable person, this should be taken into account when evaluating whether the use of video-conferencing is appropriate, and consent must also be sought from the legal representative or a person entrusted with safeguarding the interests of the vulnerable suspect or accused;

- c. Care must be taken that the suspect or accused person is able to seek legal advice prior to consenting to the use of videoconferencing in his or her native language, if necessary with the assistance of an interpreter. Also, legal remedies should be readily available to challenge a decision on using videoconferencing in both jurisdictions;
- d. The facilitation of dual defence in cross-border cases is essential. Should the suspect or accused person be interviewed by the authorities of a state other than of his residence, there should be mandatory assistance by defence counsel in both states before and during the interview, in the pre-trial stages, and throughout the proceedings during the trial stage before, during and after the trial hearing. If the suspect or accused person lacks the financial means to hire a lawyer, he or she should be eligible for free legal aid in both jurisdictions. The lawyer in the executing state should be physically present in the same room as the suspect or accused. The lawyer in the issuing State should be physically present in the same room as the authorities conducting the hearing or where the trial is taking place;
- e. The suspect or accused should always be heard in the physical presence of a judicial authority of the executing state, or another independent public authority, in order to prevent undue interference with the statements of the accused, and also to guarantee the respect for his or her rights according to the executing state's law, as well as the authenticity of the evidence;
- f. Access to the case file should be granted to the suspect or accused and to lawyers in both issuing and executing state and any documents to be examined during the interview or the trial should be made available to the suspect or accused and to his lawyers in both states before and during the interview or trial (see in this regard Recital 30 and Article 7, para. 3, Directive 2012/13/EU);
- g. The right of the suspect or accused person to speak confidentially with his or her defence team (in both issuing and executing states) must be guaranteed at all times (before and during the hearings). Should videoconferencing take place, it is of the utmost importance that all Member States can guarantee the necessary safeguards to protect confidentiality. Any breach of this confidentiality, whether by a third party or agency, should be a criminal offence, and it should not be possible to rely upon any information that arises from such a breach. It is therefore recommended that the necessary safeguarding measures taken by the Member States that will use videoconferencing should be harmonised across all those Member States;
- h. The accused should be able to use his or her own clothing and to be free of any restraints during the trial;

- i. In cross-border videoconferencing, there may be a need to have an interpreter either at the issuing authority or at the executing authority's premises, if the suspect or accused or one of the participants does not speak the language of the issuing state. Given the complexities of videoconferencing and interpreting in legal settings, it is essential that high-quality interpreting be ensured by employing only certified interpreters. Whenever possible, the interpreter should be present in the same room as the suspect or accused;
- j. The right to have materials of the case essential to safeguard the rights of the defence translated into the native language of the suspect or accused should also be mandatory;
- k. The consent of the suspect or accused person to undergo videoconferencing examination should entail cancellation of any EAW regarding the order to be brought before the trial court or before other authorities in the issuing State;
- l. After the hearing is concluded, the judicial authority of the executing state should draw up minutes of the videoconference hearing. The minutes must indicate the date and place of the hearing, the identity of the person heard, the identities and functions of all other persons participating in the hearing, any oaths taken and the technical conditions under which the hearing took place. The document should be forwarded by the competent authority of the executing or requested state to the competent authority of the issuing state;
- m. The hearing should be audio-visually recorded and the recording made available to the parties.
- n. The fundamental rights of the suspect or accused applicable in both Member States must be respected.

C. DOMESTIC CASES

C.1. INTERVIEW OF THE SUSPECT OR ACCUSED BY VIDEO IN DOMESTIC CASES IN THE PRE-TRIAL STAGE – IS IT APPROPRIATE?

48. During the pre-trial stage, the suspect or accused may be interviewed or heard for a number of purposes, primarily for the following broad categories:
- a. interviews for the purpose of advancing the investigation;
 - b. interviews with the aim of deciding on pre-trial detention (normally by a court, but in certain states also by prosecutors);
 - c. interviews at a pre-trial screening stage, after a formal indictment has been brought, with a view to avoiding trial.

a) Interviews for the purpose of advancing the investigation:

49. The use of videoconferencing may be appropriate for minor cases and with the consent of the suspect or accused, which must be assessed by the court with specific questions.
50. It should be possible for the suspect or accused to challenge consent at a later stage in exceptional circumstances, meaning that the judicial authority should be able to assess if the consent has been given freely, in an unequivocal manner, duly assisted and in full knowledge of the consequences.

b) Interviews with the aim of deciding on pre-trial detention and interviews at a pre-trial screening stage, after a formal indictment has been brought, with a view to avoiding trial

51. In principle the remote and sometimes perceived impersonal nature of video proceedings means that the suspect or accused's physical presence in the courtroom is critical to enable judges to make judgments about his or her credibility and competence, as well as physical and psychological wellbeing.
52. Furthermore, the use of video-link technology in principle impairs attorney-client communication and makes it both difficult to develop trust and to ensure the confidentiality of communications.
53. Deciding on pre-trial detention or on whether there is sufficient evidence and legal grounds for bringing someone before trial is more than a rote or mechanical application of numbers to a page. It involves a careful and thoughtful assessment of the true moral fibre of another, a task made far more complex when the suspect or accused speaks through a microphone from a remote location (please refer to section E).
54. Due to the critical importance of these hearings to the exercise of the rights of the defence of the suspect or accused, and also of the right to liberty, laid down in Articles 5 and 6 of the European Convention on Human Rights and in Articles 6, 47 and 48 of the Charter of Fundamental Rights of the European Union, such hearings in the domestic context should in principle always take place with the physical presence of the suspect or accused.
55. In addition to this, physically bringing the suspect or accused who has been apprehended to a court or within the presence of a judge is also a fundamental safeguard against ill-treatment, thereby preventing violations of Article 3 of the European Convention on Human Rights and Article 4 of the Charter of Fundamental Rights of the European Union.

C.2. PARTICIPATION OF THE ACCUSED BY VIDEOCONFERENCE IN HIS OR HER TRIAL IN

DOMESTIC CASES – IS IT APPROPRIATE?

56. In this paper we are mainly concerned with “remote trials” in which the accused is not physically present. However, we do not define what a “remote trial” is exhaustively. A remote trial may range from the trial in which only one witness participates by video-link, to that in

which the court and all participants participate by video-link. Any instruments dealing with “remote trials” should seek to define a remote trial.

57. It must be underlined that the ECBA considers that a trial conducted remotely may not, in any event, be considered the full equivalent of a trial in the physical presence of the accused person.
58. Trial in the physical presence of the accused should remain and always be the rule, especially in domestic cases. A remote trial should never be conducted without the presence of the accused if he or she does not consent to it.
59. In the interests of a fair and just criminal process it is of capital importance that the accused is present at his or her trial both as a means to ensure his or her right to a hearing and in order to enable the verification of the accuracy of his or her statements and to enable the accused to exercise his or her right to confront witnesses.
60. The right to be present is also explicitly granted by EU Secondary Law. Art. 8 Directive 2016/343/EU states that “Member States shall ensure that suspects and accused persons have the right to be present at their trial”.
61. The ECBA is aware that in some European countries the participation of the accused without his or her consent may take place by videoconference for reasons of protection of the victim, or with the aim of avoiding possible conditioning of witnesses in serious and organized crime cases (for example “mafia crimes”). The ECBA is also concerned to see that in recent years these once highly exceptional circumstances have been extended to the detriment of the right of the accused to be present at his or her trial.
62. The mere possibility that in exceptional circumstances the accused may participate in his or her trial by videoconference should not in any way diminish the fundamental principle that the accused person has a right to be physically present at his or her trial.
63. No accused person should be prevented from attending his or her own trial in person, if they wish to do so, no matter how serious the offence of which they are accused. The more serious the offence, the more important is the need to ensure that the person is physically present.
64. Those of us who conduct and participate in trials on a daily basis, such as ECBA members, are well aware of the symbolic effect of the trial for all participants, either accused persons, or victims. Criminal justice is also about participants “having their day in court”, that is, having their side of the story heard and understood. The right of the accused to look the court in the eye, in a public hearing, while making his or her statement or pleadings, is a corollary of the fair trial and of human dignity.
65. A trial in a court is not a random physical and geographical setting, but an essential requirement of fair and human criminal justice. Punishment imposed by video dehumanises the accused and weakens the effect of the trial procedure in restoring legal peace. A trial taking place in person allows the confrontation between the accused and the victims or witnesses to publically demonstrate the innocence of the acquitted person, and to make the guilty person aware of his or her wrongdoing and the evidence used to demonstrate it,

thereby also reducing further reoffending. Remote trials are simply not capable of producing the same effect.

66. This is particularly true in the current state of development of remote video technologies, which do not yet generally enable a true-to-life experience, of availability of appropriate infrastructure in courts or other official premises, which are not generally adequate throughout Europe; the widespread access of all individuals to such technologies, which is not in place; and the degree of mastery of the use of technologies by participants in criminal cases, which is also not satisfactory and requires training and education, both of professionals, and of citizens and other individuals.
67. From a different perspective, new technologies can be also used to improve the quality of defence rights and the quality of justice. The possibility for the accused to request the use of videoconferencing to participate in procedural acts may be important to foster the participation for indicted or accused persons with special needs or with reduced mobility.

C.3. ACTION TO BE TAKEN

68. **Following the above, the ECBA urges the European Union institutions and Member States' institutions and judicial authorities, as well as the Council of Europe and its Member States, to take practical and, if needed, legislative steps to:**
 - a. **Organise a comprehensive assessment of the use of remote video-technology in domestic criminal cases with a view to assessing both technical and legal issues, in particular the degree to which they are available, their quality, the degree of knowledge of users on how to master the systems, and their impact on the right to a fair trial and the rights of the defence;**
 - b. **Clearly establish the right of the accused to be physically present at his or her trial and to forbid mandatory participation of an accused in his or her trial by video-links in domestic cases;**
 - c. **Develop appropriate legal standards for remote participation where that is permitted and appropriate (*see below Chapter C.4*);**
 - d. **Promote the development of appropriate technical infrastructures and solutions (which allow for true-to-life remote participation, and the exercise of procedural rights in this context – *see below Chapter D*); and**
 - e. **Consider the issues relating to transparency and privacy in the use of remote technology in criminal trials (*see below Chapter E*).**

C.4. WHAT ARE THE REQUISITE LEGAL SAFEGUARDS IN DOMESTIC CASES?

69. Due to the importance of the right to be present, there must be certain safeguards in place in order to allow for such interviews in the pre-trial stages and at trial. In any event, should

video-conferencing be conducted, fundamental principles of a fair trial especially with respect to defence rights must be safeguarded.

70. The ECBA's main concerns are as follows:

- a. The right to be present in person at one's trial may only be waived knowingly, freely and unequivocally by the accused. Such a waiver may be withdrawn at any time during the trial;
- b. The use of videoconferencing must always be subject to the suspected or accused person's consent and to the consent of his or her defence lawyers. Consent must be given in a free and informed manner, after having received legal advice, recorded in the case file, and should be confirmed and recorded at the beginning of the hearing or trial. The form and the validity of the consent should be compatible with the criminal laws of relevant Member States. If the suspect or accused is a vulnerable person, this should be taken into account when evaluating whether the use of video-conferencing is appropriate, and consent must also be sought from the legal representative or a person entrusted with safeguarding the interests of the vulnerable suspect or accused.
- c. Care must be taken that the suspect or accused person is able to seek legal advice prior to consenting to the use of videoconferencing in his or her native language, if necessary with the assistance of an interpreter. Legal remedies should be readily available to challenge a decision on using videoconferencing.
- d. The facilitation of multi-lawyer defence teams in domestic cases in which videoconferencing is used is essential. One lawyer should be physically present in the same room as the suspect or accused, while another should be physically present in the same room where the trial is taking place. If the suspect or accused person lacks the financial means to hire more than one lawyer, he or she should be eligible for free legal aid covering the work of both members of the defence team for the trial.
- e. The suspect or accused should always be in the physical presence of a judicial authority, or another independent public authority, in order to prevent undue interference with the statements of the suspect or accused, and to guarantee the respect for his or her rights according to the executing state's law, as well as the authenticity of the evidence.
- f. Access to the case file should be granted to the suspect or accused and to his or her lawyer and any documents to be examined during the interview or the trial should be made available to the suspect or accused and to his or her lawyers states before and during the interview or the trial (see in this regard Recital 30 and Article 7, para. 3, Directive 2012/13/EU).
- g. The right of the suspect or accused person to speak confidentially with his or her defence team must be guaranteed at all times (before and during the hearings). Should videoconferencing take place, it is of the utmost importance that all Member States can guarantee the necessary safeguards to protect confidentiality. Any breach of this confidentiality, whether by a third party or agency, should be a criminal offence, and it

should not be possible to rely upon any information that arises from such a breach. It is therefore recommended that the necessary safeguarding measures taken by the Member States that will use videoconferencing should be harmonised across all those Member States.

- h. The accused should be able to use his or her own clothing and to be free of any restraints during the trial.
- i. In videoconferencing, there may be a need to have an interpreter, if the suspect or accused or one of the participants does not speak the language of the proceedings. Given the complexities of videoconferencing and interpreting in legal settings, it is essential that high-quality interpreting be ensured by employing only certified interpreters. In principle, the interpreter should be present in the same room as the suspect or accused.
- j. The right to have materials of the case essential to safeguard the rights of the defence translated into the native language of the suspect or accused should also be mandatory.
- k. The hearing should be audio-visually recorded and the recording made available to the parties.

D. WHAT SHOULD BE THE REQUISITE TECHNICAL SAFEGUARDS FOR VIDEOCONFERENCING IN CRIMINAL PROCEEDINGS?

71. The ECBA urges European Union institutions and Member States' institutions and judicial authorities, as well as the Council of Europe and its Member States, to develop appropriate and compatible technical infrastructure and solutions which allow for true-to-life remote participation, and the exercise of procedural rights by means of remote technologies in criminal cases.

72. In this context, the ECBA suggests the following standards be considered:

- a. It is necessary that technical arrangements guarantee a hearing experience that is, as far as possible, true to life, including full communication with the person under examination and interaction of all parties in the procedure. A hearing that does not include images is hence not acceptable.
- b. Furthermore, an uninterrupted and high-quality connection must be in place. Hence, Member States should invest in robust IT infrastructure.
- c. An important aspect that should be considered is the layout of the rooms in which videoconferencing is used and the positioning of the suspect or accused and the other participants. Video-link equipment should enable the imitation of the actual presence setting and, in particular for trials, of the actual courtroom as much as possible. Suspects or accused persons should be able to have a full view of the room or of the courtroom, and be able to observe all participants, so that their experience includes visual and non-verbal

communication. Therefore, the suspect or accused should be able to see the faces, facial expressions and movements of remote participants.

- d. Electronic access to the case file should be granted and any documents to be examined during the interview should be made available to the suspect or accused and to his or her lawyers in both States in an electronic manner, or by using document cameras. When written documents are presented during the hearing or trial, there is often the need to use sight translation of written text. If the interpreter is not in the courtroom where the document is presented, document cameras need to be utilised in the videoconferencing session, or the document needs to be made electronically available to the interpreter.
- e. A technical procedure, provided in all relevant languages, that stipulates how parties can interrupt each other and object to a question should be explained in advance. In some situations, if at all possible, it might be considered necessary to supply the parties with an overview picture displaying all the professional parties as this can make it easier to handle unexpected interruptions.
- f. If the suspect or accused and his or her lawyers, or the issuing and executing state lawyers are not physically present at the same site, they should be able to conduct private conversations via either the appointed interpreter or one of their own choice using, for example, a secure phone line, mobile phone or, preferably, separate videoconferencing equipment. The line for videoconferencing between the lawyers and the suspect or accused must be technically set up to prevent any means by which conversations may be captured or recorded.
- g. If the suspect or accused and his or her lawyers are in the same room, they should be able to consult with one another, if needed via an interpreter, without the judge or another party overhearing. The microphones in either jurisdiction or site should be turned off in such a situation.
- h. The equipment should allow for audio-visual recording of the hearing of sufficient quality and to guarantee the authenticity of the recording.

E. VIDEO-LINK IN CRIMINAL TRIALS: OPENNESS, TRANSPARENCY AND PRIVACY

- 73. Use of video-link/videoconferencing solutions poses further problems. Criminal trials are generally public and open to the public. The use of videoconferencing needs to properly take into account the right to a fair and public hearing (Article 6, para. 1, European Convention on Human Rights, and Article 47 Charter of Fundamental Rights of the European Union).
- 74. It must be noted here that the requirement that a hearing must be “fair and public” cannot and should not be separated into two distinct principles which can be addressed separately – fairness and openness are intrinsically linked in such a way that removing openness in itself puts the fairness of the proceedings in serious jeopardy.

- 75. The principle that hearings must be public is of utmost importance to justice and the rule of law. On one side, it acts as a protective mechanism for all of the procedural rights of the accused, victims and witnesses. On the other side, transparency and openness to the public acts as a cornerstone for public trust in the judicial system, and therefore the recognition of judicial authority. The use of videoconferencing in criminal trials must take these values into account.**
76. There are practical methods available which enable criminal trials conducted via a videoconference to be open to the public. One example is to have a dedicated room at a courthouse or elsewhere where members of the public can sit and watch the proceedings on video screens. Another example is to enable members of the public to view the proceedings remotely via internet or television network. The latter option, which essentially amounts to live-broadcasting of a court hearing, creates a number of issues regarding protection of fairness and integrity of justice, the presumption of innocence, and also the rights of the persons present in the courtroom, making it suitable as a rule only for limited parts of the hearing (such as opening statements, and the announcement of the court's verdict). The modalities of ensuring public access should be adopted by each state taking into account their constitutional traditions, e.g. concern about the impact of taking images upon a person's dignity.
77. When videoconferencing is used at trial, it is vital to ensure that the signal carrying those statements is kept secure from unauthorised recording and any potential influence on the participants in the proceedings during the trial and intimidation after the trial, and to ensure the protection of the image and privacy of the accused, the victim and other participants.
78. Special care should be taken in balancing the rights to a public trial and the right not to be presented to the public as guilty (namely in prison clothing, in a cage or glass-box, or subject to physical restraints).
79. Regardless of which method of opening the hearing to the public is adopted, it is crucial that all parties to the proceedings fully understand how it has been arranged, and which measures of ensuring the integrity of the proceedings have been applied.
80. One particular element of public hearing, which is of particular important to the accused, is the possibility for the accused and his or her relatives and friends to see each other during the trial. When hearings are conducted by way of videoconference, this is difficult, but not impossible, to arrange. This aspect should be taken into account when planning hearings by videoconference as accused persons who are unable to see their relatives and friends may feel more vulnerable during trial and thus less capable of effectively exercising their procedural rights.
81. The rapid adoption of videoconferencing options as a response to the COVID-19 crisis has led judicial authorities in many cases to use readily available commercial videoconferencing platforms like Skype, Microsoft Teams, Cisco Webex, Zoom, etc. for conducting court hearings.

82. Such platforms are private and the use of them requires acceptance of the relevant terms and conditions. Whenever such commercial products are used, due care should be exercised beforehand to ensure that the technical features of the service as well as the legal terms of use are suitable for the purposes of judicial proceedings, especially the requirements for data security and privacy.
83. Public (i.e. government-owned) videoconferencing platforms designed and implemented specifically for use in judicial proceedings enable these concerns to be addressed in the most effective way, provided that the needs and concerns of all stake-holders in the judicial process have been taken into account.

F. ACKNOWLEDGMENTS AND CONTACT DETAILS

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